Judgment Reserved on 18.08.2021

Judgment Delivered on 17.01.2022

A.F.R.

Case :- CIVIL MISC. ARBITRATION APPLICATION No. - 12 of 2021

Applicant :- CG Power And Industrial Solutions Ltd. (formerly Crompton Greaves Ltd.)

Opposite Party :- U.P. Power Transmission Corporation Ltd. Thru.Supr. Engineer

Counsel for Applicant :- Gantavya,Meha Rashmi

Counsel for Opposite Party :- Karuna Thareja,Romit Seth, Shishir Prakash

Hon'ble Mrs. Sangeeta Chandra, J.

1. This Application has been filed by the Applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended, saying that the Applicant is a public limited company duly incorporated under the Companies Act and the Respondent U.P. Power Transmission Corporation Limited (here in after referred to as

UPPTCL) is a State Transmission Utility notified under Section 39 of the Electricity Act, 2003.

2. It has been argued by the learned counsel for the Applicant that a Tender was floated by the Respondent Corporation in 2010–11 bearing Specification No.ESD–8/48 for construction of a 400/220 kW Substation at Banda on turnkey basis. The contract was awarded to the Applicant on 28.12.2011, in furtherance whereof three separate Agreements were executed between the parties, the first one being for supply of equipment and materials for construction of the Substation, that is, the Supply Agreement. In between January 2013, and March 2013, the Applicant manufactured certain equipment and the same was inspected by the Respondent. The Applicant wanted to supply the equipment two months earlier to the initially agreed date of supply. A letter was written in this regard by the Applicant to the Respondent saying that it wished to supply equipment in June 2013 before the scheduled date of delivery i.e. August 2013. The Respondent refused to accept delivery prior to

the due date citing procedural issues. After correspondence and discussion, when the Applicant agreed to bear the interest towards pre-ponement of the delivery and payment towards the equipment for the period of two months on the total cost of the equipment, the Respondent agreed to take the delivery before time. However, the Respondent instead of releasing Rs.11 Crore 76 lakhs, released only a sum of Rs.10 crores on an ad-hoc basis. It also indicated that interest at the rate of 12% per annum on the payment of Rs.10 crores shall have to be be paid by the Applicant until the date of erecting of the equipments.

3. The Applicant addressed several letters to the Respondent objecting to the unilateral levy of interest up to the date of erecting of the equipment and calling upon the Respondent to pay balance outstanding dues of Rs.1.76 crores towards delivery of equipment under the Supply Agreement. This correspondence continued all through 2016 and 2017. The Applicant thereafter supplied the second set of Transformers and Reactors in accordance with

the terms of the Supply Agreement. On 06.02.2018 the Respondent unilaterally deducted a sum of Rs.3 Crores and 24 lacs as interest on the amount paid in advance towards supply of equipment in July 2013. In effect, the Respondent had withheld Rs.5 crores and the Applicant objected to unwarranted deductions being made by the Respondent in its various correspondence in 2018. On 4 May 2019 the entire project was successfully completed by the Applicant and it requested for inspection, finally the Respondent took over the Banda Substation on 29.11.2018.

4. The Applicant served a legal notice on 25.01.2020 calling upon the Respondent to clear outstanding principal amount of Rs.5 crores along with interest at the rate of 18% per annum from the date of delivery of equipment till the date of making payment aggregating to an amount of Rs.10.91 crores and to further pay a sum of Rs.50 lakhs as token damages and Rs.50 lakhs for indulging in illegal enrichment in violation of the terms of the agreement. The Respondent refused to pay and the Applicant

invoked Arbitration Under Clause 38 of Form A of the Supply Agreement (General Conditions of Contract) subject to modification in the said Clause on account of Statutory amendment to the Arbitration and Conciliation Act, 1996.

5. On such a notice being delivered to the Respondent on 17.12.2020 alongwith Applicant's proposed panel of three persons for appointment as Arbitrator, the Respondent refused to give its consent for the appointment of any of the persons proposed by the Applicant as the Arbitral Tribunal and insisted that under Clause 38 only the Chairman UPPTCL could form the Arbitral Tribunal to adjudicate upon the disputes which have arisen between the parties. The Applicant replied on 31.12.2020 pointing out the Statutory amendment to the Arbitration and Conciliation Act 1996 with effect from 23.10.2015, by which a Departmental Authority cannot be appointed as an Arbitration Tribunal or nominate someone in his behalf, nor can any person known to either of the parties be appointed as Arbitrator and requesting the Respondent to give its consent for appointment

of Arbitrator in terms of the legal notice dated 14 December 2020.

6. In its letter of 6.1.2021, the Respondent maintained its stand regarding the power of the Chairman UPPPTCL to appoint an Arbitrator. The parties having failed to agree upon a procedure for appointment of Arbitrator within 30 days from the date of the initial notice, the present Application for appointment of a sole Arbitrator to Act as Arbitral Tribunal to adjudicate upon the disputes which have arisen between the parties has been filed on 03.02.2021.

7. Clause 38 of the Supply Agreement which is the Arbitration Clause provides that *"..if any dispute or difference or controversy shall at any time arise between the bidder on the one hand and the U.P. Power Transmission Corporation Limited and the engineer of the contract or other issues touching the contract, or as to the true construction meaning and intent of any part of condition of the same ..... or as to any other matter or thing whatsoever connected with or arising out of the contract, and whether*

before or during the progress or after the completion of the contract, such question, difference or dispute shall be referred for adjudication to the Chairman UPPTCL, or any other person nominated by him in this behalf, and his decision in writing shall be final, binding and conclusive. This submission shall be deemed to be a such submission within the meaning of Indian Arbitration Act 1940 or any statutory modification thereof....."

