

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru S.Akshayakumar Chairman
Thiru G.Rajagopal Member
and
Dr.T.Prabhakara Rao Member

(In the matter of direction issued by the Hon'ble High Court
in W.P.No.5196/2017, to decide the issue for
referral to Arbitration of D.R.P.No.13 of 2012)

Lanco Tanjore Power Company Ltd.
(formerly known as Aban Power Company Limited)
3rd Floor, 25, G.N.Chetty Road
T.Nagar
Chennai – 600 017.

... Petitioner
(Thiru Sakhya Choudhary,
Counsel for the Petitioner)

Vs.

1. The Tamil Nadu Electricity Board
Represented by its Chairman
800, Anna Salai
Chennai – 600 002.
2. The Tamil Nadu Generation and Distribution
Corporation Limited
Represented by its Director
800, Anna Salai
Chennai – 600 002.

... Respondents
(Thiru Abdul Saleem
Counsel for the Respondents)

Date of hearing : 19-09-2017

Date of Order : 13-03-2018

As per the direction of the Hon'ble High Court dated 31-07-2017 in W.P.No.5196 of 2017, I.A.No.1 of 2016 in D.R.P.No.13 of 2012 seeking for reference of the dispute raised in D.R.P.No.13 of 2012 has been taken up for hearing on 19-09-2017. The Commission upon perusal of the Petition and connected records and after hearing the submissions of the petitioner and the respondents hereby makes the following:

ORDER

1. Prayer of the Petitioner in I.A.No.1 of 2016 in D.R.P.No.13 of 2012:-

The prayer of the Petitioner in the above I.A.No.1 of 2016 in D.R.P.No.13 of 2012 is to appoint an Arbitrator for adjudicating the disputes with regard to usage of Naphtha as an alternate fuel and payment of fixed charges on a plant availability basis by the Respondent as raised by the Petitioner in the Dispute Resolution Petition and pass such other orders as deemed fit in the circumstances of the case and thus render justice.

2. Facts of the Case:-

M/s.Lanco Tanjore Power Company Limited has filed W.P.No.5196 of 2017 before the Hon'ble High Court, Madras. The prayer in the said Writ Petition is to direct the Commission to consider and dispose of I.A.No.1 of 2016 filed by the Petitioner in D.R.P.No.13 of 2012 before the Commission for referring the dispute for Arbitrator. The Hon'ble High Court of Madras in its order dated 31-07-2017 has passed the following orders:-

"In view of the submissions made by the learned counsel on either side and also following the ratio laid down by the Hon'ble Supreme Court of India in the judgment reported in (2008) 4 SCC 755 (Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd.), I direct the 1st Respondent Commission to consider the Petitioner's application in I.A.No.1 of 2016 seeking for reference of the dispute raised in D.R.P.No.13 of 2012 to arbitration by appointment / nomination of an

Arbitrator and pass orders in accordance with law after giving an opportunity of hearing to all the interested parties within a period of six weeks from the date of receipt of a copy of this order”

The present petition is taken up by the Commission pursuant to the above direction of the Hon'ble High Court. In its hearing on 19-09-2017, the Commission directed both the parties to file their Written Submission within one week. Accordingly, both the Petitioner and the Respondents have filed their Written Submissions on 28-09-2017.

3. Contentions of the Petitioner in the I.A.No.1 of 2016 in D.R.P.No.13 of 2012:-

3.1. The disputes arose between the Petitioner and the Respondent in the light of the Respondents' recalcitrant response to the Petitioner's requests for permission to use Naphtha as an alternate fuel in terms of Clause 7.5 (a) of the PPA. The request made by the Petitioner for use of Naphtha as an alternate fuel was in accordance with the provisions of the PPA and the Respondents instead of acting in terms of the PPA have suggested that the Petitioner sells power to third parties with a view to further delay the implementation of the dual fuel proposal of the Petitioner. The suggestion of the Respondent that the Petitioner should sell power generated at its plant to third parties is contrary to the terms of the PPA. In terms of clause 5 of the PPA, the respondent is under an obligation to purchase the power generated at the Petitioner's plant till 31st July 2020. The PPA does not provide for sale of power by the Petitioner to third parties.

