

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL NO.69 OF 2021

Dated: 21st December, 2021

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

M/s Saurya Urja Company of Rajasthan Limited
701-703, 7th Floor, Kailash Tower,
Lalkothi,
Jaipur-302015
Through Senior Vice President

.... Appellant

Vs.

1. Rajasthan Electricity Regulatory Commission
Vidhyut Viniyamak Bhawan, Sahakar Marg,
Jaipur,
Through Secretary.
2. M/s ACME Jodhpur Solar Power Pvt. Ltd.
Plot No.152, Sector-44,
Gurgaon-122 022,
Haryana,
Through Managing Director.
3. M/s ACME Rewa Solar Power Pvt. Ltd.
Plot No.152, Sector-44,
Gurgaon-122 022,
Haryana,
Through Managing Director

4. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. (RVPN)
Vidyut Bhawan,
Janpath, Near Vidhan Sabha,
Jaipur-302 204.
Through Managing Director Respondent(s)

Counsel for the Appellant (s) : Mr. Arijit Maitra

Counsel for the Respondent(s) : Mr. P.N. Bhandari
Mr. Paramhans Sahani
for R-2 & R-3

Mr. Anish Maheshwari
Mr. Yunus Malik
Mr. Samir Malik for R-4

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The present Appeal has been filed by the Appellant M/s Saurya Urja Company of Rajasthan Limited ("Appellant") against the impugned order dated 8.12.2020 passed by the Rajasthan Electricity Regulatory Commission ("RERC" or "State Commission") in Petition No. RERC 1783/2020 ("Petition"). The Petition was filed by the 2nd & 3rd Respondents (the Solar Project Developers (SPD)) before the State Commission under Section 86 (1) (c), (k) and (e) of the Electricity Act, 2003 ("Act") seeking directions upon the Appellant Solar Power Park Developer (SPPD) for facilitating smooth generation of solar energy without undue impediments.

2. The Appellant being aggrieved by the impugned order claiming that the Respondent Commission passed the order without having jurisdiction in the matter filed the present Appeal. The Appellant submitted that a dispute between a Generating Company and a SPPD could not have been adjudicated upon by the State Commission under the provisions of section 86(1)(f) of the Act.

3. **Description of Parties:-**

3.1 The Appellant is a Joint Venture Company between the State Government of Rajasthan and M/s IL&FS Energy Development Company Limited incorporated with the objective to plan, develop and operate Solar Parks in the State of Rajasthan under the Guidelines issued by Government of India, Ministry of New & Renewable Energy.

3.2 1st Respondent is the Rajasthan Electricity Regulatory Commission RERC established on 2nd January, 2000 under the RERC Act, 1998 and has passed the impugned order. The said RERC Act provides that the Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, within the State.

3.3 2nd & 3rd Respondents are ACME Jodhpur Solar Power Private Limited & ACME Rewa Solar Power Private Limited respectively, engaged in the business of developing and managing Renewable Energy Projects. The two companies specialize in the development, financing, and construction of solar photovoltaic power stations.

3.4 Rajasthan Rajya Vidyut Prasaran Nigam Limited (RVPN), the 4th Respondent is a company registered under the Companies Act, 1956 and has been engaged in discharging Wheeling and Transmission of Electricity.

4. **Reasons for filing the Appeal:-**

4.1 The Appellant has filed the Appeal challenging the impugned order on the following issues:

4.1.1 Whether the State Commission has the powers vested with under Section 86 of the Electricity Act, 2003 to adjudicate disputes between a Generating Company and a Solar Power Park Developer?

4.1.2 Whether the SPPD and the SPD are bound to comply with the terms & conditions of the Implementation and Support Agreement executed between the them?

4.1.3 Whether the SPPD has powers to direct the Generators to maintain grid discipline within its Electrical Grid of the Solar Park in case the output goes beyond the permissible limits?

5. **Facts of the Case:-**

5.1 Government of India, Ministry of New & Renewable Energy (MNRE) issued guidelines for setting up Solar Parks in the country. The “Scheme for the Development and Ultra-mega Solar Project” were issued on 12.12.2014 for facilitating the generators for time bound

commissioning of projects by reducing various clearances required to be obtained by the Solar Project Developers.