8. It has been argued by Miss Meha Rashmi the counsel for the Applicant that on account of statutory modification to the Arbitration and Conciliation Act, 1996 by the Arbitration and Conciliation Amendment Act, 2015 with effect from 23.10.2015, a Departmental Authority cannot be appointed as an Arbitrator nor can he nominate someone in his behalf nor can any person known to either of the parties be appointed as Arbitrator. The learned counsel for the Applicant has referred to judgements rendered by the Supreme Court in **Haryana Space Application Centre versus Pan India Consultants Private Limited (Civil appeal No.131**

of 2021 decided on 20.01.2021), and Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited 2017(4) SCC 665;

9. It has been argued by the learned counsel for the Applicant that in the judgement of **TRF Ltd. versus Aniruddha Engineering Projects Ltd. 2017 (8) SCC 377,** the Supreme Court was considering the question *"Whether an ineligible Arbitrator, like the Managing Director, could nominate an Arbitrator, who may be otherwise eligible and a respectable person, after the amendment came into effect in 2015?"*

10. Counsel for the applicant has referred to paragraphs 12 to 16 of the judgement in TRF Ltd. (Supra) where the Supreme Court had considered Section 12 (5) of the Act along with the Fifth and the Seventh Schedule. It referred with approval to the argument raised by raised by the learned counsel appearing for the appellants that the Arbitrator could not have been nominated by the Managing Director as the said authority had been statutorily disqualified. It rejected the argument raised by the Respondent that the Managing Director may

be disqualified to Act as an arbitrator, but he is not deprived of his right to nominate an arbitrator who has no relationship with the respondent or that if the appointment is hit by the Fifth, Sixth or the Seventh Schedule, the same has to be raised before the Arbitral Tribunal during the arbitration proceedings but not in an Application under Section 11 (6) of the Act. The Supreme Court considered several judgements rendered by it earlier in the subsequent paragraphs and observed that the purpose of referring to the said judgement was that the courts in certain circumstances have exercised the jurisdiction to nullify the appointments made by the authorities as there had been failure of procedure or ex facie in contravention of the inherent facet of the arbitration clause. It referred to the Seven Judges Bench in SBP and Co in paragraph 41 of judgment, and the conclusion given by the Constitution Bench in Paragraph-47, and observed that if there is a clause requiring the parties to nominate the respective arbitrator, their authority to nominate cannot be

questioned. *What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedule appended there too. But in the case before it where the Managing Director is the named sole arbitrator and he has also been conferred with the power to nominate one who can be arbitrator in his place, and in such a case if the nomination of an arbitrator by ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. Ineligibility strikes at the root of his power to arbitrate or get it our treated upon by a nominee.*

11. It was observed by the Supreme Court in paragraph 57 that*:- "... by our analysis, we are obliged to arrive at the conclusion that once the Arbitrator has become ineligible by operation of law, he cannot nominate another as an Arbitrator. The Arbitrator becomes ineligible as per prescription contained in Section 12 (5) of the Act. It is inconceivable in law that a person who is statutorily ineligible*

can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as a sole Arbitrator is lost, the power to nominate someone else as an Arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so...”

12. In response to the said submissions made by the learned counsel for the Applicant, Shri Shishir Prakash appearing for the Respondent has argued that the Arbitration Application has been cleverly drafted only to invoke the jurisdiction of this Court in a highly time-barred dispute. The agreement between the parties was signed in 2011 and supply of equipment for which the Applicant alleges unwarranted deductions being made in payment, was made in the year 2013–14. Once the payment having been made against the Supply Agreement the Applicant wishes to extract more from the Respondent than permissible under the contract.

The Learned counsel for the Respondent has pointed out that the Arbitration and Conciliation Act, 1996 is a 'general law'. All disputes relating to licensees and generating companies are to be referred to the U.P. State Electricity Regulatory Commission or to an Adjudicator nominated by it. Reference has been made to the Preamble of the Electricity Act, 2003, that it is *"... an Act to consolidate the laws relating to generation, transmission, distribution, of Electricity and generally for taking measures conducive to development of Electricity industry, promoting competition there in, protecting interest of consumers and supply of Electricity to all areas, rationalisation of Electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority Regulatory Commission and Establishment of Appellate Tribunal and for matters connected there with or incidental thereto."*

13. "Great Emphasis has been placed by the learned counsel for the Respondent on the

phrase *'Matters connected therewith or incidental thereto'*. It has been argued that the Applicant agreed to supply equipment, and construct a Power Substation at Banda for the supply and transmission of Electricity. There were three contracts signed between the parties:-1) for supply of equipment and materials that is, the Supply Agreement; 2) Erection, Testing and Commissioning and Operation and Maintenance of the Power Substation;3) Civil works. The specific timeline and procedure as well as terms of payment was decided between the parties in all these agreements. The Company requested the preponement of supply of materials and equipment without constructing the supporting civil works like laying down the plinth on which such equipment was to be placed. The firm delivered the equipment in the month of June 2013, two months prior to the stipulated schedule of supply in August 2013 at its own risk and cost. The Respondent had to taken a loan from the Power Finance Corporation. The liability to pay interest had been specifically agreed upon by the Applicant

in its letter dated 24.06.2013, and due to the laxity in the construction of the Power Substation the Respondent had to suffer losses. Nevertheless, it released a sum of Rs.10 Crores which was already much more then what was due under Paragraphs 4.2 and .4.3 of the Agreement.

14. It has also been pointed out by the learned counsel for the Respondent that Section 86(1)(F) of the Electricity Act 2003, mandates that any dispute between the licensee and the generating company can be referred to the Regulatory Commission for appointment of an expert to adjudicate the dispute. Since the Electricity Act is a special Act by implication Section 11 of the Arbitration and Conciliation Act will not apply to disputes between licensees and generating companies. This is because of the principle that "*special law overrides the general law*". In the matter of **Gujarat Urja Vikas Nigam Limited versus Essar Power Ltd 2008 (4) SCC 755**, the Supreme Court observed in Paragraph-28 that Section 86(1)(F) is a special provision and hence will override the general provision in Section 11

of the Arbitration and Conciliation Act 1996, for Arbitration of dispute between the licensee and the generating company. The learned counsel for the Respondent has read out the relevant Paragrah which observes thus:-*"...it is well settled that the special override the general law. Hence, in our opinion Section 11 of the Arbitration and Conciliation Act 1996 has no application to the question who can adjudicate/arbitrate disputes between licensees and generating companies and only Section 86(1)(F) shall apply in such a situation. ..."*

15. Under Paragraph-61 of the same judgement it was observed that *"..,we make it clear that it is only with regard to authority which can adjudicate or arbitrate the dispute that the Electricity Act 2003 will prevail over Section 11 of the Arbitration Conciliation Act. However, as regards the procedure to be followed by the State Commission or the Arbitrator nominated by it, and other matters related to Arbitration other than appointment of the Arbitrator, the Arbitration and Conciliation Act 1996 will apply, except if there is a conflict with the provisions*

in the Act of 2003. In other words, Section 86(1)(F) is only restricted to the authority which is to adjudicate or arbitrate between licensees and generating companies. Procedure and other matters relating to such proceedings will of course be governed by the Arbitration and Conciliation Act 1996, unless there is a conflicting provision in the Act of 2003."

16. In Paragraph-64 it was further observed:- *"this appeal is filed regarding deduction of Rs.5crores. The appellant may file an application under Section 94(2) of the Electricity Act 2003 before the appropriate Commission, to pass such an interim order, as it may consider appropriate. This appeal is accordingly dismissed"*

17. The learned counsel for the Respondent has referred to various paragraphs in the Counter Affidavit wherein it has been stated that the Applicant was responsible for creating hurdles in the smooth execution of the contract. It requested for preponement of supply of equipment and to ignore the terms and conditions of the Agreement. It supplied the

equipment in June 2013 two months prior to the stipulated time of August 2013, at its own risk and cost. The Applicant company had not constructed the plinth, knowing fully well that they were required to be completed prior to the delivery of the said equipments and equipments were to be unloaded on the respective plinths exclusively. For the Construction of the Banda Substation the Respondent had taken a loan from Power Finance Corporation and interest on the loan had to be borne by the Public Sector Undertaking on making payment as demanded by the Applicant. The contract had provided for payment of only 70% of the cost of the material and equipment and hundred percent cost of transportation and insurance and of the tax and duties levied on such equipment , subject as to their due dates as per approved Delivery/ Completion Schedule. However, the insistence of the Applicant for delivery of equipment before time and for making of payment before time had led to the Corporation suffering losses as it resulted in preponement of liability to pay interest.

18. The learned counsel for the Respondent has referred to another decision of the Supreme Court in **Tamil Nadu Generation and Distribution Corporation Limited versus PPN Power Generation Company (Private) Limited 2014 (11) SCC 53,** to emphasize that in respect of disputes relating to generation, transmission and distribution of Electricity, dispute resolution should be done only under the Electricity Act 2003.

19. The learned counsel for the Respondent has referred to Section 2 (17) of the Definition Section of the Electricity Act 2003, which defines a “distribution licensee” and also Section 2 (28) which defines the “generating company” and Section 2(29) and 2(38). He has referred to Section 14 of the Electricity Act of 2003 and Paragraphs 13 to 24 and 59 of the judgement rendered in Gujarat Urja (supra). The learned counsel for the Respondent has also referred to paragraphs 13 and Para 26 of the **Hindustan Zinc, 2019 (17) SCC 882** and the Statement of Objects and Reasons of the Electricity Act of 2003. It has been argued that

the Banda Substation was a Transmission Station and construction of a transmission station is as much a part of a distribution licensees' work as any other. Like laying of power lines it is a technical matter which is a function that is incidental to the supply of Electricity, and it would always be better that this adjudication is dealt with by some person who has special knowledge of the domain.

20. The learned counsel for the Respondent has also referred to Section 2(22) and Section 2(25) of the Act 2003 and argued that the Electricity supply system is an integrated whole. It has also been pointed out that instead of approaching the Chairman of UPPTCL invoking the Arbitration Clause, the Applicant repeatedly addressed all its correspondence to the Managing Director U.P.P.T.C.L.

21. Learned counsel for the Respondent has also pointed out paragraphs from the contract which provided that *"the Substation has to be constructed, erected, tested, commissioned and completed in all respects within 24 months from the date of issue of letter of intent or*

from the date of handing over of land which ever is later. The progress shall be monitored as per the approved project implementation schedule and PERT chart to be submitted by the contractor."

22. It has been argued by the learned counsel for the Respondent that any deductions that have been made from the payments of the Applicant have been because of the various clauses of the Contract which required that entire construction and running of the Substation was to take place as per Schedule/timetable, which was not adhered to by the Applicant. The Project was finally commissioned in May 2018, that is, after inordinate delay of more than four years, as per the terms and condition of the Agreement. Because of delay in charging the said substation, the Respondent suffered huge losses in terms of tariffs and Electricity supply which was mainly due to the Applicant company. The Learned counsel for the Respondent has referred to the Special Conditions which were attached to the sanction letter for loan by the Power Finance Corpn. Ltd. and has pointed out

Paragraph-23.1 wherein the UPPTCL had to submit an undertaking that it would not make any investment in a Scheme for which approval had been denied by the UPERC. The UPPTCL had to submit evidence that the investment in the Project/Scheme has been intimated to the UPERC, indicating the financing plan and repayment obligation in tariff. The argument of the learned counsel for the Respondent is that since the Power Finance Corporation Ltd. while approving loan to be given to the Respondent had laid down a condition that all progress, stage wise, had to be duly intimated to the UPERC, it meant that the UPERC had effective control over the project i.e. erecting of the Substation at Banda. The UPERC being closely associated was entitled to nominate an Arbitrator for adjudication of any dispute arising in the performance of such contract.