3.2. The PPA provided for fixed charges to be paid to the Petitioner and the Petitioner has been faced with under-recovery of such charges on account of being

unable to maintain the PLF factor at the stipulated 85% in terms of the PPA. In such circumstances the Respondent's inaction is resulting in continuous under-recovery of fixed charges which has resulted in a severe strain on the Petitioner's. Such financial strain has further affected the operations of the Petitioner's plant. It is submitted that the aforesaid D.R.P. No.13 of 2012 was filed in the light of the aforesaid untenable stand taken by the respondent with regard to granting permission to the petitioner to use Naptha as the alternate fuel to ensure that the plant load factor is maintained at 85% in terms of the PPA.

3.3. The petition was filed during July 2012 and was admitted by the Commission on 31.07.2012. The respondent filed its Counter during October 2012 and the Petitioner has also filed its Rejoinder during January 2013. The pleadings are completed and the matter is ready for hearing. The case last came up before the Commission on 12.02.2013 and the same was adjourned. However, the same has not been listed since.

3.4. The Commission has been constituted under section 82(1) of the Act and is the Regulatory authority for the State and under section 86(1)(f) of the Act all disputes between generators and the licensee are to be adjudicated by the Commission. However, the issue concerning the composition of the Commission is under challenge before the Hon'ble Supreme Court on the grounds *inter alia* that the Commission should have a judicial member. In view of such challenge the Commission has not been taking up matters involving adjudication of disputes and has been confining itself to regulatory matters. In such circumstances the continued refusal of the Respondent to permit the Petitioner to use a secondary fuel coupled

with the unintended yet inordinate pendency of the DRP 13 of 2012, as a result of the aforesaid proceedings before the Supreme Court, has resulted in the Petitioner suffering substantial financial losses.

3.5. Article 15.3 of the PPA between the parties provides that in the event of any dispute arising between the parties during the term of the PPA is to be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modifications thereto. Pursuant to the enactment of the Electricity Act, 2003, all disputes between a generator and licensee is to be either adjudicated by the State Commission or by the Arbitrator(s) to be appointed by the State Commission. The Petitioner had approached the Commission by filing the D.R.P. for the reliefs as set out in the petition with the hope that the petition will be expeditiously heard and decided, as was the case with petitions filed before the Commission prior to initialization of the aforesaid proceedings before the Supreme Court concerning the composition of the Commission. However, due to the reasons stated above, the Petition has not been heard and decided. The pendency of the Petition for the last 4 years has caused grave prejudice to the Petitioner.

3.6. In such circumstances the Petitioner is filing the present I.A. with a request to the Commission to appoint/nominate an Arbitrator to adjudicate the dispute raised by the petitioner in the present D.R.P. and refer the parties to such Arbitrator in terms of the PPA. It is submitted that in the light of the Commission not taking up contentious issues the recourse to arbitration as per the PPA would be the most efficacious manner to resolve the disputes between the parties herein. This will also be in the interest of the parties and in accordance with law.

3.7. In Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. reported in (2008) 4 SCC 755, the Hon'ble Supreme Court has held that after coming into force of the Electricity Act, 2003, in cases where the PPA provides for arbitration, it is the State Commission which will either itself adjudicate the dispute or nominate arbitrator(s) to adjudicate the dispute. In the peculiar circumstances prevailing since the Commission is not taking up any adjudicatory matters, it will be in the interest of justice to nominate Arbitrators to adjudicate the dispute involved in the instant petition and refer the parties to such Arbitrator. The appointment / nomination of Arbitrator(s) by the Commission will not involve any adjudicatory process and the Commission will be well within its powers to appoint an Arbitrator.

4. Written Submissions on behalf of the Petitioner:-

In the Written Submission dated 28-09-2017, the petitioner has submitted as follows:-

4.1. The PPA was originally entered upon in 1998 based on use of Naptha as fuel. It was subsequently at the instance of the Respondents that the primary fuel was changed from Naptha to natural gas. Difficulties arose on account of the steadily declining levels of supply of natural gas from GAIL, which required the Petitioner to explore alternate options e.g. Naptha to achieve the desired levels of generation. The Respondents have been avoiding the issue of alternate fuel, thereby preventing the Petitioner from operating the plant at a normative efficiency level and to recover fixed charges for the plant. The petition was filed way back in 2012 to address such concerns of the Petitioner.

4.2. It appears that writ petitions had been filed before the Hon'ble Madras High Court wherein the Hon'ble Madras High Court had passed interim orders to the effect that the Commission could take up all matters except those involving adjudication of disputes under section 86(1)(f) of the Electricity Act, 2003. The said writ petitions were challenged before the Hon'ble Supreme Court wherein, the Hon'ble Supreme Court transferred the writ petitions to be heard before it and since then the same have been pending. That due to the inordinate time being taken to dispose off the civil appeals pending before the Hon'ble Supreme Court, the proceedings before the Commission have been stalled and the same is adversely affecting the Petitioner and causing severe strain on the finances of the Petitioner.

4.3. The lack of permission to use an alternate fuel is leading to a loss of around Rs. 2-3 crores per month. As an operating plant, it is not possible to operate the plant on sustained basis with such losses. That in these compelling circumstances, the Petitioner has prayed for an arbitrator to be appointed by the Commission to adjudicate the present petition.

4.4. The Commission is empowered under section 86(1)(f) of the Electricity Act to adjudicate upon the dispute arising between a licensee and a generating company or to refer any such dispute for arbitration. The relevant provision is reproduced hereunder:

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

x x x

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

x x x "

4.5. That the Hon'ble Supreme Court has further recognized the power of the State Commissions to refer the disputes to an arbitrator in its judgment in Gujarat Urja Vikas Nigam Limited v. Essar Power Ltd. (2008) 4 SCC 755. The relevant paragraphs are reproduced hereunder:

"26. In our opinion in Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word "and" in section 86(1)(f) between the words "generating companies" and "to refer any dispute for arbitration" means "or". It is well settled that sometimes "and" can mean "or" and sometimes "or" can mean "and" (vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, p. 404).

27. In our opinion in section 86(1)(f) of the Electricity Act, 2003 the word "and" between the words "generating companies" and the words "refer any dispute" means "or", otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some arbitrator. Hence the word "and" in section 86(1)(f) means "or".

28. 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 disputes between the licensee and generating companies. It is well settled that the special law overrides 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.

.....
31. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India." (emphasis supplied)"

4.6. The Hon'ble Supreme Court in Gujarat Urja case has stated in no uncertain terms that adjudication of all disputes between generating companies and licensees

falls within the jurisdiction of the Commission. The relevant paragraph is reproduced hereunder:-

“60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-05-1996. 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. 10-06-2003, 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 10-06-2003 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.”

4.7. On a plain reading of the judgment of the Hon'ble Supreme Court, the following position becomes clear:

- All disputes between licensees and generating companies can be adjudicated by the State Commission only u/s 86(1)(f);
- The State Commission may adjudicate the disputes or refer the same to an arbitrator of its choice;
- The State Commission may choose to refer to arbitration any/ all disputes raised before it at its discretion.

4.8. It is very clear on a reading of the extracted portions of the judgment that the arbitrator/arbitral tribunal appointed by the Commission u/s 86(1)(f) will have the ability / jurisdiction to look into the relief as sought in the present petition as it will be appointed under the aegis of the Commission as an alternate forum to address the disputes raised before the Commission. Such arbitrator/arbitral tribunal is different in

its scope and function from one appointed under contractual provisions. The arbitrator will therefore exercise the same power as the Commission.

4.9. The contention that the arbitrator appointed by the Commission will have restricted jurisdiction w.r.t. the nature of disputes that can be dealt by it, is ex facie contrary to the plain language of section 86(1)(f) as well as the judgment of the Hon'ble Supreme Court in the Gujarat Urja case.