- 5.2 In the State of Rajasthan, Respondent No.4- RVP Non 10.03.2015, intimated that it is technically feasible to connect Bhadla Solar Park, Phase – I of 500 MW capacity at 220 KV voltage level through 220 KV D/C line for setting up the Solar Park under the said scheme.
- 5.3 On 15.05.2015, MNRE authorized the Appellant as Solar Power Park Developer (SPPD) for obtaining and maintaining connectivity and long-term access in inter-state transmission system and also to carry out other associated works for development of Bhadla - III Solar Park at Bhadla, Tehsil Bap, of Jodhpur District, of Rajasthan.
- 5.4 Subsequently, on 18.11.2015, State Government of Rajasthan entered into lease deed with the Appellant for allotting the land for the development of Solar Park, and thereafter on 08.11.2016, SECI issued the Request for Selection (RfS) document by for 500 MW grid connected Solar Photo Voltaic Power Project in the Solar Park of the Appellant.
- 5.5 On 16.08.2017, Respondent Nos.2 and 3 were declared as successful bidders and were allocated a Solar Project of 100 MWac for development in Bhadla – III Solar Park, on build, owned and operate basis, pursuant to power purchase agreement with SECI. Thereafter, the Appellant and the Respondent No.1 and Respondent No.2 signed an Implementation and Support Agreement (“ISA”) on 03.01.2018.

5.6 The Respondents commissioned the project and achieved COD for Solar Project of Respondent No.1 on 02.01.2019 and of Respondent No.2 on 21-10-2018. The SPDs started generating power and injecting into the State Grid through the electrical grid commissioned by the SPPD. However, the Appellant on 15.01.2019 wrote an email stating that RLDC has informed that there is over- injection in the grid. Further, on 25.05.2019, the Appellant again wrote an email inter alia stating that the peak load capacity recorded at 13:11 hrs. on 25-5-2019 I-2 plot is 109 MW and I-3 is 107.59 MW and asked the Respondents to reduce the power flow which should not be higher than contracted capacity i.e., 100 MW.

5.7 Being aggrieved by the email issued by the Appellant, on 24.07.2020 the Respondent No. 2 and No. 3, filed the Petition bearing Petition No.RERC/1783/2020 inter alia seeking direction for injection of excess generation and evacuation of instantaneous solar power up to 110% of the Solar Plant's rated capacity.

6. **Written Submissions/ Replies by Appellant & Respondents**

6.1 **Learned counsel, Mr. Arijit Maitra. has filed following written submissions on behalf of the Appellant for our consideration:-**

6.1.1 The Learned Counsel submitted that the issue that arises from the present Appeal is whether the Appellant is entitled to, contractually and under law, instruct the Respondent No.2 and Respondent No.3 Solar Power Generators, not to over-inject power into the transmission infrastructure built by the Appellant.

6.1.2 That the Appellant has challenged the impugned order dated 08.12.2020 passed by the Respondent No.1 (State Commission) erroneously holding that the Respondent No.2 and Respondent No.3 Solar Generators should not be restricted to occasionally inject power over its rated capacity, until it creates grid disturbance and directed the Appellant not to obstruct the Respondent No.2 and Respondent No.3 Solar Generators from evacuating solar power up to 110% of the plant's rated capacity. The Respondent Commission erred while observing that the evacuation/transmission infrastructure developed by the Appellant has an additional margin of 125 MW and the transmission elements have additional 10% margin on the rated capacity, the Respondent Commission misdirected itself while noting that clause 4.4.2 of the Power Purchase Agreement between Respondent No.2 and Respondent No.3 Solar Generators on one hand and Solar Energy Corporation of India ("**SECI**") on the other hand, provides that generation can go beyond the rated capacity and if additional generation is not allowed to be injected in the grid, then the generator will not be able to recover the shortfall in generation due to reasons beyond its control, will end up paying penalties for lesser generation than the contracted capacity. The Impugned Order is unsustainable as it denies the Appellant the right to ask the Respondent Generators to "reduce the output to the rated capacity"

6.1.3 It is submitted that the Impugned Order is patently wrong in law and on facts, and adversely affects the Appellant and the electrical system commissioned by him.

A. Inherent lack of jurisdiction

(a) The impugned order has been passed adjudicating upon the dispute u/s. 86(1)(f) of the 2003 Act, the section reads thus: -

“Section 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;”*

- (b) The dispute raised by Respondent No.2 and Respondent No.3 before the Respondent No.1, the Commission culminating into the impugned order could not have been adjudicated under section 86, since section 86(1)(f) restricts the power of the Respondent Commission to adjudicate upon disputes “between the licensees and generating companies” and to refer any dispute for arbitration.
- (c) Admittedly, the Appellant is not a licensee within the meaning of section 2(39) of the 2003 Act. The Appellant is a developer of Solar Park at Bhadla, Tehsil Bap, Jodhpur District, Rajasthan.
- (d) The Appellant further submitted that MNRE has notified the administrative approval on 12th December, 2014 for implementation of a Scheme for Development of Solar Parks and Ultra Mega Solar Power Projects in the country commencing from 2014-15 and onwards (i.e., from the year 2014 – 15 to 2018 – 19). The Guidelines for Development of Solar Parks issued by Ministry of New & Renewable Energy provides that:

***2. Concept of Solar Park**-The solar park is a concentrated zone of development of solar power generation projects and provides developers an area that is well characterized, with proper infrastructure and access to amenities and where the risk of the projects can be minimized. Solar*

Park will also facilitate developers by reducing the number of required approvals. Large size projects have a potential to bring down the cost of Solar Power. Therefore, Ultra Mega Solar Power Projects having capacity of 500 MW or above have been planned in India.

6. Role of Solar Power Park Developer (SPPD)-The Implementing Agency of Solar Park as defined in the Scheme is re-designated as the Solar Power Park Developer (SPPD). The SPPD will be nominated by the State Government for development of solar parks as per the procedure given in the Scheme for the solar park.

The SPPD is tasked with acquiring the land for the Park, cleaning it, levelling it wherever considered desirable and allocating the plots for individual projects. The detailed role and responsibility is given in the solar park Scheme. CERC in its Regulations notified on 15th May, 2015, have included SPPD as an applicant for getting Connectivity and Long Term Access (LTA) and have also defined their functions accordingly. Therefore, this Ministry shall authorize the SPPD to carry out the activities as required as per the amendments notified by CERC vide its notifications dated 15th May, 2015 in addition to actions being /to be carried out as the Scheme for "Development of Solar Park and Ultra Mega Solar Power Projects".

The SPPD will be responsible for creating the internal transmission network on behalf of the solar project developers. This network will connect with the Intra State Transmission System (ISTS) or State Transmission System. The transmission network within the solar park will be captive / dedicated transmission system of the solar project developers of the park."

- (e) Further, the sanction of the President for implementation of a Scheme for setting up at least 25 solar parks each with a capacity of 500 MW and above with a target of over 20,000 MW of solar power installed capacity in a span of 5 years from 2014-15 to 2018-19; with an estimated Central Financial Assistance (CFA) of Rs.4050.00 crore provided that:

***"6. Fund for power evacuation: The power evacuation arrangement will consist of two parts i.e. pooling stations and network within Park to collect power from each project and transmitting it to the transmission sub-station at the park boundary as the first part and the transmission sub-station along the transmission line upto Central Transmission Utility (CTU)/State Transmission Utility (STU) existing grid as the second part. The implementing agency would be responsible for the first part and the CTU/STU would be the responsible for the second part. For both these parts i.e. entire evacuation arrangement, MNRE grant may be used.----*"**

- (f) It was also submitted that the Central Commission (CERC) has *inter alia* held: -

“4.3. Decision of the Commission.

...

4.3.2. ... it is clarified that **SPPD will be a legal entity who shall act as an agent of the generating companies** which will set up solar power plants in the park...”

- (g) In *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*, (2008) 4 SCC 755, Hon'ble Supreme Court has held:-

“59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that **whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996.** This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail).

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be 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.”

- (h) Also submitted that Hon'ble Supreme Court in SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 has held:-

*“19. It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. **A judicial authority as such is not defined in the Act.** It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see Fair Air Engineers (P) Ltd. v. N.K. Modi [(1996) 6 SCC 385]). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, **in the absence of any restriction in the Act,** has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, **that court has necessarily to decide whether it has jurisdiction,** whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. **On the other hand, Section 9 insists that once approached in that behalf, “the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it”. Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication.”***

- (i) Such contracts as the Implementation & Support Agreement between the Appellant and respondent Generators are necessarily not within the regulatory purview of the Electricity Act 2003 & the Ld. RERC. Further, quoted the judgement of

the Hon'ble Supreme Court in Foreshore Coop. Housing Society Ltd. v. Praveen D. Desai, (2015) 6 SCC 412:-

“46. In American Jurisprudence, Vol. 32-A, Para 581, it is said that:

*“Jurisdiction is the authority to decide a given case one way or the other. **Without jurisdiction, a court cannot proceed at all in any case; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.**”*

*Further, in Para 588, it is said that **lack of jurisdiction cannot be waived, consented to, or overcome by agreement of the parties.***

47. It is well settled that essentially jurisdiction is an authority to decide a given case one way or the other. Further, even though no party has raised objection with regard to jurisdiction of the court, the court has power to determine its own jurisdiction. In other words, in a case where the court has no jurisdiction it cannot confer upon it by consent or waiver of the parties.”

6.2 Learned counsel, Mr. P.N. Bhandari has filed following written submissions on behalf of Respondent Nos. 2 & 3 for our consideration:-

6.2.1 The Appellant, on the basis of a private contract is challenging the very Electricity Act and it is challenging the jurisdiction of the Regulatory Commission on the basis of a private contract and by implication challenges the jurisdiction of the Hon'ble Tribunal.

6.2.2 It is elementary that on the basis of a private contract, neither Electricity Act can be brushed aside nor the jurisdiction of the Id. Commission or the Hon'ble Tribunal can be ousted.

6.2.3 The Appellant is treating its Solar Park like a foreign embassy premises, where local laws are not applicable. It has relentlessly canvassed that within the boundaries of solar Park, Regulatory Commission or Load Despatch Centre have no jurisdiction and

under the so-called private contract, all disputes have to be decided by SECI.

- 6.2.4 It is elementary that in case of any conflict between a contract and Regulations, the Regulations prevail. **The Constitution Bench of the Hon'ble Supreme Court in PTC India Ltd. vs. CERC AIR 2010 SC 1338**, in para 59 has observed thus –

“A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.”

- 6.2.5 In para 66 of the judgement, the Hon'ble Court has further observed thus-

“.....On the making of the impugned Regulations 2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts.”

- 6.2.6 A bilateral contract between parties cannot dilute the applicability of Electricity Act. The Solar Park is also fully governed by the Electricity Act & the jurisdiction of every authority extends whether it is inside or outside Solar Park. There is nothing like an “internal area”, as the Appellant has been chanting in every 3rd para.

- 6.2.7 The Appellant has asserted before the Ld. Commission that within the Solar Park, everything falls exclusively within its private jurisdiction. Hence it strongly believes that the grid safety including load management is also to be done by it and not by the State Load Despatch Centre (in brief SLDC). Repeatedly the Appellant has spoken of its “right” to maintain “grid stability” and the authority “to

curtail power”, which under the Electricity Act falls exclusively within the jurisdiction of the State Load Despatch Centre.

6.2.8 Further, submitted that Grid Management is the exclusive responsibility of the State Load Despatch authorities, all over India. The Electricity Act or the Regulations do not recognize any parallel centres of power in Load Management, either inside the solar park or outside the solar park. Incidentally, the state load despatch centre has never found fault with the so-called excess generation by the Respondents. It has not even once penalised the Respondents for any violation of the daily injection schedule which the Respondents have to mandatorily submit every day to the State Load Despatch Centre for approval. The SLDC has never directed the Respondents for any curtailment of the solar generation of Respondents.

6.2.9 The daily injection schedule of solar energy is submitted by the Respondents for approval by State Load Despatch Centre. The injection of Solar energy is monitored and regulated by SLDC every 15 minutes under Forecasting Regulations 2017. The QCAs appointed by the Respondent generators are directly injecting solar generation into the transformers of the State Transmission Company.

6.2.10 Even for ARBITRATION, the contract envisages the proceedings entirely under the Arbitration Act, while the Hon’ble Supreme Court has laid down that under Section 86 (1) (f), even the Arbitrator is to be appointed by the Commission. Further submitted various provisions of the Act stating thereby that Commission cannot be helpless simply because the generator is located within a solar or

wind park. It cannot discriminate between generators located inside the solar park and generators outside the solar park. The Respondents are equally concerned with the safety of every equipment, including the transformers in the Solar Park and if there is any damage, the respondents would be the first to suffer as the entire generation & transmission is based on efficient working of every equipment in the Solar Park.