23. Learned counsel for the Respondent referred to Sub Sections 22, 25, 30, 36, 50, 72 and 77 of Section 2 of the Electricity Act, to buttress his argument that although the word "*transmission*" has not been included, it is intended that

"*transmission*" shall also be dealt with in the same manner as in Section 86 (1)(f). He also referred to Section 174 of the Electricity Act which gave it overriding effect over all other laws and argued that the Electricity Act and the provision there in for settlement of disputes shall override the provisions of the Arbitration Act insofar as Disputes relating to Electricity are concerned. The learned counsel for the Respondent referred to judgment rendered by a Division Bench in Writ-C No.11295 of 2019 (**Akhilesh Kumar versus State of U.P.**) and paragraph 23 thereof, to say that '*casus omissus*' should be supplied by the Court in certain cases where it is necessary to give full effect to the provisions of the Statute. He argued that the word "*transmission"* although was not mentioned along with "*distribution*" in sub Section (5) of Section 2, distribution would include transmission also.

24. The learned counsel for the Respondent also referred to Section 150 and Section 174 of the Electricity Act, and to the judgement rendered by the Supreme Court in the case of Mayavti

Trading Private Limited, 2019 SCC Online SC 1164, during the course of his arguments. He referred to Sections 39 and 40 of the Act and argued that this Court will have to see whether '*generation*' includes '*transmission*' as all are interrelated and "*power system*" includes generation, transmission and distribution. All are technical. Only generation cannot be said to be technical, transmission lines and substations that facilitate transmission are also technical matters, that need to be referred to an expert in the field for adjudication. The Applicants are suppliers of components and build substations to facilitate transmission and therefore they are also covered by the Electricity Act and the learned counsel for the Respondent also referred to page 29 of the Contract and argued that the aggregate value of the first contract of Rs.92,71,72,000 is related to the second, and the third contract the learned counsel for the Respondent also referred to the Statement of Objects and Reasons of the Act and paragraph 1.1 and argued that transmission comes within "works relating to the supply of Electricity."

25. In rejoinder to the arguments raised by the learned counsel for the Respondent, the learned counsel for the Applicant has said that the reliance placed upon the provisions of the Electricity Act 2003, is erroneous and misconceived. The Electricity Act 2003 has no application in the facts of the present case which arise out of a purely commercial dispute between the parties. The parties are governed by the Indian Contract Act and the Arbitration and Conciliation Act alone. The Electricity Act 2003 deals with generation, transmission distribution and trading of Electricity and governs contracts in relation thereto. In this case there is no generation, distribution or trading of Electricity whatsoever. The dispute has arisen out of the provisions of the Supply Agreement dated 28.11.2011. The Supply Agreement was a contract for supply of equipment and material for construction of a Substation and the Applicant has simply sold the equipment and materials such as Transformers and Reactors to the Respondent for construction of the Substation. The State

Electricity Regulatory Commission is a body set up under Section 86 of the Electricity Act 2003 to regulate the process of procurement of Electricity by distribution companies from a generating company under the agreement for purchase of power. Under Section 86(1)(F) of the Act, the State Electricity Regulatory Commission has jurisdiction only over those disputes which arise under these agreements for purchase of power between the licensees/distribution companies and the generating companies. It has been argued that the Applicant is neither a licensee nor a generating company. It has neither generated Electricity nor supplied it to the Respondent. The Supply Agreement is a contract for supply of construction material and equipment simpliciter. In the performance of the Supply Agreement the Applicant has not undertaken any work of transmission, distribution or trading of Electricity as a licensee, and the Respondents' reliance on Section 67 of the Electricity Act 2003 is also misconceived. The judgement relied upon by the Respondents

reported in 2002 (8) SCC 715, has no application to the present case. Also, the judgement reported in 2008 (4) SCC 755 is exclusively in respect of Electricity disputes between distribution companies and generating companies and the Power Purchase Agreement. It has been argued that this Court has been approached for appointment of Arbitrator as there was failure of both the parties to agree upon the same under Section 11 (6) of the Act of 1996. It has further been argued that the Respondents' claim that the loan taken from the Power Finance Corpn. was to facilitate the Applicant company, was inappropriate and false. The loan document filed as Annexure to the Counter Affidavit shows that the Respondent raised a loan of Rs.640 crores from the Power Finance Corpn to finance the project.

26. Miss Meha Rashmi has also argued that the learned counsel for the Respondent fairly admitted that the Applicant is neither a licensee nor a generating company and therefore not covered under Section 86(1)(f), but should be read as covered under the said Section by this

Court and the definition of generating company should be extended to include the Applicant as well. Such a power is not given to the Court under Section 11 (6) of the Act where the jurisdiction is limited only to see whether there was a contract, and in the said contract there was an Arbitration Clause providing for settlement of disputes through an Arbitral Tribunal. It was also argued that there were three contracts signed between the Applicant and the Respondent. Dispute has arisen only with respect to the first contract which relates to supply of equipments and does not include construction of the Substation. It is an incorrect submission made by the Respondent that the Applicant is constructing the power Substation and laying down the power lines as well. The learned counsel for the Applicant referred to **Duro Felguera S.A. V. Gangavaran Port Limited 2017 (9) SCC 729**, and paragraphs 38 and 42 thereof. The contract between the Applicant and the Respondent is purely commercial and not a technical contract. The equipment has to be delivered tested on the site by the officials of

the Respondent, and delivery has to be taken thereafter. It also requires replacement of defective equipment or material but it is not the case of the Respondent that defect was found in the equipment and materials that was supplied. Therefore no technical experience is required to adjudicate the dispute of holding back nearly 10 crores of rupees from the dues of the Applicant.

27. It has also been argued that the intention of the legislature in framing the Arbitration Act is clear as also in framing the Electricity Act. When the intention of the legislature is clear and the language is unambiguous the court should not read a '*casus omissus*' in the language and supply the same while sitting in limited jurisdiction under Section 11 (6) of the Arbitration Act. Miss Meha Rashmi, further contended that the argument of the Respondent is misplaced in so far as he has communicated the anxiety of the Respondent regarding technical difficulties being discovered in the equipment supplied. Such is not the case. The case is that Applicant had preponed the supply of certain equipment and material and also had

asked for preponement of payment and was willing to pay the interest calculated on preponement of payment by two months by the Respondent, to the Bank. In such a dispute only terms which would have to be in interpreted are commercial terms. The question to be decided by the Arbitrator was whether the deductions made by the Respondent was justified at the time of final payment. Moreover, it has been argued that while framing the Electricity Act, nothing prevented the Legislature from saying that any dispute of a licensee shall be referred to the Commission. Instead the words used are *"any dispute relating to generation"* shall be referred to the Commission. The judgements that have been relied upon by the learned counsel for the Respondent relate to power Purchase Agreements. The legislature did not intend that all the disputes relating to a licensee or a generating company be referred to the Commission. It intended that some disputes relating to generation could also be referred to the Arbitrator.

28. It has been argued further by the learned counsel for the Applicant that the State Electricity Commission is a body set up under Section 86 of the Electricity Act 2003, to regulate the process of procurement of Electricity by distribution companies and generating companies under an agreement for purchase of power. Under Section 86(1)(F) of the Act the State Electricity Commission has jurisdiction only over those disputes which arise under these agreements for purchase of power between the distribution companies and the generating companies.

29. Learned counsel for the Applicant argued that the scope of judicial enquiry is limited and reference was made to para 132, 150 to 153 154 and 233 of the judgement rendered in **Vidya Drolia Vs. Durga Trading Corporation reported in (2021) 2 SCC 1**. The learned counsel for the Applicant also referred to **Babita Lila Vs. Union of India and Others reported in 2016 (9) SCC 647** and Para-63 thereof, and argued that this Court has to consider whether in the monitory claim it is necessary to add

words which are not relevant for decision of the dispute. Where there is no ambiguity in the statute, the Court should not interpret the words in such a manner as to create confusion. Learned counsel for the Applicant referred to Paragraphs 64, 65 and 66 of **2016 (9) SCC 647 Babita Lila Vs. Union of India & Others** and of **Dharmendra Textiles Processors reported in 2008 (13) SCC 369**, and argued that similar matter had come up before this Court and the Designated Judge had referred the dispute to a retired judge of this Court. Learned counsel for the Applicant referred to judgements in **Hindustan Zinc Limited Vs. Ajmer Vidyut Vitran Nigam reported in 2019 (17) SCC 82, Suresh Shah Vs. Hipad Technology reported in 2021 (1) SCC 529 and Gujarat Urja Vikas Nigam Vs. Essar Power reported in 2008 (4) SCC 755**.

30. In **Suresh Shah versus Hipad Technology India Private Limited 2021(1) SCC 529,** in paragraph 19 the Supreme Court had observed in a dispute relating to tenancy/ lease agreement which was not covered under the Rent Control Act that *"in so far as eviction or tenancy*

relating to matters governed by special statutes, where the tenant enjoys statutory protection against the eviction, whereunder the court/forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters. Hence, in such cases the dispute is non-arbitrable. If the special statutes do not apply to the premises/property under lease/tenancy created thereunder as on the date when the cause of action arises, to seek eviction or such other relief and in such transaction if the parties are governed by an arbitration clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the arbitration clause." The Supreme Court in the said judgement relied upon observations made in **Vidya Drolia versus Durga Trading 2021 (2) SCC 1**.

31. The learned counsel for the Applicant has also placed reliance upon and **Enzen Global Solutions versus Central Electricity Supply Utility Odisha, 2018 (4) ARBLR 250**; and paragraphs 10 to 15 where a single judge of the Odisha High Court

observed, after referring to various communication between the parties that a commercial agreement between the parties with regard to arbitration clause is not to be interpreted by the strict rules of interpretation, as may be applicable to formal documents or conveyances but by gathering the intention of the parties to the agreement. A common sense meaning of the agreement is to be taken as to what was the intention of the parties with regard to the settlement of disputes. From the perusal of communication between the parties the clear intention of the parties had emerged that they were in agreement to first settle the dispute amicably and if not then by referring to Odisha Electricity Regulatory Commission, the parties and also agreed that 0ERC would not be obliged to Act as arbitrator. The Court looking into the reluctance of OERC to Act as Arbitator directed the parties to suggest an agreed name of a person to be appointed as arbitrator, and on failure to do so the court would appoint an arbitrator.

32. Counsel for the Applicant has also placed reliance upon a coordinate bench decision in **Messers Technical Associates Versus U.P. Power Transmission Corporation Limited Arbitration Application No.66 of 2019**, where the Bench after hearing the parties at length had observed basis of judgement rendered in TRF (supra) that the Chairman of the Commission had become ineligible to Act as arbitrator, and therefore he could also not appoint an arbitrator to settle the dispute between the parties. This Court also referred to a later judgement of the Supreme Court in **Perkins Eastman Architects DPC and others Versus HSCC India Ltd. 2019 SCC Online Supreme Court 1517**; which also held that "*the ineligibility referred to was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to Act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the*

dispute resolution by having the power to appoint an arbitrator."

33. This Court having heard the learned counsel for the parties at length finds that in **Babita Lila and others versus Union of India 2016 (9) SCC 647**, it has been held that *casus omissus* cannot be inferred when there is a conscious exclusion. In Para-63 of the said judgement the Supreme Court had observed that "there is no presumption that *casus omissus* exists and the Court should avoid creating *casus omissus* where there is none. It is the fundamental rule of interpretation that Courts would not fill the gaps in statute, their function being "*jus discre non facere* "that is, to declare or decide the law. The Supreme Court had relied upon observations made by it and **Union of India versus Dharmendra Textile Processors 2008 (13) SCC 369**, where it had been ruled that a *"a Court cannot read anything in the statutory provision or stipulated provision which is plain and unambiguous. It was held that a statute being an edict of the legislature, the language employed therein is determinative of the*

legislative intent." It recorded with approval of the observation in **Stock versus Frank Jones (Tipton). Ltd. 1978 (1) All England Reporter 948**; that it is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. The observation there in that rules of interpretation do not permit the Courts to do so unless the provision as it stands is meaningless or doubtful and that the Courts are not entitled to read words into an Act of Parliament unless a clear reason for it is to be found within the four corners of the statute, was underlined. It was proclaimed that the *casus omissus* cannot be supplied by the Court except in the case of necessity and that reason for, is found in the four corners of the statute itself but at the same time *casus omissus* should not be readily inferred and for that purpose, all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that construction to be

put on a particular provision makes a consistent engagement of the whole statute.

34. In **Union of India and others versus Dharmender Textiles,** it has been observed by the Court on the basis of English precedents that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words, or which results in rejection of words as meaningless has to be avoided. As observed in **Crawford versus Spooner 1846 (6) Moo PC 1**, *"The Courts cannot aid the legislatures defective drafting of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. "....."The question is not what maybe supposed and has been intended but what has been said. Statutes should be construed not as Theorems of Euclid, but words must be construed with some imagination of the purposes which lie behind them. ..."....Two principles of construction, one relating to casus*

omissus and the other in regard to reading the statute as a whole, appear to be well settled. Under the first principal casus omissus cannot be supplied by the Court except in case of clear necessity ...,The Golden Rule for considering all written instruments is that the grammatical and ordinary sense of the word is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical or and ordinary sense of the word may be modified, so as to avoid that absurdity and inconsistency, but no further. The Later part of this Golden Rule must however be applied with much caution if the precise words used are plain and an ambiguous we are bound to construe them in their ordinary sense even though it may lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful and obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely

because we see ,or fancy we see, an absurdity or manifest injustice from an adherence to the literal meaning."

35. In DMRC case (supra) in Paragraph-19 the Supreme Court has observed that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasi-judicial proceedings. "*It is for this reason that notwithstanding the fact that relationship between the parties to the arbitrary tribunal and the arbitrators themselves are contractual in nature and the source of an arbitrators appointment is deduced from the agreement entered into between the parties, notwithstanding the same, non-independence and non-impartiality of such arbitrator (although contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties*

require him to rise above the partisan interest of the parties and not to Act in, or so as to further, the particular interest of either parties. After all the arbitrator has adjudicatory role to perform and, therefore he must be independent of the parties as well as impartial..."

36. In **Haryana Space Application Centre versus Pan India Consultants Private Limited reported in 2021 (3) SCC 103**, a three judges Bench of the Supreme Court observed in Paragraphs 17 and 18 thus- "*we are of the view that the appointment of the Principal Secretary Government of Haryana as a nominee arbitrator of HARSAC which is the nodal agency of the Government of Haryana, would be invalid under Section 12 (5) of the Arbitration and Conciliation Act 1996, read with Seventh Schedule. Section 12(5) of the Arbitration Act 1996 (as amended by the 2015 Amendment Act), provided that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, or counsel, falls within any of the categories specified in the Seventh Schedule, shall be in eligible to be*

appointed as Arbitrator. Item 5 of the Seventh Schedule of the Act which defines the various persons who would be ineligible to Act as arbitrator reads as under: "arbitrators relationship with the parties or counsel- **The arbitrator is a Manager Director or part of the Management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matter in dispute in the arbitration."**

37. In Vidya Drolia versus Durga Trading (supra), the Supreme Court has observed in paragraph 132 of the judgement that: – "the Courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the Courts to refer the parties to arbitration, if the action brought is the subject of an Arbitration Agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term "*prima facie*" in **Nirmala J. Jhala versus State of Gujarat 2013 (4) SCC 301**, this Court had

noted: *"48. – – 27 – – prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case was to be believed. While determining whether a prima facie case has been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question, and not whether that was the only conclusion which could be arrived at on that evidence – –)."*

38. The Supreme Court in paragraph 134 further observed: *–"prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the Reference stage is to cut the dead wood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law The litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists or the disputes /subject matter*

are not arbitrable, the application under Section 8 would be rejected. At this stage the Court should not get lost in the thicket and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the Court and in this context, the observations of B.N. Srikrishna J. of "*good arguable case*". In **Shin Etsu chemical Co Ltd. versus Akash Optifibre Ltd. 2005 (7) SCC 234,** are of importance and relevance. Similar views are expressed by this Court in **Vimal Kishor Shah versus Jayesh Dinesh Shah 2016 (8) SCC 788**, wherein the test applied at pre arbitration stage was whether there is a good arguable case for the existence of an arbitration agreement.