4.10. Section 86(1)(f) per se does not restrict or distinguish in any manner the nature of dispute that can be handled by an arbitrator appointed by the Commission. Therefore, to give such an interpretation would amount to reading into the provisions something that has not been provided by the legislature. The law is well settled that courts cannot add to or read into the language of the statute for the purposes of interpretation of statute. The Hon'ble Supreme Court in Karnataka State Financial Corpn. v. N . Narasimahaiah, (2008) 5 SCC 176 held as under:-

“36. While interpreting the provisions of a statute, the court employs different principles or canons. To interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. (See New India Assurance Co. Ltd. v. Nusli Neville Wadia [(2008) 3 SCC 279 : JT (2008) 1 SC 31]) Attempt on the part of the court while interpreting the provisions of a statute should, therefore, be to pose a question as to why one provision has been amended and the other was not? Why one terminology has been used while inserting a statutory provision and a different clause in another? It is well known that casus omissus cannot be supplied. (See Ashok Lanka v. Rishi Dixit [(2005) 5 SCC 598], J. Srinivasa Rao v. Govt. of A.P. [(2006) 12 SCC 607: (2006) 13 Scale 27] and Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and ETIO [(2007) 5 SCC 447] .)”

4.11. The Hon'ble APTEL in Gajendra Haldea v. Central Electricity Regulatory Commission, 2006 SCC OnLine APTEL 149 has held as under:

“19. It is well settled that what is missing from the statute cannot be brought in by the Court through a process of involved interpretation, as to do so will be

legislation and not construction. Even in case of an inadvertent omission of a matter by the legislature a court or a judicial tribunal is not empowered to supply the omission. In the case of Magor & St. Mellons Rural District Council v. New Port Corporation (1951) 2 All E.R. 839, it was held that the duty of the court is to interpret the words, the legislature has used. Those words may be ambiguous, but even if they are, there is no power with and duty of the Court to travel outside them on a voyage of discovery."

4.12. .That apart, the very fact that the Hon'ble High Court has by its order directed the Commission to consider the Application filed by the Petitioner to refer the disputes to arbitration and pass orders in accordance with law clearly shows that the Hon'ble Court has allowed the Commission to refer the entire dispute to an arbitrator if it so feels appropriate.

5. Written Submissions filed on behalf of the Respondents:-

In their Written Submissions dated 28-09-2017, the respondents have submitted as follows:-

5.1. The Composition of the Commission is under challenge before the Hon'ble Supreme Court in Civil Appeal No.13451 of 2015. In the said case in C.A.No.13451 of 2015, an undertaking is there that the Commission will not adjudicate matters under section 86(1) (f) of the Electricity Act. As per section 86 (1) (f) of the Electricity Act, it is contemplated:

"adjudicate upon the disputes between the licensees and generating companies and to refer the disputes to arbitration".

5.2. Therefore, the power to adjudicate disputes includes the power / discretion of the Commission to refer the matters to arbitration and hence allowing the above petition would go against the very undertaking given to the Hon'ble Court.

5.3. Furthermore as per Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. [(2008) 4 SCC 755], the division bench of Hon'ble Supreme Court of India has held as follows:-

“30. Shri Jayant Bhushan, learned counsel for one of the parties in the connected case submitted that section, 86(l)(f) is violative of Article 14 of the Constitution of India because it does not specify when the State Commission shall itself decide a dispute and when it will refer the matter to arbitration by some arbitrator. In our opinion there is no violation of Article 14 at all. It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator. Some leeway has to be given to the legislature in such matters and there has to be judicial restraint in the matter of judicial review of Constitutionality of a statute (vide Govt. of A.P. vs. Smt. P. Laxmi Devi (2008) 4 SCC 720).

31. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India.”

5.4. Neither of the circumstances mentioned above are applicable in the present case. Furthermore the prayers sought by the petitioner in the main petition are such which can be decided only by the Commission. The present case is a case to be adjudicated by the Commission and not an issue which can be adjudicated by way of arbitration. The Petitioner has sought for direction against the Respondents directing to allow usage of Naphtha as an alternate fuel or alternatively payment of fixed charges on a plant availability basis by the Respondent. The same can be adjudicated only by the Tribunal (Commission).

5.5. In the present circumstances the matter cannot be referred to arbitration and the above petition has to be dismissed so as the Commission would adjudicate the main petition.

5.6. If the present petition is allowed, it would amount to contempt as well circumventing the undertaking given to the Hon'ble court.

