

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.Nos10814 and 13689 of 2018

COMMON ORDER:

Heard the learned Advocate General for the petitioners and Sri B.Prakash Reddy, Sri S.Niranjan Reddy, learned Senior Counsel appearing for the third respondent in the writ petitions and Sri Putluru Srinivas for the second respondent.

2. W.P.No.10814 of 2018 is directed against the order in I.A.No.211/2018 in Appeal No.41/2018, on the file of the Appellate Tribunal For Electricity at New Delhi dated 16.03.2018. W.P.13689 of 2018 challenges the order dated 26.02.2018 passed by the appellate Tribunal for Electricity, New Delhi in Appeal No.41 of 2018.

3. Petitioners are the distribution companies. On 15.04.1998 the erstwhile A.P. State Electricity Board and the third respondent herein entered into a Power Purchase Agreement. As per Clause 4.1.1 of Power Purchase Agreement dated 15.04.1998, R.3 was obligated to achieve financial closure within 12 months for discharging the obligation by the APSEB. Validity of the Power Purchase Agreement was extended till on 30.09.2001. In 2013, a Memorandum of Agreement was entered into between the third respondent and the Distribution Companies. Thereafter, the third respondent herein filed O.P.No.21 of 2015 before the A.P. Electricity Regulatory Commission, seeking determination of capital cost and tariff for supply of power. On 28.04.2016, the petitioners-distribution companies entered into an agreement with the third respondent for continuation of Power Purchase Agreement dated 15.04.1998. Thereafter, on 11.05.2016, the distribution Companies filed O.P.No.19 of 2016 for grant of approval for continuation of Power Purchase Agreement under Electricity Reforms Act, 1998.

4. The petitioners-distribution companies filed I.A.No.1/2018, seeking withdrawal of O.P.19 of 2016 and I.A.No.2 of 2018 for consequential rejection of OP.No.21 of 2015. The third respondent herein filed I.A.No.3/2018, seeking its transposition as petitioner in OP.No.19 of 2016 filed by the petitioners-distribution companies. The A.P. Electricity Regulatory Commission on 31.01.2018, allowed I.A.Nos.1 and 2 of 2018 and rejected I.A.No.3/2018 for transposition by way of a common order dated 31.01.2018. Questioning the validity and legal sustainability of the said order, third respondent herein preferred Appeal No.41/2018 on the file of the Appellate Tribunal for Electricity, New Delhi. In the said appeal, the third respondent filed I.A.No.211 of 2018, seeking the following reliefs:

- “(a) stay the Judgment and Order dated 31.03.2018 passed by the Andhra Pradesh Electricity Regulatory Commission, pending the hearing and decision in the appeal;
- (b) direct the respondents 2 and 3, namely, the two Distribution Licensees in the State of Andhra Pradesh to continue to implement the Power Purchase and Continuation Agreement Procurement Process Agreement which was followed prior to 31.01.2018 in the same manner as before and maintain the status quo as was prevalent on 31.01.2018 and restore Petition No.OP 21 of 2015 and OP 19 of 2016 for adjudication by State Commission and pass orders for a two part tariff based on the approved project cost along with the approval of Continuation Agreement 2016 in a time bound manner;
- (c) direct the Respondents 2 and 3 to pay the amount outstanding to the Appellant together with the Delayed Payment Surcharge and continue to pay fixed charges to the Appellant

(d) pass any such further order or orders as this Hon'ble Tribunal may deem just and proper in the circumstances of the case."

5. In W.P.No.13689 of 2018, the order passed by the Appellate Tribunal, admitting appeal No.41 of 2018, dated 26.02.2018, is under challenge.

6. When the matters are taken up, learned Senior Advocates, appearing for the third respondent in the writ petitions have taken a preliminary objection with regard to the very maintainability of the writ petitions by contending that in view of the availability of alternative remedy of appeal to the Hon'ble Supreme Court under Section 125 of the Electricity Act, 2003, the present writ petitions cannot be entertained.

7. On the other hand, it is contended by the learned Advocate General appearing for the petitioners that since the very jurisdiction of the APERC and the Appellate Tribunal are under challenge, the present writ petition is maintainable. In elaboration, it is further contended that as per Clause 5.2(b) (i) of the terms and conditions for determination of operation for supply of electricity by generating company to a distribution licensee and purchase of electricity by distribution licensees and Section 21 (5) of the A.P. Electricity Reforms Act, 1998, the Regulatory Commission does have the jurisdiction only where the PPA had been signed and approved by the Commission prior to 06.01.2006 or the PPA was signed and pending before the Commission as on 06.01.2006. In order to sustain the argument in favour of maintainability of the writ petition, the learned Advocate General placed reliance on the Judgment of a Division Bench of this Court in the case of *STATE OF TELANGANA AND ORS v. MD. HAYATH UDDIN AND ORS*¹.