6.2.11 In the judgement of Torrent Energy (Appeal No 3 Of 2011, delivered on 23.3.2012, the Hon'ble Tribunal has also followed the same logic, although, Torrent's case was much stronger as it had been provided under the contract, exclusive right for generation in SEZ. But the Hon'ble Tribunal rightly held that such contracts cannot override the authority of the Electricity Act & the Regulatory authorities under the Act. The extracts of judgement in Torrent Energy Ltd. Vs. Dakshin Gujarat Vij Co. Ltd. (Appeal no.3 of 2011) were also submitted.

6.2.12 Further submitted the decision of the **Hon'ble Supreme Court in India** Thermal Power Ltd V State of Madhya Pradesh (2000) 3 SCC 379 wherein the following has been observed:

“SUMMARY OF OUR FINDINGS

The Co-developer Agreement executed between the Developer and the Co-Developer cannot override the provisions of the Electricity act, 2003 nor it can have any implication on the powers and functions of the State Commission as a statutory body under the Electricity Act, 2003.TheDahej SEZ Limited has no authority to give any assurance that a licensee under the Electricity Act, 2003 shall not undertake distribution and retail supply of electricity. The Appellant's reliance on the approval of the Government of India to the Co-Developer Agreement is misconceived.....”

6.3 Learned counsel for Respondent No. 4 has filed following reply in the instant appeal for our consideration:-

- 6.3.1 That it is further mentioned that the Appellant has created internal transmission network on behalf of SPD i.e. Solar Project Developers and this network is connected to Intra-State transmission system or State transmission System. The transmission network within the Solar Park is dedicated transmission system of the Solar Project Developers (SPD) of the park.
- 6.3.2 That the Power Purchase Agreement ("PPA") has been executed between both Respondents No. 2 &3 and Solar Energy corp. India("SECI") in which Respondent No. 4 is not party and further no relief and direction is prayed against the answering respondent-RVPN in the original petition. It is further reiterated that the answering respondent –RVPN role is to evacuate power of the appellant for 500 MW capacity at 220kV Voltage level, at GSS Bhadla.
- 6.3.3 That the QCA nominated by the Respondent No. 2 & 3 submits the schedule on behalf of the generator to the SLDC based on available capacity of the generator for the day provided by the generator himself but the scheduling cannot be allowed beyond the contracted capacity as it is restricted under the SLDC scheduling software.
- 6.3.4 That in the facts and circumstances of the case it is submitted that Paragraph 8(A)[Facts in Issue] and 8(B) [Question of Law] are matters concerned between the Appellant and the Respondents

other than the answering Respondent and therefore the same needs no reply.

7. **Our Observations and Findings:**

7.1.1 We have heard learned counsel appearing for the Appellant and the Respondents at considerable length of time. It has been observed that there are two issues which need to be decided based on the written submissions/ arguments and the relevant material available on records during the proceedings. The two issues which emerge in the instant Appeal for our consideration: -

Issue No.1:-Whether the State Commission has the jurisdiction in the subject matter to adjudicate disputes between a Generating Company and a Solar Power Park Developer under section 86 of the Electricity Act, 2003?

Issue No.2:-Whether the SPPD has the powers to direct the SPD (the Solar Generators), located within the Solar Park developed by the SPPD, to restrict power generated under the provisions of the ISA to the maximum permissible capacity, if it exceeds?

7.1.2 The State Commission through the impugned order has directed the Appellant to facilitate smooth generation of solar energy without undue impediments. On the contrary the Learned Counsel for Respondent no. 19 has challenged the impugned order and pleaded for setting aside the order. Before deciding on the merit of the case, it is necessary to look into the various legal and contractual provisions relevant to the case.

- The section 86 (1)(f) provides that:

“Section 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 “**Guidelines for Development of Solar Parks**”, guidelines under which the scheme has been formulated and executed, issued by the Government of India, Ministry of New & Renewable Energy, provides that:

*“2. **Concept of Solar Park-** The solar park is a concentrated zone of development of solar power generation projects and provides developers an area that is well characterized, with proper infrastructure and access to amenities and where the risk of the projects can be minimized. Solar Park will also facilitate developers by reducing the number of required approvals. Large size projects have a potential to bring down the cost of Solar Power.*

*3. **Scope-** MNRE has rolled out a scheme plans to set up 25 solar parks, each with a capacity of 500 MW and above; thereby targeting around 20000 MW of solar power installed capacity.*

MNRE has notified the administrative approval on 12th December, 2014 for implementation of a Scheme for Development of Solar Parks and Ultra Mega Solar Power Projects in the country commencing from 2014-15 and onwards (i.e. from the year 2014 – 15 to 2018 – 19),---

*6. **Role of Solar Power Park Developer (SPPD)-** The Implementing Agency of Solar Park as defined in the Scheme is re-designated as the Solar Power Park Developer (SPPD). The SPPD will be nominated by the State Government for development of solar parks as per the procedure given in the Scheme for the solar park. The SPPD is tasked with acquiring the land for the Park, cleaning it, levelling it wherever considered desirable and allocating the plots for individual projects. The detailed role and responsibility is given in the solar park Scheme.*

The SPPD will be responsible for creating the internal transmission network on behalf of the solar project developers. This network will connect with the Intra State Transmission System (ISTS) or State Transmission System. The transmission network within the solar park will be captive / dedicated transmission system of the solar project developers of the park.

*7. **Role of Solar Energy Corporation-** Solar Energy Corporation of India (SECI) may also receive proposals in a prescribed format (Annexure II) for setting up solar power parks and forward to MNRE with their recommendation. Upon receipt of proposal at MNRE, an in-principle approval will be accorded. SECI will ensure that the SPPD prepares and submits the DPR in 60 days after the fund for preparation of DPR is released by MNRE through SECI.*

SECI will coordinate with SPPD for construction of pooling substation, land development and other common facilities as per DPR and ensure completion as per timeline.

SECI will also coordinate with Power Grid Corporation of India Limited (PGCIL) for construction of transmission line and grid connectivity and ensure that there is no mismatch in commissioning of solar projects and that of transmission lines.

SECI will develop a web enabled monitoring system for monitoring progress of solar parks. This will also have a provision for uploading photographs of solar parks.

8. Development/Operation and Maintenance of the Solar Park- The SPPD will be responsible for development of the Solar Park and its facilities, to the extent that the selected Solar Project Developers will be able to set up their solar power projects and the CTU shall be able to undertake the inter-connection work of Transmission to its ISTS for evacuation of solar power by solar project developers from the pooling station for Intra-State sale or Inter-State sale, on a Plug-and-Play model.

The SPPD will also be responsible for Operation and Maintenance of the Solar Park for a period of 25 years. The SPPD will ensure the following facilities provided in the solar park are maintained for 25 years:

(i) Road connectivity within the park;

(ix) The SPPD shall develop the transmission system inside the solar park through tenders directly or deposit work through STU or PGCIL or any other Government Agency. The cost for development of internal transmission should come out through a transparent mechanism as this is created on behalf of the solar project developers.

(xi) The SPPD may prepare an estimate for the above O&M expenses, and formulate a recovery model to ensure the sustainability of the park, as per the financial model given in the Scheme for the solar park.

(xii) **Transmission network and Pooling sub-station:** The SPPD shall coordinate with the State Government Authority while finalising the Transmission network and Pooling Sub-Station, so as to complete the work with optimum expenditure and also efficiently and avoid cost and time over-run.

(xiii) **Transmission Network:**

a) Internal transmission system will be considered as dedicated system of the generators' developed on their behalf by SPPD.

b) Forecasting and Scheduling will be done as per CERC Regulations and Indian Electricity Grid Code. The SPPD may take the function of forecasting if the solar project developers so desire.

c) Interconnection point will be at the ISTS system i.e. 400 kV substation where ISTS system is involved. The solar park where internal transmission system is connected to the STU system, its interconnection point will be at the STU system. All costs and losses up to that point will be on account of the solar project developers or SPPD depending upon the arrangement between the solar project developers and the SPPD.

(xiv) The SPPD may enter into an Implementation Agreement with the Solar Project Developers (SPDs) clearly indicating terms and conditions (suggested draft enclosed at Annexure III).

- The sanction of the President of India for implementation of a Scheme for setting up at least 25 solar parks each with a capacity of 500 MW and above with a target of over 20,000 MW of solar power installed capacity in a span of 5 years from 2014-15 to 2018-19 provided that **“Any dispute that arises out of any provision of the scheme shall be settled by an Arbitrator appointed by this Ministry (Ministry of New & Renewable Energy) for the purpose and his decision shall be final and binding.”**
- The Implementation & Support Agreement signed between the Appellant and the Respondent outlined the procedure for Dispute Resolution under Article 20 of the Agreement as follows:

“Article 20: Dispute Resolution and Arbitration

20.1 In the event of a dispute between the Parties arising out of or in connection with this Agreement, the Parties shall mutually discuss and endeavour to amicably resolve such dispute within 30 (thirty) days.

20.2 If the Parties are unable to resolve any dispute, controversy or claim relating to or arising under this Agreement, as stated above, the same shall be referred to SECI for resolution of the dispute, SECI upon hearing the Parties shall provide its decision within 30 (thirty) days from the date the dispute was referred to SECI. In the event any Party is aggrieved by the decision of SECI, such aggrieved party shall have the right to refer the matter to arbitration.

20.3 Disputes referred to arbitration shall be conducted by a panel consisting of three (3) arbitrators (“Arbitration Tribunal”). The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015.”

- 7.1.3 We are clear in our mind that the present dispute cannot be resolved under the provisions of section 86(1)(f) which empowers the State Commission with the powers to adjudicate upon the **disputes between the licensees, and generating companies** and to refer

any dispute for arbitration. Undisputedly, the Solar Power Park Developer (SPPD) does not fall either in the category of a Generator or a Licensee under the provisions of the Electricity Act, 2003. As per the “**Guidelines for Development of Solar Parks**”, the SPPD is entrusted with the development of the transmission network within the solar park as a captive / dedicated transmission system of the solar project developers of the park and therefore, is not a transmission Licensee.

7.1.4 Government of India, Ministry of New & Renewable Energy has specifically brought out with the “**Guidelines for Development of Solar Parks**” for smooth, efficient, cost effective and time bound development of the Solar Power Development in the Country. Further, to resolve the dispute between the SPPD and the SPD has incorporated the provision therein as “***The SPPD may enter into an Implementation Agreement with the Solar Project Developers (SPDs) clearly indicating terms and conditions (suggested draft enclosed at Annexure III).***”

7.1.5 The Implementation Agreement (the Implementation & Support Agreement) signed between the Parties i.e., the SPPD (the Appellant) and the SPD (the Respondent) as mentioned above provided the procedure for the Dispute Resolution as:

“Article 20: Dispute Resolution and Arbitration

20.1 In the event of a dispute between the Parties arising out of or in connection with this Agreement, the Parties shall mutually discuss and endeavour to amicably resolve such dispute within 30 (thirty) days.

20.2 If the Parties are unable to resolve any dispute, controversy or claim relating to or arising under this Agreement, as stated above, the same shall be referred to SECI for resolution of the dispute, SECI upon hearing the Parties shall provide its decision within 30 (thirty) days from the date the dispute was referred to SECI. In the event any Party is aggrieved

by the decision of SECI, such aggrieved party shall have the right to refer the matter to arbitration.

20.3 Disputes referred to arbitration shall be conducted by a panel consisting of three (3) arbitrators ("Arbitration Tribunal"). The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015."

7.1.6 The State Commission has failed to bear in mind that the dispute brought before the State Commission is not covered under the provision of section 86 (1)(f) and considering it, Ministry of New & Renewable Energy has notified the said Guidelines for resolving the dispute between the SPPD and the SPD through arbitration under the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015.

7.1.7 We hold, on the given facts, that Government of India with a conscious decision has issued these guidelines and vested the dispute resolution powers under the Arbitration and Conciliation Act.

7.1.8 The contention of the Learned Counsel of the Respondents has been heard in length and the submission with reference to the judgement passed by the Constitution Bench of the Hon'ble Supreme Court in PTC India Ltd. vs. CERC AIR 2010 SC 1338, been duly noted and considered wherein it was decided that in case of any conflict between a contract and Regulations, the Regulations will prevail. In para 59 it has been observed that -

"A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities in as much as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations."

- 7.1.9 We do not think the above observations of Supreme Court in any way detract from the conclusions drawn in preceding paras of the judgment quoted earlier, as a dispute between a Generating Company and a Solar Power Park Developer is entirely different from a dispute between the licensees and generating companies covered under section 86 (1)(f) of the Act.
- 7.1.10 The Learned Counsel for the Respondents have submitted that after the judgement in PTC, it is well established that if there is any conflict between the Regulations & a private contract, the Regulations will prevail. We agree to the said contention of the Learned Counsel if the contract is in contradiction to the said Regulation and signed after the notification of the said Regulation. However, there is no such inconsistency observed.
- 7.1.11 We accept the contentions of the Appellant that the State Commission does not hold the powers to adjudicate the dispute between a Solar Power Park Developer and the Solar Project Developer under section 86 (1)(f) and such a dispute can only be resolved under the provisions of the Implementation & Support Agreement signed by the Appellant and the Respondent in line with the “**Guidelines for Development of Solar Parks**” issued by Ministry of New & Renewable Energy.
- 7.1.12 The second issue regarding whether the SPPD and the SPD are bound to comply with the terms & conditions of the Implementation and Support Agreement has also been considered and the Learned Counsel(s) for the Appellant and the Respondents have been heard at length along with the facts and documents placed before us.

7.1.13 The Agreement (ISA) signed by the parties with conscious mind and with detailed understanding of the facts cannot be considered as a document without any contractual liabilities. The Agreement once signed has to be complied with the governing laws of the country. The said agreement clearly provides for the contractual rights, duties, obligations, and liabilities of the Respondent Generators as follows:

“3.5 Operation and maintenance of Essential Solar Park Facilities and Additional Facilities:

3.5.1 The SPPD shall be responsible for the operation and maintenance of the Essential Solar Park Facilities and the Additional Facilities in accordance with Schedule-I during the Term of the PPA.

3.5.2 The SPPD shall commence the operation and maintenance of the Essential Solar Park Facilities and the Additional Facilities from the Substantial Completion Date.

4.16 Evacutaion of extra power generated by the SPD:

4.16.1 The SPPD shall have no obligation to evacuate any extra power generated by the SPD beyond the rated capacity of 100 MWac per allocated plot. However, the SPPD shall evacuate extra energy as long as the peak capacity achieved is less than or equal to the rated capacity of the Project as per the PPA.

4.16.2In case at any point of time the peak capacity reached is higher than the rated capacity at the point where power is injected at the 33 kV level of the Pooling Substation, the SPD will have to forego the excess generation and reduce the output to the rated capacity, as per the instructions of the SPPD to ensure compliance with the grid requirement.”

7.1.14 The ISA provides that the essential and additional facilities shall be operated and maintained by the SPPD and during the operation enjoins the powers to restrict the excess generation beyond the rated capacity inter-alia the SPD has to forego the excess generation and reduce the output to the rated capacity.

7.1.15 The ISA signed by the Appellant and the Respondents is governed by the Indian Contract Act, 1872 and thus as per section 37 of this Act mandates “37. *Obligation of parties to contracts. — The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.*”

7.1.16 Hon’ble Supreme Court in *DLF Universal Ltd. v. Town and Country Planning Deptt.* [(2010) 14 SCC 1 : (2011) 4 SCC (Civ) 391 : AIR 2011 SC 1463] has held that:

“13. It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the

court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation."

7.1.17 The Appellant has the responsibility to commission, operate and maintain the transmission system within the Solar Park and any damage to the equipment shall be the sole responsibility of the SPPD. There is no means for the SPPD to recover the loss due to damage to its equipment. Due to over-injection of power by Respondent No.2 and Respondent No.3- Generators, the useful life of the transformers of the Appellant will reduce except that the Appellant has recovered a one-time cost of development for the Solar Park.

7.1.18 The Appellant in order to protect the equipment has issued the directions under the provisions of the contract and thus enjoins the right to do so. We accept the submissions made by the Appellant that the provisions of the ISA are in addition and not in contradiction to the Electricity Act 2003 or the Rules and Regulations framed thereunder.

ORDER

In light of the above, we are of the considered view that the issues raised in the Appeal have merits and hence the Appeal is allowed. The impugned order dated 8.12.2020 in Petition No. RERC 1783/2020 passed by Rajasthan Electricity Regulatory Commission is hereby set aside and in case of any dispute resulting under the

execution of the Implementation and Support Agreement shall be resolved as per the mandate of the Agreement.

In view of the disposal of the Appeal, the reliefs sought in the pending IAs, if any, do not survive for consideration and accordingly stand disposed of.

No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 21st DAY OF DECEMBER, 2021.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Judicial Member**

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