

Record of Proceedings dated 07.07.2018

O. P. No. 8 of 2017

M/s. Shree Cement Limited Vs. TSSPSDCL & Vedanta Limited

Petition filed seeking recovery of the amounts due from the respondents towards sale of power on short term basis U/s 86 (1) (f) of the Act, 2003.

Sri. Buddy A. Ranganadhan, Senior Advocate alongwith Sri. P. Vikram, Advocate for the petitioner, Sri. Y. Rama Rao, Standing counsel for the respondent No.1 and Sri. K. Gopal Chowdary, Advocate for respondent No. 2 are present. The counsel for the petitioner stated that the petitioner is an interstate trader in electricity having obtained licence from the Central Electricity Regulatory Commission (CERC). The TSDISCOMs have notified procurement of power on short term basis for the period July, 2015 to May, 2016.

The counsel for the petitioner stated that intending to bid for the capacity under short term, it has contacted the respondent No. 2 to ascertain if it is ready to supply energy for sale to TSDISCOMs from its sources of generation. It received a reply in the affirmative and thereafter applied for bidding the capacity and was awarded letter of intent by the TSDISCOMs.

The counsel for the petitioner stated that the petition involves claim of amounts on two counts relating to point of connection (POC) at the injection point and after the delivery point, which fall in different states. He has explained the various provisions of the power purchase agreement as well as the power supply agreement entered with the respondents No.1 and 2 respectively. It is his case that both the agreements replicate similar clauses and can be termed as back to back agreements.

The counsel for the petitioner, while making submissions, has readout the provisions of the PPAs at clauses 3.2 and 3.10 in both the agreements. He stated that the PPA between trader and generator requires payment of charges at the injection point and the PPA entered with the DISCOM by the trader requires payment of charges for the transmission and delivery point charges.

The counsel for the petitioner stated that the trader is required to obtain the corridor for short term, medium term or long term open access. In this case, the petitioner has obtained MTOA, even though, it has contracted with the respondent No.1 for supplying power on short term basis. The capacity contracted is for 62 MW. The trader based on the information from the generator has to provide day ahead schedules for the supply of energy on the next day in terms of the agreement and the drawl is dependent on the DISCOMs requirement.

The counsel for the petitioner stated that the licensees as well as generator have to pay the point of connection charges in terms of CERC regulation. While the generator pays the charges at injection point, the beneficiary will pay the charges at the drawl point. However, the CERC had amended the regulation in the year 2015 during the substance of the agreement and required POC charges to be paid at the point of delivery only by merging the charges in respect of injection point also.

The counsel for the petitioner stated that the petitioner is entitled to POC charges and interest thereon. Since POC charges are required to be paid upfront and the same have been paid by it, it is now seeking the reimbursement of the same along with interest in terms of the PPA. The charges borne by the petitioner have to be reimbursed to it and it is immaterial who reimburses the same, be it the generator or the licensee. The present petition is filed against the Respondents No. 1 and 2 to recover the said amounts only.

The counsel for the petitioner stated that the petition was originally filed intending to recover the amount from the licensee, facilitator of generation as well as generator itself. However, during the pendency of the petition, due to negotiations between the respondent Nos. 2 and 3, the need for any directions against the respondent No. 3 became infructuous. Accordingly, the counsel for the respondent No. 3 filed an application for deletion of the respondent No. 3, which was ordered by the Commission in its order dated 30.06.2018.

The counsel for the petitioner sought to rebut the contention about the maintainability of the petition and stated that this Commission had jurisdiction to adjudicate the matter. In fact, section 86 (1) (b) of the Act, 2003 specifically provides that regulation of power procurement including the price at which it is procured by

the distribution licensee lies within the domain of the Commission as distribution activity is not provided to be regulated by the CERC. This is despite the fact that the petitioner is interstate trader and was granted licence by the CERC. Section 64 (5) of the Act, 2003 also requires dispute resolution in the matter of tariff, if the beneficiary of energy supply falls within the territorial jurisdiction of this Commission.

The counsel for the petitioner, therefore, prayed that the Commission may decide the liability of the respondents and direct the payment of the POC charges due to it. He also stated that the issue of jurisdiction came for consideration before the Hon'ble ATE in several matters, wherein it had been specifically held that the Commission in whose jurisdiction the power ultimately consumed has the jurisdiction to entertain the dispute. In this regard, he relied on the judgment of the Hon'ble ATE in Appeal No. 168 of 2014 for this purpose.

The counsel for the respondent No. 2 stated that as part of the arrangement, it had obtained orders for sale of capacity to the TSDISCOMs. The petitioner conveyed to it that it had obtained MTOA for undertaking supply as has been contracted by the petitioner for supply of energy. The provisions of the PPAs provide for payment of charges including POC.

