

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

Appeal No. 7/09

Dated: 6th August, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

**Lanco Amarkantak Power Pvt. Ltd.
Plot No. 130, 3rd Floor, Road No. 2
Banjara Hills
Hyderabad – 500 034** **Appellant**

Versus

**Madhya Pradesh Electricity Regulatory Commission
4th & 5th Floor, "Metro Plaza"
E-5 Arena Colony, Bittan Market
Bhopal – 462 016** **Respondent 1**

**PTC India Ltd.
2nd Floor, NBCC Tower
15 Bhikaji Cama Place
New Delhi – 110 066** **Respondent 2**

**MP Power Trading Co. Ltd.
Shakti Bhawan, Vidyut Nagar
Jabalpur – 482 008 (MP)** **Respondent 3**

**Power Grid Corporation of India Ltd.
B-9, Qutab Institutional Area
Katwaria Sarai
New Delhi – 110 016** **Respondent 4**

**Madhya Kshetra Vidyut Vitaran Co. Ltd.
Bijlee Nagar, Govindpura
Bhopal – 462 023** **Respondent 5**

**Paschim Kshetra Vidyut Vitaran Co. Ltd.
GPH Campus Polo Ground
Indore – 452 003** **Respondent 6**

**Poorv Kshetra Vidyut Vitaran Co. Ltd.
Shakti Bhawan, Vidyut Nagar
Jabalpur – 482 008**

..... **Respondent 7**

**Counsel for the Appellant(s) : Mr. Shanti Bhushan, Sr. Advocate
Mr. Manu Nair &
Mr. Arun Mohan**

**Counsel for the Respondent(s) : Mr. Vikas Singh, Sr. Advocate
Mr. Apoorva Misra
Mr. Rahul Dhawan
Ms. Shobna Masters
Mr. MG Ramachandran
Mr. G. Umapathy**

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. Lanco Amarkantak Power Pvt. Ltd. is the Appellant herein. Aggrieved by the order dated 25.8.2008 passed by the Madhya Pradesh State Commission, the Appellant has filed this Appeal. The short facts are as follows:

Facts

2. The Appellant, Lanco Amarkantak Power Pvt. Ltd. is a generating company situated in Chhattisgarh. PTC India Ltd., the 2nd Respondent (R-2) herein is a company licensed by the Central Commission to undertake trading in electricity as an inter-state trader.

3. A Power Purchase Agreement (PPA) between the Appellant and PTC India Ltd. (R-2) was entered into on 11.5.2005. As per this Agreement, R-2 can

enter into a Power Sale Agreement (PSA) with one or more purchaser for the sale of power purchased from the project established by the Appellant in Chhattisgarh and the necessary petition for approval of tariff for sale of the above power by R-2 to other purchasers shall be filed before the Appropriate Commission.

4. Thereupon, a PSA was entered into between the R-2 and MP Power Trading Co. Ltd., R-3 on 30.5.2005 for sale of power supplied by the Appellant under the PPA. In the meantime, the Appellant requested the R-2 for waiving certain conditions. In regard to the condition in Article 3.1.3 of the PPA, the R-2 refused to agree to waive the same but agreed to defer stating that the same can be considered later.

5. On 16.11.2005, R-3 as a trading licensee, on the strength of PSA between R-2 and R-3 filed a petition before the Madhya Pradesh State Commission for the approval of the said PSA. The State Commission observed that the Appellant being the party to the PPA had not submitted to the jurisdiction and directed R-2 and R-3 to pursue the Appellant to submit to the jurisdiction to comply with the direction of the Commission. In the meantime, since the condition in Article 3.1.3 has not been waived, the Appellant terminated the PPA by the letter dated 14.3.2008 and intimated the same to R-2. As against this letter of termination, the R-3 filed a writ petition in the High

Court of Madhya Pradesh and obtained a stay of the operation of the termination letter. In the meantime, the Appellant appeared before the Madhya Pradesh State Commission in the petition filed by R-3 and submitted that there is a dispute over the jurisdiction of the State Commission to deal with the matter and also informed that already PPA has been terminated through the letter dated 14.3.2008. Despite this representation, the State Commission passed an order on 6.5.2008 holding that it has jurisdiction to determine the tariff for the PPA and directed the Appellant to submit to its jurisdiction.

