

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO. 1520 OF 2014****IN****SUIT NO. 1074 OF 2008**

M/s.Adani Enterprises Ltd.

...Applicant / Orig.Deft.1

**In the matter between**

Maharashtra State Electricity Distribution Co.Ltd.

...Plaintiff.

vs.

M/s.Adani Enterprises Ltd. &amp; Ors.

...Defendants

Mr.Harinder Toor with Nirav Shah, Anuj Jaiswal i/b. Little &amp; Co. for Plaintiff.

Mr.Amit Vyas i/b. Economic Laws Practice for Defendant No.1.

**CORAM : S.C. GUPTE, J.****RESERVED ON : 1 DECEMBER 2015****PRONOUNCED ON : 28 MARCH 2016****JUDGMENT :**

The Notice of Motion seeks rejection of the plaint under Order 7 Rule 11 of the Code of Civil Procedure for want of jurisdiction. The case of the Applicant, who is original Defendant No.1, is that the subject matter of the dispute in the present suit falls within the ambit of Section 86 of the Electricity Act, 2003 and only the State Electricity Commission established under that Act has the jurisdiction and authority to decide the dispute.

2           The Plaintiff is a company carrying on the business *inter alia* of transmission and distribution of electricity in the State of Maharashtra. Defendant No.1 is a trader of electricity and holds licence for inter-state trading in electricity. Due to power shortage in the State, the Plaintiff had floated a tender inquiry for purchase of electricity, pursuant to which Defendant No.1 made an offer. It is the

Plaintiff's case that this offer was accepted and an order was placed on Defendant No.1 for supply of off peak power on the terms and conditions of the order. The terms *inter alia* included payment of compensation by Defendant No.1 in the event of its failure to supply 70 per cent of the contracted power. The Plaintiff's grievance is that there was such failure on the part of Defendant No.1. The Plaintiff has, accordingly, filed the present suit for damages.

3 Defendant No.1 submits that this being a dispute between licensees, the exclusive jurisdiction to decide it is with the Maharashtra State Electricity Regulatory Commission ("MERC") by virtue of Section 86(1)(f) of the Electricity Act, 2003 ("Act"). On the other hand, the Plaintiff contends that only disputes between licensees on the one hand and generating companies on the other fall within Section 86(1)(f) and not disputes *inter se* between licensees. Secondly, and without prejudice to his first contention, the Plaintiff submits that there are other parties to the suit and as such the dispute is not only between licensees and cannot be relegated for adjudication before MERC.

4 Section 86(1)(f) is in the following terms :

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

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

The submission of the Plaintiff is that the disputes contemplated here are disputes between two parties, one of whom must be a licensee and the other a generating company. In other hands, the Plaintiff suggests the word "and" appearing in Section 86(1)(f) between the words "licensees" and "generating company" to be read conjunctively. Defendant No.1 would read the word disjunctively so that disputes between licensees or disputes between generating companies would be covered under Section 86(1)(f).

5 If one has regard to the provision of Section 86(1)(f) itself, there are

two important indications why the Plaintiff is not right in the conjunctive interpretation of “and”. Firstly, there is a comma between the words “the licensee” and “generating companies” and secondly, the terms used are in plural and not singular, ie.. “licensees” as opposed to “licensee”, and “generating companies” rather than “generating company”. These are clear indications that from a semantic point of view, the provision contemplates not just disputes between a licensee and a generating company, but disputes *inter se* between licensees as well as disputes between generating companies. Even from a purposive point of view, there is no rationale for limiting or restricting the jurisdiction of the Electricity Regulatory Commission to disputes only between a licensee and a generating company and exclude disputes between two or more licensees or generating companies.

6           A similar provision contained in Electricity Regulatory Commission Act, 1998 (“ERC Act”) was interpreted by this Court in the case of **Dabhol Power Company vs. Maharashtra State Electricity Board**<sup>1</sup>. In that case, the provision of Section 22(2)(n) of ERC Act fell for consideration of the Court. The provision, which is in *pari materia* with Section 86(1)(f), reads as follows :

**22. Functions of State Commission.-** (2) Subject to the provisions of Chapter III and without prejudice to the provisions of sub-section (1), the State Government may, by notification in the Official Gazette confer any of the following functions upon the State Commission, namely:-

(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for arbitration.”

The argument that Section 22(2)(n) covered only disputes between a licensee and a utility was repelled by the Court. The Court held as follows:

“37. Section 22(2)(n) confers power on the State Commission to adjudicate upon disputes and differences between the licensees and utilities as such disputes and differences can directly or indirectly have ramifications or implications on the matters statutorily entrusted to its

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<sup>1</sup> WP No.1205 of 2011 decided on 5 March 2002.

exclusive jurisdiction. Such disputes can no longer be left to be resolved through private dispute resolution mechanisms and have to be adjudicated upon by the Commission in accordance with the provisions of the ERC Act. The word 'adjudicate' clearly denotes wide amplitude of power. The Legal Thesaurus (2<sup>nd</sup> Edition) defines adjudicate as "to deliver judgment, determine finally, exercise judicial authority". The Blacks Law Dictionary (6<sup>th</sup> Edition) defines it as "to determine finally. Synonymous with adjudge in its strictest sense". Mr.Chidambaram, however, urged that section 22(2)(n) would cover disputes only between the licensees and utilities and not between two utilities. In other words, there must be dispute between licensee on the one hand the utility on the other hand. The interpretation is based on complete misconceived reading of section 22(2) (n). The submission ignores the well settled meaning of the word "between" which means "among". The Blacks Law Dictionary (6<sup>th</sup> Edition) states that sometimes it is used synonymous with among. In re:Cossentine(1933) CH 119 Maugham J examined the article in the Oxford Dictionary on the word and pointed out that, today, with reference to a division and particularly to an equal division the words 'between' was not only the natural word to use, but was just and proper as the word 'among'. (see also re: Alcock(1945) 1 Ch.264.) (emphasis supplied)."

These observations apply with equal force even for interpretation of Section 86(1)(f) of the Act.

7            Learned Counsel for the Plaintiff relies on the judgment of Supreme Court in **Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd.**<sup>2</sup>. In that case, the Supreme Court did observe that Section 86(1)(f) of the Act was a "special provision for adjudication of disputes between the licensee and the generating companies" and would override the general provision "for arbitration of disputes between the licensee and generating companies." Relying on these observations, it is submitted by Counsel that even according to the Supreme Court the scope of Section 86(1)(f) was limited to disputes between a licensee on one hand and a generating company on the other. At the outset, it must be noted that Supreme Court in that case was not considering which disputes were covered by Section 86(1)(f), but whether an application of Section 11 of the

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2 (2008) 4 SCC 755

Arbitration and Conciliation Act, 1996 ("Arbitration Act") was maintainable in view of Section 86(1)(f) of the Act insofar as disputes between licensees and generating companies were concerned. In that case, the dispute was between a generating company and a distribution licensee and this dispute was sought to be referred to arbitration by filing a petition under Section 11 of the Arbitration Act. The Supreme Court held that under Section 86(1)(f) of the Act, Electricity Regulatory Commission alone could adjudicate or arbitrate the dispute and that provision would prevail over Section 11 of the Arbitration Act. The order of Gujarat High Court appointing an arbitrator under Section 11 of the Arbitration Act was, accordingly, set aside by the Supreme Court. The judgment of **Gujarat Urga Vikas Nigam** is not an authority for understanding which disputes are covered by Section 86(1)(f) and which are not. It is an authority for the proposition that Section 86(1)(f) of the Act is a special provision which prevails over the general provision of Section 11 of the Arbitration Act and accordingly, as and when a dispute is covered by Section 86(1)(f) of the Act, it cannot be adjudicated through an arbitrator appointed under Section 11 of the Arbitration Act.

8           The Appellate Tribunal for Electricity has correctly interpreted the scope of Section 86(1)(f) of the Act insofar as the parties to disputes referred to therein are concerned in the case of **PTC India Limited vs. Gujarat Electricity Regulatory Commission, Central Power Distribution Company of A.P. Ltd. vs. Tata Power Trading Company Ltd. and Pune Power Development Private Ltd. vs. Karnataka Electricity Regulatory Commission** on the same lines as proposed by me above.

9           Learned Counsel for the Plaintiff submits that there are other parties to the dispute, who are neither licensees nor generating companies. Relying on the judgment of Supreme Court in the case of **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya**<sup>3</sup>, he submits that neither the cause of action nor the parties can be split. He relies on other judgments to contend that at the stage of Order 7 Rule 11, we must go by averments in the plaint alone and apply the

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<sup>3</sup> (2003) 5 SCC 531

provision for rejection of plaint only when the statements made in the plaint without any doubt or dispute show that the suit is barred by any law in force. These principles are firmly established and need no elaboration. The question is, whether these come into play and help the Plaintiff in the present case. The plaint unmistakably establishes that the dispute is between two licensees, one a distribution licensee and the other a trading licensee with whom the former entered into a power purchase agreement. The breach of that power purchase agreement by the latter is the subject matter of dispute in the suit and what is claimed as relief is grant of compensation by way of damages for such breach. Merely because the Plaintiff has chosen to join some others, who are neither parties who ought to be joined nor necessary for proper adjudication of the suit, it cannot be said that Section 86(1)(f) does not cover the suit.

10           The Plaintiff's reliance on the case of **Dhulabhai vs. State of Madhya Pradesh**<sup>4</sup> does not take its case any further. Insofar as exclusion of jurisdiction of courts and forii other than Regulatory Commissions in the matter is concerned, the judgment of the Supreme Court in the case of **Gujarat Urja Vikas Nigam** clearly holds the field. In that case, the Supreme Court has made it clear that on a principle that a special law overrides the general law, Electricity Regulatory Commission alone can adjudicate the disputes or refer them to arbitration. Section 86(1)(f) provides for a special manner of adjudication of disputes referred to therein. Such disputes have to be decided by the Commission itself or referred to arbitrator. By implication all other methods are barred. Even on the principle of law laid down in **Dhulabhai**, where there is no express exclusion of jurisdiction, on an examination of the scheme of the particular Act, including remedies thereunder, it is necessary to find the intendment of the Act. If the intendment is to provide for finality to the adjudication of the statutory authority, the civil court's jurisdiction must be held to be barred if there is adequate remedy to do what civil courts would normally do in a suit. There is an adequate adjudicatory machinery in the Act here; the commission can grant effective relief just a civil court would; and any adjudication by the Commission is subject to an appeal before the Appellate Tribunal. The

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4 AIR 1969 SC 78

intendment is clearly to provide for a final adjudication and there is an adequate remedy. The jurisdiction of ordinary civil courts may well be treated as ousted.

11           Thus, there is a case for rejection of plaint under Order 7 Rule 11 in the present suit. The Notice of Motion is, accordingly, made absolute in terms of prayer clause (a). No order as to costs.

**(S.C. Gupte, J.)**