¹ 2018 (1) ALD 247

8. On the other hand, while contending that the said Judgment would not come to the rescue of the petitioners herein, the learned Senior Counsel, Sri B.Prakash Reddy relied upon the Judgment of the Hon'ble Apex Court in *UNION OF INDIA AND OTHERS v. MAJOR GENERAL SHRI KANT SHARMA AND ANOTHER*².

9. Learned Advocate General also placed reliance on the judgment of the Hon'ble Apex Court in the case of *KANWAR SINGH SAINI v. HIGH COURT OF DELHI*³. It is further submitted by the learned Advocate General that the writ petitions before this Court is very much maintainable in view of the Judgment of a Division Bench of this Court in *STATE OF TELANGANA AND ORS (supra 1)* as confirmed in SLP (C) No.4813/2018.

10. Refuting the submissions of the learned Advocate General, it is submitted by Sri B.Prakash Reddy, learned Senior counsel that having submitted to the jurisdiction of the Electricity Regulatory Commission by filing applications, now it is not permissible for the petitioners to contend that the Electricity Regulatory Commission has no jurisdiction to entertain the OPs. While submitting so, Sri B.Prakash Reddy, learned Senior Counsel has cited a judgment of the Hon'ble Apex Court in *GUJARAT URJA VIKAS NIGAM LTD v. ESSAR POWER LTD.*⁴

11. Admittedly, in the present case, as against the orders passed by the A.P. Electricity Regulatory Commission, the third respondent herein preferred a statutory appeal under Section 111 of the Electricity Act, 2003 before the appellate Tribunal for Electricity. Section 125 of the Electricity Act, 2003 reads as under:

² (2015) 6 SCC 773

³ (2012) 4 SCC 307

⁴ (2008) 4 SCC 755

“Section 125. (Appeal to Supreme Court):

Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.”

12. It is very much evident from a reading of the above provision of Law that any aggrieved person is entitled to file an appeal before the Hon'ble Supreme Court against the orders of the appellate Tribunal on any one of the grounds specified in Section 100 of the Code of Civil Procedure, 1908.

13. It is submitted by the learned Advocate General that in the instant case the very jurisdiction of the APERC and the appellate Tribunal are under challenge. In the considered opinion of this Court, the said aspect which according to the petitioners goes to root of the matter can be urged as a substantial question of law as provided under Section 100 of the Code of Civil Procedure.

14. In *STATE OF TELANGANA AND ORS (supra 1)*, the order passed by the National Green Tribunal, New Delhi was challenged. A Division Bench of this Court on the ground that the question raised therein would touch the very jurisdiction of the National Green Tribunal to entertain the application, entertained the writ petition. The Special Leave Petition filed against the said order of the Division bench also ended in dismissal. There is also no dispute

with regard to the principle laid down by the Hon'ble Apex Court in *KANWAR SINGH SAINI (supra 3)*.

15. In *UNION OF INDIA AND OTHERS (supra 2)*, the Hon'ble Apex Court while referring to its earlier judgment in *CICILY KALLARACKAL v. VEHICLE FACTORY⁵* held at paragraphs 40 and 41 as follows:

“40. In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.

41. In view of Article 141 the law as laid down by this Court, as referred to above, is binding on all courts of India including the High Courts.”

16. In the instant case also Section 125 of the Electricity Act 2003 specifically provides for appeal to the Hon'ble Supreme court against the decision or order of the appellate Tribunal on any one or more of the grounds specified under Section 100 of the Code of Civil procedure.

17. In view of the judgment of the Hon'ble Apex Court in *UNION OF INDIA AND OTHERS (supra 2)*, the judgment of a Division Bench of this court in *STATE OF TELANGANA AND ORS (supra 1)*, in the considered opinion of this Court, would not render any assistance to the petitioners herein.

18. In the case of *GUJARAT URJA VIKAS NIGAM LTD (supra 4)*, the Hon'ble Apex Court at paragraph 60 held as under:

“60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be

⁵ (2012) 8 SCC 524

done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.”.

19. Having regard to the law laid down by the Hon'ble Apex Court in *UNION OF INDIA AND OTHERS (supra 2)* and keeping in view the statutory remedy available to the petitioners herein under Section 125 of the Electricity Act, 2003, this Court is not inclined to entertain the present writ petitions.

20. Accordingly the writ petitions are dismissed. However, it is open for the petitioners herein to avail the remedy available under Section 125 of the Electricity Act, 2003 and to raise all the grounds. Consequently, Miscellaneous Petitions, if any, pending in this Writ Petition shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:02.05.2018
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI



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