6. As against this order, the Appellant filed an Appeal before the Tribunal and ultimately by its Order dated 21.10.2008 the said order was set aside. In the meantime, the Appellant filed an application before the High Court of Madhya Pradesh to vacate the stay order obtained by R-3. However, the same was dismissed. Therefore, they filed a writ appeal before the Madhya Pradesh High Court Division Bench as against the writ proceedings with reference to the termination of the contract. At that stage, PTC India Ltd., R-2 filed a petition before the Madhya Pradesh State Commission challenging the termination of PPA letter dated 14.3.2008 even though the very same subject matter was pending before the Madhya Pradesh High Court.

7. In the said petition before the State Commission the Appellant appeared and raised objection with regard to jurisdiction and requested the Commission

to give an opportunity to the Appellant to file an affidavit regarding the said issue. However, the State Commission passed the impugned order dated 25.8.2008 holding that this Commission has got a jurisdiction to deal with the dispute between the R-2 and the Appellant and ordered stay of the operation of the termination letter. Hence this Appeal has been filed by the Appellant as against the said order dated 25.8.2008.

8. Mr. Shanti Bhushan, the Learned Senior Counsel appearing for the Appellant, while assailing the Order dated 25.8.2008, would raise the following contentions:

i) The Madhya Pradesh State Commission has no jurisdiction to entertain a dispute between the Appellant, a generating company situated in Chhattisgarh and a trading licensee, the 2nd Respondent to whom sale of power takes place within the State of Chhattisgarh.

ii) In a case of dispute between the generating company and the licensee who is not granted licence either by the Madhya Pradesh State Commission or the Chhattisgarh State Commission, such a dispute cannot be adjudicated either by the Madhya Pradesh State Commission or by the Chhattisgarh State Commission.

iii) Even though the licence has been granted to the R-2 by the Central Commission, this dispute cannot be adjudicated even by the Central Commission because the nature of the dispute is not covered by Section 79(1)(f) of the Electricity Act, 2003.

9. In reply to the above contentions, while justifying the order impugned, Mr. Vikas Singh, the Learned Senior Counsel appearing for the R-2 and Mr. MG Ramachandran, the Learned Counsel appearing for the R-3 would strenuously submit that the Madhya Pradesh State Commission is the Appropriate Commission for the purpose of PPA in question especially when Section 64(5) provides that in case of inter-state supply involving the territories of two States, the tariff shall be determined by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor and that in the instant case, the power to be generated by the Appellant in Chhattisgarh was to be supplied to Madhya Pradesh and in the light of the definition of the Appropriate Commission in the PPA and Section 64(5) of the Act, the Appropriate Commission in the present case has to be Madhya Pradesh only and therefore, the Order impugned is perfectly valid and justified.

10. Mr. Vikas Singh, the Learned Senior Counsel for the R-2 in order to substantiate his plea would refer to the definition of licensee in Section 2(39)

and in Section 14 of the Electricity Act, 2003 which provides for three kinds of licensees and also Rule 9 of the Electricity Rules, 2005 which provides that the trading licensees which have been granted a licence by the Central Commission are deemed licensees and also the Clause 4.2(a) as amended by the Madhya Pradesh Regulations dated 21.12.2005 wherein it was provided that a trader who has obtained a trading licence from the Central Commission for inter-state operation shall not be required to obtain a trading licence for intra-state trading. On the strength of these provisions, it is contended that the R-2 who is a trading licensee from the Central Commission for inter-state trading is entitled to approach the Madhya Pradesh State Commission as the trading licensee who is engaged in the intra-state trading. He also cited *2008 (4) SCC 755 in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.* wherein it is held by the Supreme Court that all the disputes between the licensees and the generating companies can only be resolved by the Appropriate Commission.

