

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
 Shri A. K. Das, Member
 Shri S. K. Parhi, Member**

Case No. 02/2018

M/s. Manikaran Power Ltd.	Petitioner
Vrs.		
M/s. Vedanta Limited	Respondent

In the matter of: **An application under Section 158 & S.86 (1) (f) of the Electricity Act, 2003 read with Clause 17 of the Letter of Intent (LOI) dated 29.03.2017 seeking reference of the dispute between the applicant and M/s. Vedanta Ltd. for Arbitration and appointment of an Arbitrator as the transaction in question i.e. sale-purchase of power is within the State of Odisha.**

For Petitioner: Shri Sanjeet Trivedi, Advocate & Shri Vedanta Sonkhiya, Legal Officer of M/s. Manikaran Power Limited.

For Respondent: Shri S.Satyakam, Advocate & Shri Ninad Nigam, DM M/s. Vedanta Limited.

ORDER

Date of hearing: 23.10.2018

Date of order: 01.06.2019

The present Petition has been filed by M/s. Manikaran Power Ltd. a trading licensee of CERC seeking indulgence of the Commission under Section 86 (1) (f) read with Section 158 of the Electricity Act, 2003 for reference of the dispute between the applicant and M/s. Vedanta Ltd. for Arbitration. The Petitioner is engaged in the business of trading of electricity and holds a Trading License for the said purpose from CERC. The Respondent M/s Vedanta Ltd. is inter- alia engaged in the business of power generation and sale of the power so generated. The petitioner submitted that in the month of March 2017, the Petitioner being in the need of purchase of power, for onward sale to M/s. Ultra Tech Cement Ltd, Jharsuguda approached the Respondent. Accordingly, a letter of intent was signed on 29.03.2017.

2. The broad terms of the said LOI, governing the transaction of sale- purchase of power between the parties were as under:

- i. The arrangement is valid for the period of 01.04.2017 to 31.03.2018.
 - ii. The procedural formalities to apply for Short-term open Access to SLDC were to be done by the petitioner/ Manikaran power Ltd. and the Respondent herein was to provide the necessary support to the petitioner in this regard.
 - iii. As the power supply is subject to technical and other constraints, provision was made for accommodating such technical and transmission corridor constraints, effects of the Regulations framed by Odisha Electricity Regulatory commission and the directives/decision of concerned state Load Dispatch centre/ Distribution Licensee, insofar as the responsibility/liability of the parties is concerned.
 - iv. Keeping in view the constraints mentioned above, the maximum permissible deviation from the actual scheduling was limited to 25% of the approved open access energy on monthly basis and deviations in excess of said limit attracted payment of compensation by the defaulting party.
3. The Petitioner submitted that as per the agreement power supply started from the month of April, 2017. Invoices were accordingly raised and payments were to be made as per the agreed terms. The said arrangement worked well for the period 01.04.2017 till 30.06.2017 and supplies were made by the Respondent as per the agreed terms. However after the month of June 2017, the supply of power was abruptly stopped by the Respondent. Repeated inquiries by the Petitioner bore no results and the position is continuing as such.
4. As per clause 12 of the letter of Intent dated 29.03.2017, the Petitioner is to be compensated for non-supply as follows:
- *"In case deviation from VL/MPL side is more than 25% of the approved open access energy on monthly basis, VL/MPL shall pay compensation at Rs.1.00/KWh for the quantum of shortfall in excess of permitted deviation of 25% in energy off take/supplied.*
 - *For any compensation payable by MPL/VL as above, invoice shall be raised by VL./MPL as the case may be and payment shall be made within 8 days from the date of receipt of the invoice.*
 - *Surcharge @1.25% per month on outstanding payments after the 8th day from the submission of bills through fax/mail. Surcharge shall be calculated on day to day basis.*
5. Further, on enquiry by the Petitioner the Respondent stated that power supply from 01.07.2017 to 14.09.2017 could not be made as the requisite consent for power supply

was not granted by Odisha SLDC. As regards to the power supply from 14.09.2017 onwards it could not be supplied due to closure of CGP on the direction of Pollution Control Board. As per the Respondent since both the events come under the clause of force majeure under the agreement it was not possible to pay compensation. The Petitioner states that the above submission of Respondent is baseless since the Respondent fails to provide any material evidence for denial of open access by SLDC and closure notice of Pollution Control Board.

6. Further, the petitioner submitted that in order to invoke the Force Majeure clause, it is the duty of the party claiming it to immediately notify the same to the other party which the respondent has not done. As per the agreement, if dispute remains unresolved then the same can be sent for arbitration under Section 158 of the Electricity Act, 2003. Therefore, the Petitioner prays to send the matter for arbitration under the Electricity Act.
7. M/s Vedanta has filed its reply on 25.05.2018 stating therein that S.158 of the Act contemplates appointment of an arbitrator only in cases where the matter has been directed to be determined by an arbitrator under the Act, otherwise in all other respects, the provisions of the Arbitration Act, 1996 shall apply. Section 158 of the Act is quoted below:

“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.”