The counsel for the respondent No. 2 stated that the CERC amended the regulation insofar as payment of POC charges in the year 2015. Therefore, the respondent No. 2 is not liable to pay the said charges, even though the agreement requires the payment of the same to the extent of 50% of the amount due to the petitioner. It is for the respondent No. 1 DISCOM to settle the accounts by paying the charges in terms of the regulation issued by the CERC.

The counsel for the respondent No. 2 stated that the respondent No. 1 is liable for all the costs and consequences and the respondent No. 2 is having nothing to do with the dispute between the petitioner and respondent No. 1. Inasmuch as the clauses in the agreement emphatically provide that all the expenses are to be borne by the trader or DISCOM. Therefore, no claim can be made against this respondent.

The counsel for the respondent No. 2 stated that the contention regarding back to back agreement between the licensee and the trader as well as the trader

and the generator cannot be termed as back to back agreements. Such a concept has not been approved by the court of law. Mere reflection of clauses or clauses being one and the same in both the agreements entered by the petitioner and generator or petitioner and licensee does not constitute or amount to back to back agreements. Enforceability of such agreement depends on the authority under which the agreement is entered and is always subject to the general principles of the law.

The counsel for the respondent No. 2 stated that the Hon'ble Supreme Court as well as the Hon'ble ATE did not recognize the back to back agreements. He relied on the judgments of Hon'ble Supreme Court (1) M/s. MD. Serajuddin and others Vs. The State of Orissa & interveners, (2) Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments and judgment of the Hon'ble ATE in M/s. Jaiprakash Power Ventures Limited Vs. Haryana Electricity Regulatory Commission and others. Citing the extensively from the judgment, being relied upon by him. He emphasized that the relationship should be derived between the parties from the agreement itself. Such is not the case at present. The petitioner sought to undertake sale of the energy generated by the 2nd respondent and therefore, stating that any action or inaction of the DISCOM who is the beneficiary through the trader, cannot be accepted.

The counsel for the respondent No. 2 stated that what is required is privity of contract between the respondent No. 2 and the petitioner and as it had nothing to do with the DISCOM even though the trader sold the energy procured from the respondent No. 2 on the basis of two contracts of sale and purchase put together. This aspect was considered by the constitutional bench of the Hon'ble Supreme Court in M/s. MD. Serajuddin and others Vs. The State of Orissa and interveners.

The counsel for the respondent No. 2 stated that jural relationships between (1) party awarding head contract (awarder / employer) and head contractor, and (2) head contractor and subcontractor were held, in absence of clear tripartite contract are ordinarily quite distinct and separate, and awarder / employer will not be liable for claims of subcontractor against head contractor, unless head contract clearly provides for such transference of liability i.e. clear acceptance of liability of subcontractor claims by awarder in head contract itself. Even a clause indicating "back-to-back" liability in the subcontract would not serve to vary / novate the head

contract and fasten payment liability on awarder / employer. Head contract cannot be varied / novated by what is agreed upon in subcontract.

The counsel for the respondent No. 2 stated that this issue has been considered by the Hon'ble ATE in M/s. Jaiprakash Power Ventures Limited Vs. Haryana Electricity Regulatory Commission and others. It was held that State Commission will have jurisdiction to adjudicate upon the PPA between the generating Company and inter State Trade only if nexus or privity is established between the PPA and the PSA between the Inter State Trader and the Distribution Licensee. In the present case, the Hon'ble ATE finds no nexus between the PPA entered into between parties therein that is the appellant and PTC (R-3) and PSA entered into between PTC (R-3) and Haryana Power (R-1). Hence, State Commission has no jurisdiction to go into the dispute in question.

The counsel for the respondent No. 2 stated that the petitioner can agitate against the respondent No. 2 by invoking appropriate remedies available to it under law, but not this Commission. Based on the regulation of CERC, the respondent No. 2 is not liable to pay any amount to the petitioner insofar as POC charges are concerned and it is for the respondent No. 1 to pay or contest the same being the beneficiary. He also pointed out that similar relief has been asked against the respondent Nos. 1 and 2 and it cannot be same against both the respondents if at all the claims have to be accepted. The claim insofar as respondent No. 2 can at best be 50% of the total relief sought in the petition.

The counsel for the parties stated that their arguments are inconclusive and would like to make some more submissions. Therefore, they have requested for adjournment to any other date of the hearing. Therefore, the matter is adjourned.

Call on 18.08.2018 at 11.00 P.M.

Sd/-
Chairman