11. Mr. MG Ramachandran, the Learned Counsel for R-3 while adopting the arguments advanced by Mr. Vikas Singh, the Learned Senior Counsel for R-2 would vehemently contend that the conjoint reading of PPA and relevant clauses in Regulations and Sections in the Electricity Act, 2003 would clearly indicate that the place where the power is consumed is a criteria to decide about the jurisdiction of the Commission and in this case the power generated

by the Appellant in Chhattisgarh has been consumed in Madhya Pradesh and as such Madhya Pradesh State Commission alone has got the jurisdiction.

12. We have heard the submissions made by the respective parties and we have given our careful consideration to the rival contentions.

13. The main question that arises for consideration is as follows: Whether the Madhya Pradesh State Commission has got a jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside Madhya Pradesh and the R-2 (PTC) which has not been granted licence by the Madhya Pradesh State Commission?

14. On going through the entire records projecting the complete facts of the instant case and also relevant Clauses of the Regulations framed by the Madhya Pradesh State Commission as well as the Rules and Section of the Act, it is clear that this Madhya Pradesh State Commission has no jurisdiction to decide the dispute between the Appellant and R-2 which relates to the termination of their contract which was entered into between them in the form of PPA. The reasons are as follows:

i) Section 86(1)(f) of the Act recognizes the power of the State Commission to adjudicate upon disputes between the licensees and the generating

companies and to refer any dispute for arbitration. Let us quote Section 86 of the Act now –

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

(a)

(b)

(c)

(d)

(e)

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

ii) The above provision with the opening words the State Commission , must be construed in the context of the territorial jurisdiction of the Regulatory Commission of each State. The word “the licensee” as referred to in Section 86(1)(f) has to be construed to mean such licensees which have been granted a trading licence or such licensee who has been granted a trading licence by the particular State Commission seeking to assume jurisdiction over the dispute. This means, the State Commission can assume jurisdiction in respect of the disputes arising between a generating company and an electricity trader operating under a trading licence granted by it. In this case, Madhya Pradesh State Commission has assumed jurisdiction in respect of the disputes under the PPA between the Appellant, a generating company which is situated in

Chhattisgarh and R-2 who is a trading licensee granted by the Central Commission and not the Madhya Pradesh State Commission.

15. The Madhya Pradesh State Commission itself has framed Regulations in 2004 which would give the details of the jurisdiction to adjudicate disputes between generating companies and trading licensees under Section 86(1)(f) read with Section 158 of the Act. It clarifies that the Madhya Pradesh State Commission can only deal with the dispute relating to the licensees that operate under a trading licence granted by the Madhya Pradesh State Commission.

16. In this context, it would be worthwhile to refer to relevant Regulation. Para 10.2 of the MPERC Regulations reads as follows:

“10.2 The Commission may act as arbitrator or nominate person(s) as arbitrator(s) to adjudicate and settle disputes between the Trading Licensee, any other licensee or generating companies in pursuance of clause (f) of sub-section (1) of section 86 read with Section 158 of the Central Act and Regulations of the Commission.”

17. Then, who is a trading licensee? This is defined under Clause 1.4(t) of the MPERC Regulations which is as follows:

“a person who has been granted a Trading Licence for intra-state trading in Madhya Pradesh and does not include a person granted

license by CERRC (Central Commission) for inter-state trading or a person granted license for trading by other State Commission.”

18. So both Clauses 10.2 and 1.4(t) of the Regulations have clarified the situation.

- i) Admittedly in this case the PPA has been executed in New Delhi, outside the State of Madhya Pradesh.
- ii) The Appellant's generating station admittedly situated outside the State of Chhattisgarh.
- iii) The delivery point for power output from the Appellant's power plant to the R-2 as defined in Article 1.1 of the PPA is located within the State of Chhattisgarh.
- iv) Admittedly, the R-2 is not the trading licensee under the Madhya Pradesh State Commission and he is holder of the trading licence by the Central Commission for inter-state trading.