8. The Respondent further submitted that the Petitioner has failed to point out where the present matter has been directed to be determined by arbitration under the provisions of the Act. Therefore, in the absence of specific pleading/averment to the effect that matters like that in the instant petition are covered specifically under the Provisions of the Act, Section 158 cannot be invoked. Hence the petition of the petitioner is liable to be dismissed.
9. It is further submitted by the Respondent that the jurisdiction of the State Commission relates to matter /disputes arising within the State of Odisha in terms of section 86 of the Act. But in the instant case there is Inter-State supply of power as the petitioner is located at New Delhi and therefore the petitioner has not satisfied the conditions to

invoke the jurisdiction of the Commission. It may be noted that as per Clause 12 of the Letter of Intent (LOI), compensation is payable on deviations from the approved schedule. It is the duty of the petitioner in terms of Clause 4 of the LoI to obtain Short Term Open Access (STOA) approval. Since no approval of SLDC with respect to grant of STOA was communicated by the petitioner, the Respondent was unable to supply power. Inaction/refusal by SLDC in granting open access is a force majeure condition as laid down in Clause 14 of the LOI and the Respondent is not liable to make payment of compensation to the petitioner as it falls within the ambit of Force Majeure conditions.

10. The Respondent challenges the present petition inter alia on the following grounds:
 - i) The Letter of Intent issued by the Respondent was accepted by the Petitioner who is located in New Delhi and thus, the Agreement was executed in New Delhi.
 - ii) That, the parties have clearly agreed that the High Court of Delhi at New Delhi alone would have the jurisdiction to decide disputes. In case either of the parties opts for arbitration, the venue for the same would be in New Delhi. Thus, the Petitioner has not made out any grounds to invite the jurisdiction of this Hon'ble Commission for appointment of an arbitrator under Section 158 of the Electricity Act, 2003.
 - iii) Since the Petitioner is admittedly, an inter-state trading licensee, the jurisdiction of OERC would not be attracted as laid down by the Hon'ble APTEL in LANCO Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission & Ors. Appeal No.07/2009 dated August 6, 2009. M/s. LANCO Amarkantak Power Pvt. Ltd. v. Madhya Pradesh Electricity Regulatory Commission & Ors. Appeal No. 07/2009 (Decided on August 6, 2009) is exactly the same as the instant situation. In the present facts and circumstances also, the dispute is between a generating company and an inter-state trading licensee and the delivery point of power was within the state. However, the Hon'ble APTEL was pleased to hold that, in such facts and circumstances, the State Commission where the generating company is situated would not be entitled to hold jurisdiction solely on this ground.

11. In this regard, Respondent submitted that the instant transaction is between the Petitioner who is located in New Delhi and the Respondent who is located within the state of Odisha. The ultimate party to whom the Petitioner sells is irrelevant for the purposes of ascertaining jurisdiction since there is no contract between the Respondent and such third party.
12. The Respondent further submitted that it has been held by the Hon'ble Appellate Tribunal for Electricity, New Delhi (APTEL) that merely because the parties are located within the territorial boundaries of the state, the State Commission's jurisdiction is not automatically attracted. The observations of the Hon'ble APTEL in *M/s Vandana Vidyut Limited, Raipur & Ors. v. Chhattisgarh State Electricity Regulatory Commission & Ors.* Appeal No. 89 of 2014 relied upon are quoted below:

"8 The Learned State Commission is not competent to adjudicate the matter just on the ground that both the parties are situated within the territorial jurisdiction of the State of Chhattisgarh. No State Commission can be bestowed with the jurisdiction just on the ground that both the parties are situated within the territorial jurisdiction of the concerned State Commission. Even the State Commission cannot be held entitled to hold jurisdiction just on the ground that the short term interstate open access consumers like the Appellants are governed by the State Grid because such short term open access consumers first, use the intra state transmission systems, for which they pay the relevant charges to the concerned STU or State Grid Utility.

13. The petitioner in its rejoinder submitted that the precise issue involved in the petition is which is the appropriate forum, for adjudication of a dispute between a Generating Company and an Inter State Trading Licensee, arising out of a transaction involving supply of electricity within the State of Odisha. Section 86(1)(f) of the Electricity Act 2003 provides twofold mechanism for the same. It mandates that either such a dispute can be adjudicated by the State Commission itself or the Commission may refer it to one or more arbitrators. The discretion as to choose one of the said two modes of adjudication lies with the concerned State Commission. The Commission, within whose jurisdiction cause of action has arisen, shall have the jurisdiction under Section 86 of the Act. In the present case, the entire cause of action has arisen within the State of Odisha and the same is established from the following facts:
- The transaction in question is an intra -state trade where power is to be supplied from Jharsuguda to Jharsuguda, within the state of Odisha.
 - The delivery point for supply of power is within the state of Odisha.

- Approvals for the transaction is regulated by Odisha SERC Regulations and Odisha State Grid Code.
 - Approvals for the transaction are to be given by Odisha SLDC.
 - LOI has been issued within the State of Odisha.
 - Generating unit is also situated within the State of Odisha.
14. Heard the parties at length and perused the records. Under Section 86 (f) of the Electricity Act the State Commission can adjudicate the disputes between the Licensee and Generating Companies and refer any dispute for arbitration. The term ‘Licensee’ under the Section 2(38) of the Act means a person who has been granted a licence under Section 14 of the Act. As far as Section 14 is concerned the appropriate Commission to grant licence is Odisha Electricity Regulatory Commission (OERC). Therefore, the term Licensee under Section 86 (1) (f) of the Act refers to a person who has been granted licence by OERC under Section 14 of the Act. In the present case the Petitioner is an inter-State trader who has been granted licence by CERC and hence cannot be covered under licensee under Section 86 (1) (f) of the Act over which the jurisdiction of this Commission extends.
15. Accordingly, this dispute between the inter-State trader (Licensee of CERC) and a generating company can neither be adjudicated by this Commission nor be referred by this Commission for arbitration. In our opinion the jurisdiction of this Commission in this case as far as Section 86 (1) (f) of the Act is concerned is barred. Therefore, referring the matter under Section 158 of the Act for arbitration does not arise.
16. With this observation, the case is disposed of.

Sd/-
(S.K.Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson