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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 09th February, 2022

+ ARB.P. 572/2020

IL AND FS ENERGY DEVELOPMENT COMPANY LIMITED

..... Petitioner

Through: Mr. Sarojanand Jha, Mr. Suraj Malik
and Mr. Karan Sharma, Advocate.

versus

AMITY UNIVERSITY

..... Respondent

Through: Mr. Darpan Wadhwa, Senior
Advocate with Mr. Tanmaya Mehta
and Mr. Raajan Chawla, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. IL&FS Energy Development Co. Ltd. [*hereinafter "IL&FS"*] by way of the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter "the Act"*] seeks appointment of an Arbitral Tribunal for adjudication of disputes in relation to and arising from 'POWER PURCHASE AGREEMENT' dated 16th October, 2014 [*hereinafter "PPA"*]. The said PPA contains an arbitration clause [Clause 16] which reads as follows: -

"16. DISPUTE RESOLUTION



16.1 If any dispute or difference of any kind whatsoever shall arise between the Parties in connection with or arising out of this Agreement or out of the breach, termination or invalidity of the Agreement hereof ("Dispute"), any of the Parties shall notify the other of the existence of such Dispute and both Parties shall attempt, in good faith, to resolve the Dispute through mutual discussions within fifteen (15) days of such notification.

16.2 Notwithstanding the existence of any dispute except for non-payment, the Parties hereto shall continue to perform their respective undisputed obligations under this Agreement throughout the Term of this Agreement.

16.3 In the event that the Dispute is not resolved in terms of Clause 16.1 above, the Parties shall submit the Dispute to arbitration in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal shall comprise of three arbitrators. One arbitrator shall be appointed by each Party. The two appointed arbitrators shall nominate the third arbitrator who shall serve as the presiding arbitrator.

16.4 The award of the arbitral tribunal shall be conclusive and binding on the Parties. The arbitral tribunal shall give a reasoned award. The arbitration shall be conducted in Delhi. The Parties shall bear the costs of arbitration as directed by the arbitral tribunal.

16.5 All disputes arising from this Agreement shall, subject to Clause 16.3 above, be within the exclusive jurisdiction of the Courts at Delhi."

2. The existence of the afore-noted PPA is not in dispute. Yet, Respondent viz. Amity University [hereinafter "**Amity**"] strongly opposes the maintainability of the petition, contending that this Court does not have the jurisdiction to refer the parties to arbitration. The parties are 'generating companies' as defined under the Electricity Act, 2003 [hereinafter "**EA**"], and disputes between them in relation to the PPA fall squarely within the ambit of EA and exclusive jurisdiction for adjudication thereof vests with the concerned State Electricity Regulation Commission [hereinafter "**SERC**"].



CONTENTIONS OF THE PARTIES

FOR AMITY UNIVERSITY

3. Mr. Sandeep Sethi, Senior Counsel who had argued the matter on behalf of Amity along with Mr. Darpan Wadhwa, Senior Counsel and Mr. Tanmaya Mehta, contend that disputes raised by IL&FS fall squarely within the scope of Section 86(1)(f) of EA and thus, the appropriate forum for adjudication is Uttar Pradesh Electricity Regulatory Commission [hereinafter “**UPERC**”]. The afore-said provision reads as under: -

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

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



(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.”
[Emphasis supplied]

4. Mr. Sethi argued that Section 86(1)(f) of EA covers **all disputes** between arising between ‘generating companies’ and ‘licensees’ and not only of the kind enumerated in other sub-clauses of Section 86. The EA is a special law that excludes the general law. Further, Section 86(1)(f) is wide enough to bring within its ambit **all disputes** relating to electricity, except those involving a ‘consumer’. He emphasised that UPERC alone would have jurisdiction to adjudicate the disputes between the parties that are sought to be referred to arbitration.

5. Mr. Sethi argued that IL&FS was to install/ set-up a one Mega-watt (1 MW) Solar PV Rooftop Project for generation of electricity on the roof space provided by Amity [hereinafter “**solar power plant**”].¹ Amity provided capital expenditure [“**CAPEX**”] support to the tune of Rs. 1.70 Crores to IL&FS to set-up the solar power plant.² During the currency of the PPA, the said plant is to be operated and maintained by IL&FS for 15 years

¹ Clause 2.2 of PPA.

² Clause 10 of PPA.



and during this time, IL&FS was to earn tariff for electricity supplied.³ After expiry of the term, the solar power plant is to be handed over to Amity. In light of the foregoing, Amity has a stake and interest in the project and is clearly a 'co-owner' of the solar power plant. Mr. Sethi states that undisputedly, IL&FS is also a 'generating company' since it has commissioned the solar power plant which is a power generating plant. Therefore, he submits, the dispute is between two generating companies, which falls within the ambit of Section 86(1)(f) of the EA and UPERC has the prerogative to adjudicate the disputes and private arbitration *de hors* the provisions of EA, is not maintainable.

6. In support of the afore-noted contentions, reliance is placed upon the judgment of the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.***⁴. In the said case, the Appellant therein approached the SERC under Section 86(1)(f) of EA and Respondent instead approached the Gujarat High Court seeking appointment of an Arbitrator for adjudication of disputes, an Arbitrator was appointed by the High Court and aggrieved by the same, Appellant approached the Supreme Court. On consideration, the Apex Court relegated the matter to SERC with a direction to either deal with the matter itself or refer it to arbitration. Mr. Sethi further submits that disputes involve technical aspects as there were several technical defect(s) in the design and installation of solar power plant. Amity has huge counter-claims against IL&FS and therefore, SERC would be most competent and suitable forum, being a specialised tribunal, to adjudicate the disputes

³ Clause 6 of PPA.

⁴ (2008) 4 SCC 755. Reliance is placed on paragraphs No. 59-62.



between the parties. Mr. Wadhwa adds that Amity has already invoked the jurisdiction of UPERC (under Section 86 of the EA) and since the said forum is now adjudicating the disputes between the parties, they should not be relegated to arbitration.

7. Mr. Sethi also placed reliance on the judgment of the Supreme Court in *Tamil Nadu Generation and Distribution Corp v. PPN Power Generating Company*⁵ to contend that even simple money claim(s) can lie within the jurisdiction of the SERC. Further, he strongly relied upon the judgment of the Himachal Pradesh High Court in *Rajpur Hydro Power Pvt. Ltd. v. Gangdari Hydro Power Pvt. Ltd.*⁶. Mr. Sethi highlighted that in the above-noted case, the Court had examined the entire scheme of the EA and held that dispute between two ‘generating companies’ can be referred to the SERC. The relevant portion of the said judgment reads as follows: -

“30. Section 86(1)(f) of the Act deals with dispute between the licensees and Generating Companies. Endorsing the view taken by the Appellate Tribunal for Electricity, New Delhi in Pune Power Development and Allian Duhangan Hydro Power cases, for the language of this sub-section, I am of the considered view that jurisdiction to adjudicate upon the dispute between two licensees or between two generating companies or between licensee(s) and generating Company(ies) lies with State Commission under Section 86(1)(f) of the Act.”

[Emphasis supplied]

FOR IL&FS ENERGY DEVELOPMENT CO. LTD.

8. *Per contra*, Mr. Sarojanand Jha, counsel for IL&FS submits that the disputes between the parties are clearly arbitrable. Regardless, he submits that the objection on arbitrability as raised by Amity is a question that has to

⁵ (2014) 11 SCC 53.

⁶ 2021 SCC Online HP 5070. Reliance is placed on paragraphs No. 28-36.



be adjudicated by the Arbitral Tribunal and places reliance on the judgment of the Supreme Court in *Vidya Drolia and Others v. Durga Trading Corporation*⁷ to support his contention.