19. The above admitted facts clearly show that the PPA as also the rights and obligations 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.

20. The Learned Senior Counsel appearing for the R-2 placed heavy reliance on the decision of Supreme Court in 2008 (4) SCC 755 to state that all the disputes between licensees and generating companies can only be resolved by the State Commission. This judgment is of no use to the R-2 since the said judgment has not considered the scope and ambit of the term "licensee" for the purpose of Section 86(1)(f). The Hon'ble Supreme Court has clarified that High Court cannot resolve the dispute by referring to arbitration but it is a Commission alone who can solve the dispute between the licensees and the generators either by itself or by referring it to the arbitration. In the above judgment, Supreme Court did not go into the question as to who can be called a licensee to invoke the jurisdiction of the State Commission. In this case, as referred to earlier, the R-2 who is a trading licensee who has been granted license by the Central Commission cannot be construed to be licensee to invoke the jurisdiction of the State Commission as he has not got any licence from the State Commission.

21. It was argued vehemently by both Learned Counsel for the R-2 and R-3 that the Madhya Pradesh State Commission has got jurisdiction over the present dispute by virtue of the fact that the PPA and PSA constitute back to back arrangements. This contention cannot be countenanced as these two agreements are separate and distinct. Further between the two different parties these two agreements had been entered into. The close reading of the PPA

clearly establishes that the obligation of the Appellant to supply the power energy output under the PPA is solely to R-2 which is independently entitled to sell the said power to one or more purchasers and accordingly the R-2 is independently responsible and liable for the supply of power to such purchasers.

22. As pointed out by the Learned Senior Counsel appearing for the Appellant that Clause 16.2 of the PPA establishes the distinct and independent nature of the PPA and the PSA and expressly dis-applies any notion of third party rights in as far as it clarifies that the PPA is solely for the benefit of the parties thereto, namely, the Appellant and R-2.

23. The resale of power procured under PPA takes place under the Power Sale Agreement (PSA) between the R-2 and R-3. the Appellant is not a party to this transaction. As such the purchase of power under the PPA cannot be construed to be within the jurisdiction of the Madhya Pradesh State Commission since there is no certainty whatsoever that the power would be resold by R-2 to Madhya Pradesh. Therefore, the argument based on treatment of both agreements as one is not sustainable.

24. The reliance was sought to be placed by the Respondents on some letters written by the Appellant to suggest that the Appellant submitted to the

jurisdiction of the Madhya Pradesh State Commission as the Appropriate Commission to determine the tariff under the PPA. This contention is stoutly denied by the Learned Senior Counsel appearing for the Appellant by referring to various other letters. Whatever it is, the acts and agreements of the parties cannot be the basis for determination of the jurisdiction of the Commission and the jurisdiction can be established only under the statutes.

25. This position also has been clarified by the Tribunal in the earlier proceedings in the judgment dated 21.10.2008 passed in Appeal No. 71 of 2008. The Learned Counsel for the Respondents refer to Section 64(5) of the Act to invoke the jurisdiction. Admittedly, this Section relates to the jurisdiction of the Commission to determine tariff under Section 86(1)(a) of the Act and not about 86(1)(f) of the Act.

26. Admittedly, the impugned order that was passed by the Commission on 25.8.2008 was purely based on the order passed by the Commission on 6.5.2008 relating to the jurisdiction. That was passed by the Commission in relation to the dispute between R-2 and R-3 in respect of PSA. Even the said order dated 6.5.2008 passed by the Commission directing the Appellant to submit to its jurisdiction with reference to PSA was challenged by the Appellant before the Tribunal which in turn ultimately set aside the said order on

21.10.2008 holding that the Madhya Pradesh State Commission has no jurisdiction to direct the Appellant to submit to its jurisdiction.

27. It is contended that the order dated 6.5.2008 would relate to the PSA and the impugned order dated 25.8.2008 would relate to the PPA. But curiously, the Commission passed the impugned order mainly based upon its own order dated 6.5.2008 to hold that it has a jurisdiction to resolve the dispute between the R-2 and the Appellant. Admittedly, as mentioned earlier, this order has been held to be wrong and the same has been set aside by the Tribunal on 21.10.2008. So the Commission's finding in the impugned order with regard to jurisdiction on the basis of the 6.5.2008 order is not valid.

28. Similarly, the reference and reliance upon the definition of licensee under Section 2(39) read with Section 14 of the Act is of no use as the said definition does not take into consideration the fact that for the purpose of Section 86(1)(f), the delineation of the adjudicatory jurisdiction of the State Commission inter se is necessary.

29. As mentioned earlier, the words "The State" as incorporated in Section 86 would mean that every State Commission has to have jurisdiction to adjudicate upon every dispute between its licensee and a generator. Otherwise every State Commission would have jurisdiction to adjudicate upon every

dispute between any generator and any licensee which could not have been the intention behind adjudicatory mechanism under the Act.

30. A reference has been made by the Learned Counsel for the Respondents to Rule 9 as well as some Clauses of Regulations to strengthen their submission. That submission is not sustainable. As referred to above, Clause 10 (2) of the Regulations as well as the amended Regulation 1.4(t) as amended on 21.12.2005 would clearly define the trading licensee as a person who is granted a trading license for intra-state trading in Madhya Pradesh and not a person granted license by the Central Commission for inter-state trading or any other person who has been granted licence for trading by the other State Commission. In short, these two provisions would give the exact answer for the question which arises in this case

31. According to the Learned Counsel for the Respondents, the person who is granted a trading licence by the Central Commission need not obtain a separate licence to undertake intra-state trading from the State Regulatory Commission. There is no dispute over this proposition. But merely because a person who has been given licence for inter-state trading can undertake intra-state trading also without any licence from the State Commission, it does not mean such a licensee who is undertaking both the intra-state trading and inter-state trading can automatically become a licensee of the State Commission. If

that principle is accepted then any Regulatory Commission in India would become competent to decide any dispute between any licensee and any generating company anywhere in India. This is not the intention of the Legislature.

32. To put it briefly, the conjoint reading of Clause 10(2) and Clause 1.4(t) and Section 86(1)(f) would clearly indicate that the Madhya Pradesh State Commission could deal with the disputes only between the trading licensee who has been granted a trading licence for intra-state trading in Madhya Pradesh and the generator and that person cannot be called to be trading licensee to invoke the jurisdiction of the Commission merely because he has been granted licence either by the Central Commission for inter-state trading or by any other Commission for trading.

33. Lastly, it was contended by the Learned Senior Counsel for the Respondent that if this Tribunal comes to the conclusion that Madhya Pradesh State Commission has no jurisdiction, it could be given liberty to approach the Chhattisgarh Commission. Opposing this contention, it is contended by the Learned Senior Counsel for the Appellant that such a protective order by giving liberty to enable the R-2 approach the other Commission will have the effect of perpetuating the illegality of the Order dated 25.8.2008 and as such, such a liberty should not be given to R-2 especially when the Appellant has taken a

stand that the dispute in question cannot be decided by any Commission and the R-2 has to seek relief through arbitration only as referred to in the PPA.

34. In the light of the said objection, we do not want to give any liberty. As such, the Appeal has to be allowed on the ground that the Order impugned is liable to be set aside as it suffers from the lack of jurisdiction. Accordingly, the order dated 25.8.2008 is quashed and set aside. This Appeal is allowed. No costs.

(A.A.Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 6th August, 2009

REPORTABLE / NON-REPORTABLE