

(2018) 02 MP CK 0180
In the Madhya Pradesh High Court
Case No : 16160 of 2017

Mahakaushal Sugar & Power Industries Ltd
Vs

APPELLANT

State of M.P. and others

RESPONDENT

Date of Decision : 01-02-2018

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 2\(b\)](#) - Definitions
[Electricity Act, 2003](#), [Section 14](#), [Section 2](#), [Section 127](#), [Section 127](#)

Citation : (2018) 02 MP CK 0180

Hon'ble Judges : Vandana Kasrekar

Bench : Single Bench

Advocate : Rajesh Pancholi, P.K. Kaurav, Aditya Khandekar, Anoop Nair

Final Decision : Dismissed

Judgement

1. The petitioner has filed the present writ petition for quashing of order dated 31/08/2017 as well as for directing the respondents to purchase

electricity from petitioner's Bagasse based Co-generation Power Plant at Narsinghpur by executing the power purchase agreement in accordance

with the tariff order of MPERC and also to pay compensation/damages and some other reliefs have also been prayed for.

2. Respondents No.2, 3 and 5 have also filed preliminary objection stating that the petitioner has a remedy of filing a dispute before the State

Commission under Section 86 (f) of the Electricity Act, 2003 (hereinafter referred to as "the Act of 2003"). Second preliminary objection which is

taken by the respondents is that the petitioner is a member of the Sugar Association of M.P.. This association had filed a petition in pursuance of

the order dated 29/05/2017 passed by the appellate tribunal for electricity in

Appeal No.144/2017 under Section 86(1)(e) and (86(1)(b) in

Petition No.29/2017 (Sugar Mills Association Madhya Pradesh Vs. M.P. Power Management Co. Ltd. before M.P. Electricity Regulatory

Commission praying for the same relief and this fact has been deliberately suppressed by the petitioner in para-2 of the writ petition and, therefore,

deserves to be dismissed on the ground of suppression of material facts. He relied upon the judgment passed by the Apex Court in the case of

Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., reported in (2008) 4 SCC 755 .

3. Learned counsel for the respondents argues that the word "generating company" has been defined under Section 2(28) of the Electricity Act

and as per this definition, "generating company" means any company or body corporate or association which owns or operates or maintains a

generating station. The word "" licensee"" is defined under Section 2(39) of the Act which means a person who has been granted a licence under

section 14. On the basis of these definitions, learned counsel for the respondents submits that the case of the petitioner, therefore, squarely falls

under Section 86(1) (f) of the Act, therefore, the petitioner should have approached to the State Commission. He further submits that against the

order passed by the M.P.E.R.C., the petitioner has remedy of filing an appeal to the appellate tribunal under Section 127 of the Act of 2003.

Thus, as the petitioner is having statutory remedy, the present writ petition deserves to be dismissed on this count alone.

4. Learned counsel for the petitioner argues that the preliminary objection raised by the respondents regarding maintainability of the writ petition is

misleading, flimsy and fallacious. Firstly, he submits that there has to be a written, proper and concluded written contract for which dispute can be

adjudicated and sent for arbitration for decision. He submits that in the instant case there is no written executed contract and there is no

relationship, as such in absence of agreement, MPERC gets jurisdiction only in respect of the disputes arising from the executed contract or old

contract. He also submits that in the present case as there is no written contract between the parties, therefore, in view of Section 2(b) of the

Arbitration and Conciliation Act, 1996, the existence of written arbitration agreement is sine qua non for a dispute capable of adjudication by the

arbitrator. So far as the judgment relied upon by learned counsel for the respondents in the matter of Gujarat Urja Vikas Nigam Ltd. (supra) is

concerned, learned counsel for the petitioner submits that the said judgment would not be applicable in the present case as there is no concluded

written contract between the parties. Learned counsel for the petitioner relied on the definition of generation station as given under Section 2(3) of

the Act of 2003. He relied upon the judgment passed by the Apex Court in the case of Whirlpool Corporation vs Registrar Of Trade Marks,

Mumbai & others reported in (1998) 8 SCC 1 and submits that the writ petition is maintainable.

5. Heard learned counsel for the parties on preliminary objections.

6. Section 86 of the Act of 2003 provides for functions of the State Commission. Clause (f) of sub-section (1) of Section 86 provides for

adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration. Word "licensee" and

"generating company" is defined under Sections 2(28) and 2(39) which reads as under :

2(28) ""generating company"" means any company or body corporate or association or body of individuals, whether incorporated or not, or

artificial juridical person, which owns or operates or maintains a generating station;

2(39) "" licensee"" means a person who has been granted a licence under section 14.

7. As per the said definition, generating company means a company which owns or operates or maintains a generating station. Licensee means a

person who has been granted a licence under section 14 of the Act of 2003. The said definition does not refer that there should be a concluded

contract or agreement between the parties. Any dispute between the licensee and generating company can be referred to the State Commission

and it does not mean that before referring the matter to the State Commission, there should be a concluded contract between the parties. The

petitioner company has established their factory and, therefore, it comes under the definition of generating company. It is also to be noted that the

Apex Court in the case of Gujarat Urja Vikas Nigam Ltd. (supra), in para 60 has 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 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.

8. As per this judgment, after coming into force of the Electricity Act, 2003, all adjudication of disputes between licensees and generating companies can only be done by the State Commission or by the Arbitrator appointed by it. After 10/06/2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than State Commission. Thus, as per the said judgment, after 10/06/2003, all disputes are to be adjudicated by the State Commission. The judgment relied upon by learned counsel for the petitioner relates to appointment of arbitrator under the Arbitration and Conciliation Act in which written agreement between the parties is essential. However, in the present case, there is no such requirement and any disputes between the licensee and generating company can be decided by the State Commission. In the present case, the petitioner is a generating company and respondents No.2, 3 and 5 are the licensees and, therefore, the dispute between them is covered under Section 86(1) (f) of the Act of 2003. Now, in the present case, it is also to be noted that the petitioner has already approached before the M.P.E.R.C., therefore, the association and the M.P. E.R.C. has already passed the order which is under challenged before the Tribunal. Thus, in view of aforesaid, as the petitioner has alternate remedy of raising dispute before the State Commission, this Court does not find

any reason to interfere into the matter.

9. Accordingly, the writ petition is dismissed without any order as to cost.