9. Without prejudice to the foregoing, he further contends that disputes between the parties is primarily on account of non-payment of certain dues arising under the PPA. Mr. Jha referred to several clauses of the PPA to controvert the plea of Amity that it is a ‘*generating company*’. He stressed that such contention is misconceived, based on a misconstruction/misinterpretation of the terms of the PPA. Mr. Jha has placed substantial reliance on the judgment of the Supreme Court in *Hindustan Zinc Limited v. Ajmer Vidyut Vitran Nigam Limited*⁸ to submit that the Court has to give due regard to the nature of dispute between the parties and in light of the terms and conditions in the Agreement. He underscored that in *Hindustan Zinc* (supra), disputes arose between a ‘*licensee*’ and a ‘*generating company*’, yet the Supreme Court held that since the disputes arose under an ‘*Open Access Agreement*’, the bar under Section 86 (1)(f) of EA, will not apply. In addition, reliance was also placed on the judgment in *PTC India Ltd. v. Jaiprakash Power Ventures Ltd.*⁹, relevant paragraph whereof is reproduced as under: -

“A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where However, where a

⁷ (2021) 2 SCC 1.

⁸ (2019) 17 SCC 82.

⁹ 2012 SCC OnLine Del 2838.



trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.”

ANALYSIS

10. The Court has considered the contentions advanced by the counsel for the parties.

11. The PPA is executed for ‘PROCUREMENT OF SOLAR POWER ON LONG TERM BASIS’ between the Seller viz. IL&FS and Buyer viz. Amity. In terms of Clause 6 (TARIFF) of the PPA, tariff for the sale of energy, has been settled between the parties. Further, sub-clause (xiii) of Clause 1.1 (DEFINITIONS) stipulates that the power generated from solar power plant is being consumed through ‘LT Board for Amity Campus, there is no clearance envisaged’. However, if approval is so required, IL&FS will be responsible to obtain the same, in coordination with the Buyer viz. Amity. The said clause also provides that the generation and supply of solar energy connected to ‘Amity’s LT distribution network & this whole System will not interact with the Discom’s network’. Thus, IL&FS is making direct supply of electricity from the solar power plant to Amity.

12. It has also been brought to the notice of the Court that IL&FS continues to operate and maintain the solar power plant. It has issued the notice for termination, and in terms of Clause 12.2 of the PPA, Amity had an “obligation to buy-out the Project from the Seller” as per the modalities agreed between the parties. However, in absence of invocation of a ‘buy-out’ clause by Amity, as envisaged under the PPA, ownership of the said solar power plant *prima facie* continues to vest with IL&FS.



13. The solar power plant is for captive consumption. The supply of electricity is a direct transfer of electricity from the generating company to the consumer and is not subject to regulation. The afore-noted clauses read along with other clauses contained in the PPA, manifests that the plea of Amity as canvassed before the Court, regarding it being a ‘*generating company*’, does not appear to be a correct construction/ interpretation of the terms of the PPA. *Prima facie*, it appears to be a ‘*consumer*’ which is required to make payment of the tariff in terms of PPA. However, at the highest, the Court can only observe that the stand of Amity is arguable, and therefore, this objection cannot render this petition to be non-maintainable. An opportunity should, therefore, be afforded to IL&FS to take recourse to the arbitration clause [Clause 16 – DISPUTE RESOLUTION], since evidently disputes have arisen between the parties, a fact which is not controverted by Amity.

14. In *Hindustan Zinc* (supra), the Supreme Court first took note of the view and opinion expressed by the High Court of Judicature for Rajasthan, Jaipur Bench in paragraph No. 11, that reads as follows: -

“11. The High Court held that, in the peculiar facts of this case, the captive generating plant of the company situated at Chanderiya was to use, through open access, the distribution system of the respondent to wheel power to three of its own units which were situated at Aghucha, Debari and Dariba as aforestated. Given this fact, and given the fact that the three agreements were entered into with these three units, the High Court held that the hat worn by the appellant company, which contained all four units, was that of an open access consumer and not that of a generating company. As a result of which, Section 86(1)(f) of the Electricity Act would not be attracted. Consequently, the issue being one of inherent lack of jurisdiction, the High Court reversed the order of the Commercial Court, Ajmer, and set aside the entire award stating that the dispute raised between the parties in the present case would be outside Section 86 of the Electricity



Act altogether. The High Court also went on to discuss the merits of the award and, on several grounds, set aside the award as being perverse on merits as well.”

[Emphasis supplied]

15. Thereafter, the Apex Court analysing Section 86 of EA and noticing the bone of contention revolved around the said provision, observed in paragraph No. 23 as follows: -

“23. This being the case, the High Court is right in stating that the arbitrator could not, in law, have been appointed by the State Commission under Section 86 of the Electricity Act. The award based on such appointment would be non est in law.”

16. The Court finds that Amity’s claim to oust the jurisdiction of this Court, is *prima facie* not in consonance with the terms of the PPA, as discussed above. As a result of which, Section 86(1)(f) of EA would not be attracted.

17. The judgments relied on by Amity viz. ***Gujarat Urja*** (supra), ***Tamil Nadu Generation and Distribution Corp.*** (supra) and ***Rajpur Hydro*** (supra) are distinguishable since the disputes therein arose between licensees and generating companies. In the present matter, Amity is unable to make good its case that it falls under the definition of ‘*generating company*’ within the meaning of the EA. Each case will turn on its own facts and as noted above, this Court has analysed the provisions of the PPA and *prima facie* concludes that the disputes are certainly arbitrable, as per the arbitration agreement contained in the PPA.

18. The jurisdiction invoked by IL&FS is in accordance with law and the



provisions contained under the PPA. Thus, the present petition deserves to be allowed.

19. The terms of the PPA between the parties envisaged an appointment of a three-member Arbitral Tribunal. Despite, the Petitioner nominating its Arbitrator, Respondent has failed to act, as per the arbitration agreement. Accordingly, a three-member Arbitral Tribunal is directed to be constituted, comprising of: (i) Hon'ble Mr. Justice Ajit Prakash Shah (Retd.), former Chief Judge of the Delhi High Court [Contact No.: +91 9910160007] as the nominee Arbitrator of IL&FS; (ii) Hon'ble Ms. Justice Gita Mittal (Retd.), former Chief Justice of the Jammu and Kashmir High Court [Contact No.: +91 9818000220] as the nominee Arbitrator of Amity; (iii) The two nominee Arbitrators shall now concur and agree upon the third Arbitrator; within a period of thirty days from today. In the event, the learned Arbitrators are unable to concur on the third Arbitrator, both the parties shall be at liberty to approach this Court.

20. The parties are directed to appear before the learned Arbitral Tribunal as and when notified. This is subject to the learned Arbitrators making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

21. The learned Arbitrators will be entitled to charge their fee in terms of the provisions of the Fourth Schedule appended to the Act.

22. It is clarified that the Court has not examined any of the claims of the



parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/ counter claims before the learned Tribunal in accordance with law.

23. Mr. Darpan Wadhwa, Senior Counsel for Amity has requested that the order of appointment be kept in abeyance to afford an opportunity to the parties to explore resolution of disputes through mediation process. To this suggestion, Mr. Jha, counsel for IL&FS is agreeable and accordingly, for a period four weeks from today, the order of appointment shall be kept in abeyance.

24. The parties shall appear before the Delhi High Court Mediation and Conciliation Centre on 14th February, 2022.

25. In the meantime, the learned Arbitrators can proceed to concur and agree on the third Arbitrator.

26. Immediately after expiry of four weeks from today, the learned Arbitral Tribunal shall enter upon reference unless, the parties have amicably resolved their disputes.

27. With the foregoing directions, the present petition is disposed of.

SANJEEV NARULA, J

FEBRUARY 9, 2022/nk