39. The Supreme Court in paragraph 135 referred with approval the observations made by the England and Wales High Court in **Silver Dry Bulk Co. Ltd. versus Homer Hulbert Maritime Co. Ltd. Reported in 2017 EWHC 44 (Comm)**; Where it was observed that "*a good arguable case is somewhat more than merely arguable,*

but need not be one which appears more likely than not to succeed. ... It represents a relatively low threshold which retains flexibility for the Court to do what is just, while excluding those cases where the jurisdictional merits were so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it was very likely that the tribunal had no jurisdiction.....”

40. In **Mayavti Trading 2019 (8) SCC 714**, the Supreme Court noticed the argument made by Shri Mukul Rohatgi Learned Senior Advocate that Sub Section (6A) has since been omitted by an amendment carried out in the Act in 2019, (though it has not yet come into force), on the recommendations of a High-Level Committee Review regarding institutionalisation of arbitration in India headed by Justice B.N. Srikrishna. The Court observed however that the omission of Sub Section 6(A) is not to resuscitate the law that was prevailing prior to the Amendment Act of 2015. The Amendment Act of 2019 omitted Section 11 (6A) because

appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint Arbitrators and consequently to determine whether an arbitration agreement exists. In Paragraph-38 of Duro Felguera, (supra), it was observed that it is not possible for a composite reference to be made for settling the disputes under different contracts by constitution of a single Arbitral Tribunal for dealing with such arbitration. As per the amended provisions of Subsection (6A) of the Section 11, the power of the Court is only to examine the existence of arbitration agreement. When there are five separate contracts each having independent existence with separate arbitration clauses,There cannot be a single Arbitral Tribunal.

41. Under paragraph 42 of the said judgement the Supreme Court negatived the arguments raised by the Learned senior counsel for the respondents that where various agreements constitute a composite transaction, the Court can refer disputes to a single Arbitral Tribunal

if all ancillary agreements are relatable to the principal agreement and performance of one agreement is so intrinsically interlinked with the other agreements. The Supreme Court observed that the case before it stood entirely on a different footing. All five different packages as well as the corporate guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the original contract or the MOU which was only intended to have clarity in the execution of the work. In Paragraph-50 of the said judgement Justice Kurian Joseph concurred with the view expressed by Justice Bhanumati that five different agreements could not be subsumed into one agreement on the basis of Memorandum of Understanding. Each of such five agreements have separate elements and therefore it should have a separate Arbitral Tribunal. A Coordinate Bench decision of this Court in **Trading Engineers International Ltd. versus U.P. Power Transmission Corporation Limited Arbitration Application No.5 of 2020**, this Court had observed that certain disputes

regarding monitory claims of the petitioner had accrued which were not being addressed by the respondent. There was in the aforesaid agreement between the parties an arbitration clause in Clause No.38 of the Agreement. The petitioner had invoked arbitration clause, notice of which was served upon the respondents however the respondent had not replied to the same nor participated in the formation of the Arbitral Tribunal. In the Arbitration Application filed thereafter the Court had issued notice and the respondents had appeared through Counsel and orally submitted that they did not wish to file any response as they had no objections to the Court appointing an Arbitrator. The Court had thereafter appointed a Retired judge of this Court as Arbitrator.

42. In **Messers Mayavti Trading Private Limited versus Pradyuat Deb Burman 2019 SCC Online Supreme Court 1164**; a three-judge Bench of the Supreme Court has considered the scope of interference under Section 11(6) of the Arbitration Act. It referred to judgement rendered in United India Assurance Co. Ltd.

versus Antique Art Exports Private Limited 2019 (5) SCC 362 which had distinguished the judgement in Duro Felguera S.A. v Gangavarman Port Ltd. 2017 (9) SCC 729, By negativing, The argument raised by the Learned counsel for the respondent that after insertion of SubSection (6) (A) to Section 11 of the Amendment Act 2015, the jurisdiction of this Court is curtailed and the limited mandate of the Court is to examine the factum of existence of an Arbitration clause, by holding that it is only a general observation relating to the facts in the case of Deuro Felguera. The Supreme Court in United India (Supra) had observed that in Duro Felgeura the Supreme Court had taken a note of the facts of that particular case and that Sub Section (6A) introduced by Amendment Act 2015, and in that context had observed that preliminary disputes are to be examined by the Arbitrator and not for the Court to be examined within the limited scope available for appointment of Arbitrator under Section 11 (6)of the Act.

43. The Supreme Court in Mayavti Trading (supra) thereafter referred to the facts and circumstances leading to the introduction of Section 11 (6A) by way of Amendment Act of 2015. Section 11 (6A) provided that the Supreme Court or the High Court while considering any application under SubSection (4) or SubSection (5) or SubSection (6) of Section 11 shall confine itself to examination of the existence of an Arbitration Agreement. Prior to SubSection 11 (6A) being introduced, the Supreme Court in several judgements beginning with **SBP and Co. versus Patel Engineering Ltd. and Another 2005 (8) SCC 618,** had held that at the stage of Section 11 (6) application being filed the Court need not merely confine itself to the examination of the existence of an arbitration agreement , but could also go into certain preliminary issues such as stale claims ,accord and satisfaction having been reached , etc.

44. In **ONGC Mangalore Petrochemicals Ltd. versus A.N.S. Constructions 2018 (3) SCC 373**, a case which arose before the insertion of Section 11

(6A), the Supreme Court had dismissed a Section 11 petition on the ground that accord and satisfaction had taken place as no dues certificate was submitted by the contractee company and on the request completion certificate was issued by the appellant contractor. The 246th Law Commission Report dealt with some of these judgements and felt that at the stage of Section 11 (6) application only existence of an arbitration agreement has to be looked at and not other preliminary issues. In SBP and Co. (supra) a seven judge Bench overruled the view taken earlier that the power of the Chief Justice under Section 11 (6) of the Act is administrative in nature. The seven judges Bench had held that the power to appoint an arbitrator under Section 11 is a judicial and not administrative power. One of the conclusions in SBP & Company (supra) was as follows:– *"the Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgement. These will be (1) his own jurisdiction to entertain the request, (2)*

the existence of a valid arbitration agreement, (3)existence or otherwise of a live claim, (4) the existence of the conditions for the exercise of his power and (5) on the qualifications of the Arbitrator or the Arbitrators." This position was further clarified in **National Insurance Company Limited versus Bogra Polyfab 2009 (1) SCC 267**, where the Supreme Court observed in paragraph 22 as follows: –*"where the intervention of the Court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate as deferred in SBP and Co 2005 (8) SCC 618, this Court identified and segregated, the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (1) issues which the chief Justice or his designate is bound to decide; (2)issues which he can also decide, that is, issues which he may choose to decide; and (3) issues Which should be left to the Arbitral Tribunal to decide.*

45. In National Insurance Company (supra), the Supreme Court further observed in Para 22.1 as follows:-

"22.1 the issues (first category) which the Chief Justice/designate will have to decide are: a) whether the party making the application has approached the appropriate High Court, (b)whether there is an arbitration agreement and (c) whether the party who has applied under Section 11 of the Act is a party to such agreement. 22.2 the issues (second category)which the chief Justice /his designate may choose to decide or leave them to the decision of the Arbitral Tribunal are: a) whether the claim is a dead (long barred) claim or a live claim, (b) whether the parties have concluded the contract/transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection. 22.3 the issues (third Category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are: (a) Whether a claim made falls within the arbitration clause (for example, a matter which

is reserved for final decision of a departmental authority and excepted or excluded from arbitration, (b) The merits of any claim involved in the arbitration." The Supreme Court observed in Mayavati Trading that as a result of these judgements the door was left wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the Arbitrator under Section 16 of the Act. As a result, the Law Commission of India vide its Report No.246, suggested that various sweeping changes be made in the 1996 Act. Referring to SBP and Co and Bogra Polyfab, the Law Commission recommended addition of a new Subsection, namely Subsection (6A) in the Section 11. The Law Commission referred to the judgement of the Supreme Court in **Shin Etsu chemical Ltd. Versus Aksh Optifibre 2005 (7) SCC 234**, Where the Supreme Court ruled in favour of looking at the issues/controversy only prima facie.

46. After addition of Section 11 (6A) the scope of judicial intervention is only restricted to

situations where the Courts or Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, the Commission recommended that in the event the Court or judicial Authority is prima facie satisfied against the argument challenging to have an Arbitration Agreement, it shall appoint the Arbitrator and/or refer the parties to arbitration, as the case maybe. The amendment envisages that Judicial Authority shall not refer the parties to Arbitration only if it finds that there does not exist an Arbitration Agreement, or that it is null and void. If the judicial authority is of the opinion that Prima facie an Arbitration Agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the Arbitration Agreement to be finally determined by the Arbitral Tribunal. However, if the Judicial Authority concludes that the agreement does not exist, then its conclusion will be final and not prima facie. The Amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and

void. In the event that the judicial authority refers the dispute to arbitration and/or appoint an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to Appoint an arbitrator.

47. The Supreme Court in Mayavti Trading (supra) considered the Objects and Reasons as mentioned in the Ordinance which later was introduced as Amendment Bill of 2015. A few of the objects were and enumerated by the Court i.e. an application for appointment an Arbitrator shall be disposed of by the High Court or the Supreme Court as the case maybe as expeditiously as possible say within a period of 60 days, and while considering such an application the High Court or the Supreme Court shall only examined, the existence of a prima facie arbitration agreement and not other issues. *"A reading of the Law Commission Report together with Statement of Objects and Reasons, shows that the Law Commission felt*

that the judgements in SBP and Co and Bogra Poly fab required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or the High Court while considering an application under Section 11 (4) to 11 (6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator." Supreme Court further observed in paragraph 10 of Mayavti Trading that the law prior to 2015 Amendment that had been laid down by the Supreme Court which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. The Supreme Court overruled the observations made by this Court in United India Insurance Co. Ltd. It specifically held that Section 11 (6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgement and Deuro Felguera SA.

48. The decision in Mayavti Trading was rendered by three judges bench on 5 September 2019,

and having overruled the observations made by the division bench in United India Insurance Company Limited versus Antique Art Exports Private Limited and lays down the law that in so far as exercise of judicial power under Section 11 (6A) of the Act is concerned, the Designated Judge should confine himself only to the examination of the existence of an arbitration agreement in the narrow sense, as has been laid down and Duero Felguera, and leave all other issues to be decided under Section 16 of the Act by the Arbitral Tribunal.

49. This Court having considered at length the argument of learned counsel for the parties and case laws relied upon by the facts that reliance on the provisions of the Electricity Act 2003 is misplaced. The Applicant is neither a licensee nor a generating company. It has neither generated Electricity not supplied it to the Respondent and the Supply Agreement is a contract for supply of materials and equipment. The Applicant has not undertaken any work of Transmission, Distribution and Trading of Electricity as a licensee, and the Respondent

counsels' reliance on Section 67 of the Electricity Act is also misplaced. The judgements relied upon by the Respondent have no application to the present case as these judgements deal exclusively with Electricity disputes between distribution companies and generating companies under Power Purchase Agreements. The Arbitration application deserves to be allowed and is allowed. This Court proposes the name of Justice O.P. Srivastava (Retd.) to Act as Arbitrator.

50. Let the office issue notice to the proposed Arbitrator seeking his consent under Section 12 of the Act.

Order Date: 17.1.2022

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