5.7. The very cause title of the petition shows that the petition falls under ambit of 86 (1) (f). The cause title name of the petition reads as follows:-

“Petition under 86 (1) (f) of the Electricity Act, 2003, READ with Rules 32 & 48 of the TNERC Conduct of Business Regulations”

5.8. The entire issue regarding the constitution of the Commission is pending before the Hon'ble Supreme Court and posted to 26th of October 2017. In such circumstances, it would be appropriate to hear and decide the main petition only after the matter is decided by the Hon'ble Supreme Court. Moreover there are many such other petitions pending adjudication and as such there is no urgency for adjudicating the main petition by referring it to arbitration, moreso when the Hon'ble Supreme Court is likely to hear the matter pending before it.

5.9. The relief that the Petitioner is seeking, if permitted would amount to contempt and instead the Petitioner could have impleaded itself before the Hon'ble Supreme Court and seek for a direction for adjudication of their main petition. It is submitted that as such the above petition is devoid of merits and liable to be dismissed.

6. Findings of the Commission:-

We have heard the arguments of the learned counsels for both sides and gone through their Written Submissions.

6.1. Consequent to the orders of the Hon'ble High Court of Madras in its order dated 31.07.2017 in W.M.P.No.5518 of 2017 in W.P.No.5196 of 2017 directing the Commission to hear the petitioner herein and pass orders in the matter of referring the dispute in DRP No.13 of 2012 for arbitration, the matter is taken on the file of the Commission and order is passed as below.

6.2. Before proceeding to pass orders in the subject matter, it is necessary to trace the background leading to the present direction of the Hon'ble High Court. The writ petitioner before the Hon'ble High Court namely, M/s.Lanco Tanjore Power Company Limited is also a petitioner before the Commission in D.R.P.No.13 of 2012 which was filed for seeking directions to TANGEDCO for permitting the usage of Naptha as an alternate fuel. The said request was made by the Petitioner in view of the reduction in the supply of gas from Gas Authority of India Limited (GAIL).

6.3. Inasmuch as the matter pertaining to the jurisdiction of the Commission to hear the petitions relating to the dispute resolution is sub-judice before the Hon'ble High Court of Madras and Hon'ble Supreme Court consequent to the appointment of the Chairperson of the Commission and an undertaking has been given to the Hon'ble High Court of Madras not to hear the DRPs until the issue attains finality, the Commission has not taken up the DRPs for more than 3 years. In view of the same, the DRP No.13 of 2012 could not be taken up and disposed. In the meanwhile, the

petitioner filed an I.A. in DRP No.13 of 2012 to refer the matter for arbitration and the said I.A. is also pending before the Commission in view of the pendency of subject matter before the Hon'ble Supreme Court on the issue of jurisdiction as to the disposal of DRPs by the Commission. In view of the pendency of both the DRP No.13 of 2012 and the I.A. therein before the Commission, the petitioner herein moved the Hon'ble High Court of Madras in W.P.No.5196 of 2017 and the Hon'ble High Court passed an order to the effect that the question as to the referral of the matter for arbitration shall be heard by the Commission and shall pass in accordance with law within a period of six weeks from the date of receipt of a copy of the order of the Hon'ble High Court. The order was received by the Commission on 28.08.2017.

6.4. In the backdrop of the above sequence of events, the Commission, in order to comply with the directions of the Hon'ble High Court of Madras has taken the matter referred by the Hon'ble High Court on its file and heard the parties to the case on 19.09.2017. While the counsel for the petitioner vehemently contested that there is no bar in referring a dispute for arbitration even in the face of a self-imposed undertaking not to hear the DRPs, the counsel for TANGEDCO responded by contending that the matter pertaining to the appointment of the Chairperson of the Commission will be coming up before the Hon'ble Supreme Court on 25th October, 2017 and if the present I.A. is allowed, it would amount to contempt and therefore, orders need not be passed until the Hon'ble Supreme Court finally decide the issue regarding the Constitution of the Commission.

6.5. However, considering the fact that there is an order by the Hon'ble High Court directing the Commission to examine the question of referring the matter for

arbitration, the Commission deems it fit to examine such option as the issue pertaining to appointment of Chairperson stands on a different footing and the present issue is concerned with referral for arbitration and not adjudication. Though Commission is of the view that the power to refer the matter for arbitration is intrinsic part of dispute resolution under section 86(1)(f) and the question of referral for arbitration cannot be decided without first sitting under adjudicating jurisdiction under section 86(1)(f) in which there is a self-imposed bar, still the Commission is of the view that there is a need to comply with present direction of the Hon'ble High Court and bearing the same in mind, it would be appropriate to see whether the referral for arbitration can be resorted to without detriment to the self-imposed undertaking.

6.6. In line with the same, the Commission has given adequate thought and consideration on the issue of referral of the dispute for arbitration. The Commission has also given deep consideration to the rival submissions on this issue. The most crucial question which arises for consideration is whether there is any binding direction from the Hon'ble High Court to the effect that the Commission shall refer the matter for arbitration. However, in our view, we see no such binding direction from the orders of the Hon'ble High Court. From the language of the orders of the Hon'ble High Court under reference in para-2 above, we find that the Commission has been set at liberty to examine the question of referral of a dispute for arbitration in accordance with law and there is no binding direction to refer the matter for arbitration. In other words, we have to state that the Hon'ble High Court did not go into the merits of the prayer for referral of a dispute for arbitration but gave liberty to the Commission to examine the issue in accordance with the law after giving an opportunity of hearing to all interested parties.

6.7. Having said so, we are now inclined to examine as to whether a referral of a dispute can be made as sought for by the petitioner. There is no quarrel on the point that the State Commission has the powers to adjudicate the dispute or refer a matter for arbitration under section 86(1)(f). The judgement of the Hon'ble Apex Court has settled the issue once for all and therefore, the only question before the Commission is whether the referral for arbitration is necessitated in the present case and whether such referral would be in line with the decision of the Hon'ble Supreme Court. In this connection, we have to necessarily refer to the observations of the Hon'ble Apex Court in the Gujarat Urja's case in Para-31 which has been re-produced in the order of the Hon'ble High Court under reference also. The observation of the Hon'ble Supreme Court would make it patently clear that there are only two circumstances under which referral for an arbitration can take place, namely, (1) the Commission must not have time to decide the dispute by itself (2) the dispute must involve a highly technical point which even the State Commission may not have the expertise to decide. Viewed from the said angle, we are of the considered opinion that time is not a constraint insofar as the disposal of disputes are concerned and therefore, we cannot agree to the referral of the present dispute for arbitration on that score. The disputes are pending before the Commission not because of time constraint but due to self-imposed bar in a legal proceeding. On the issue of referral of matter for arbitration on technical point too, we have to observe that there is no technical point in the present DRP which can be said to be involving a question which this Commission cannot decide. After all, the issue is nothing but substitution of naphtha as a fuel instead of gas. This, by no stretch of imagination, can be said to be beyond the expertise of the Commission. If the prayer is allowed on this score, we are afraid, we will be undermining the capacity of the Commission by ourselves to which

we are unable to subscribe. Even assuming that the matter can be referred to Arbitration on the basis of the general observations of the Hon'ble Supreme Court that there may be various other considerations for which the State Commission may refer the matter for arbitration, still it must be said that the expression "various other considerations" as occurring in the order of the Hon'ble Supreme Court would not cover legal bar which has arisen out of the undertaking given to the court and in all probability such expression would refer only to any other considerations in the course of the functions of the Commission under the Electricity Act, 2003 and not otherwise.

6.8. In the totality of the given circumstances, we are of the firm view that the referral for arbitration of the dispute in the present DRP cannot be ordered by the Commission. As rightly contended by the Counsel for TANGEDCO, the remedy for the petitioner lies before the Supreme Court by way of impleadment in the SLP No.17879 of 2014 and other connected petitions. We are constrained to observe that we are unable to be of help to the petitioner though we sympathise with the plight of the petitioner. We are conscious of the fact that the number of DRPs pending before the Commission are mounting and we hope that the issue attains finality soon. In the result, the prayer for referral of the Dispute in DRP No.13 of 2012 is dismissed. No costs.

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission