

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 35 of 2008

Dated: 9th January, 2009

Present: Hon'ble Mr. Justice M.Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

Uttar Pradesh Power Corporation Ltd.,
Through the Chairman,
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226 001

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Appellant

Vs.

1. Central Electricity Regulatory Commission,
Core-3, 6/7 Floor, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi-110 003
Through the Secretary,
2. M.P. Power Trading Company Limited,
Through the Chairman,
Shakti Bhawan, Rampur,
Jabalpur (MP) 482008
3. The Principal Secretary, Energy Department,
Government of Uttar Pradesh, Bapu Bhawan,
Lucknow-226 001.
4. Uttar Pradesh Jal Vidyut Nigam Limited
Through the Chairman,
Shakti Bhawan, 14, Ashok Marg,
Lucknow-226001

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Respondents

Counsel for the Appellant : Mr. Sitesh Mukherjee

Counsel for the Respondent(s): Mr. G. Umopathy for Resp.2

JUDGMENT

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

Uttar Pradesh Power Corporation Ltd. (UPPCL) the Appellant herein has filed the present appeal challenging the order dated 27/8/08 of the Central Electricity Regulatory Commission (CERC) in the petition filed by the Madhya Pradesh Power Trading Company (MPPTC), the Respondent herein rejecting the preliminary objections regarding jurisdiction raised by the Appellant and holding that the Central Electricity Regulatory Commission (CERC) has got jurisdiction to adjudicate the matter and directing the Appellant to release the legitimate share of the supply of energy to Madhya Pradesh Power Trading Company.

2. This Tribunal entertained this Appeal and ordered notice. However, no stay was granted. As there was no stay, the Central Commission proceeded to hear the parties on merits in the main petition and passed the final order dated 2/11/08 directing for payment of compensation by the Uttar Pradesh Power Corporation Ltd., successor to the erstwhile Uttar Pradesh State Electricity Board (UPSEB) to the Madhya Pradesh Power Trading Company, the Appellant and the successor to the Madhya Pradesh Electricity Board. Against this order, the Appellant has filed another Appeal in Appeal No. 151 of 2008. The said Appeal is pending.

3. In this Appeal, we are only concerned with the question as to whether the finding rendered by the Central Commission (CERC) in the Interim Order dated 27/2/08, holding that the Central Commission has got a jurisdiction to adjudicate the matter is correct or not.

4. Let us first consider the Facts of the case:

5. Rihand Hydel Power Station (RHPS) and Matatila Hydel Power Station (MTPS) located in Uttar Pradesh were developed by the erstwhile UP State Electricity Board, the predecessor of the Appellant, the Uttar Pradesh Power Corporation Ltd. (UPPCL). During July 1963, the Central Zonal Council under the Ministry of Home Affairs (MHA) decided that the Madhya Pradesh Electricity Board (MPEB), the predecessor of Madhya Pradesh PTC will have 15% share of energy from the RHPS and 1/3rd share of energy from the MHPS situated in U.P. State from year to year at cost + 5% to be worked out by the Zonal Council. In 1997, it was decided that in case the MP Electricity Board was not provided with its entire share of power, the balance units would be treated as overdrawal by the Uttar Pradesh State EB and the compensation would be paid to the Madhya Pradesh State EB. This arrangement was accepted and acted upon by the Appellant.

6. Though the power supply from Matatila Hydel Power Station (MHPS) against the share of Madhya Pradesh was made intermittently, there was no power supply from the Rihand Hydel Power Station (RHPS) from November 1992 onwards. A series of high-level meetings were held between both the State Governments to resolve the issue of supply of energy and payment of compensation. It was decided in the meeting held in 1993 by both Governments that all amounts payable by UP Electricity Board to the MP Electricity Board would be subject to the interest to the borrowing rate of MPEB + 2%.

7. Another meeting was held between the two Governments in 1994. In that meeting, the Government of M.P. requested the Government of U.P. to ensure the power supply from U.P. Though there were a series of meetings, there was no fruitful result.

8. Therefore, the Madhya Pradesh PTC was constrained to file a petition No. 107/07 before the Central Commission praying for direction to Uttar Pradesh to release the legitimate share of power supply to Madhya Pradesh from the RHPS (45 MW) and MPHS (10 MW) and to direct the UP Power Corporation Ltd. to pay compensation amount with interest.

9. During the pendency of the said petition before the Central Commission, the Appellant herein, UPPCL raised the preliminary objection through the petition stating that the Central Commission has no jurisdiction to entertain the petition as it has only powers to adjudicate upon disputes in matters connected with clauses 79(a) to (d) and 79(1)(f) of the Act and the issue in question does not fall under these Clauses.

10. The Commission, in order to decide the question relating to the preliminary objection, heard the arguments from both the parties with reference to its jurisdiction. Ultimately, by the interim order passed on 27/2/08, the Central Commission held that it has got jurisdiction to regulate inter-state transmission as the issue would fall under Section 79(1)(c) of the Act and directed the Appellant to restore the share of power to Madhya Pradesh through the mechanism of Inter-Regional Exchange. Aggrieved over this decision, the present Appeal has been filed.

11. Both the Counsel, for Appellant as well as the Respondent were heard at length.

12. The gist of the contentions urged by Shri Sitesh Mukherjee, the Learned Counsel for the Appellant assailing the order impugned with regard to jurisdiction is as follows:

“The finding given by the Central Commission holding that it has got the jurisdiction as the dispute is with regard to the matter connected with inter-State transmission of electricity as per Clause 79(1)(c) of the Act, is not correct for the following reasons:

- i. The transaction involves supply of electricity. Inter-State Transmission involves the conveyance of electricity from one State to another as defined in Section 2(36) of the Electricity Act. As per Section 2(74), transmission means ‘the conveyance’. ‘Supply’ is the sale of electricity to a licensee or a consumer. The word ‘supply’ means sale of electricity to a licensee or a consumer as per Section 2(70) of the Act. So, the activity of transmission as per Clause 79(1)(c) is different from that of supply as defined in Section 2(70) of the Act.**
- ii. The present matter involves the purchase of power and supply. Thus, it is a trading activity and not an Inter-State activity. Both the UP Power Corporation Ltd. and the MP Power Trading Company Ltd. (MPPTC) are trading licensees. So, this dispute does not fall within Section 79(1)(c) of the Act. On the other hand, the dispute in question is related to the sale of electricity. Since the question of Inter-State Transmission of electricity does not arise, the Central Commission has no jurisdiction to deal with the situation which is not specifically included in Section 79(a) to 79(d), so as to attract Section 79(1)(f) of the Act.”**

13. Refuting the above points, the Learned Counsel for the Respondent No.2, Shri G.Umapathy, while justifying the Order impugned would make the following reply:

- 1. “The dispute in this case arose due to non-supply of power i.e. Madhya Pradesh’s share of power from the Rihand Hydel and the Matatila Hydel Power Stations which are located in Uttar Pradesh, thus violating the agreements entered into between the two States. Since**

the matter related to Inter-State Transmission of Electricity, the matter is within the jurisdiction of the Central Commission u/s 79(1)(c) and 79(1)(f) of the Act.

2. ***The issue has already been settled in high-level meetings of the Central Zonal Council held at Nainital on 11/10/69, attended by the Hon'ble Chief Ministers of both UP and MP, and also by the Home Minister of the Union Government. Both the States accepted that M.P. has a legitimate share of 15% from the Rihand Hydrel Power Station and one-third (1/3rd) share from the Matatila Hydrel Power Station, at cost plus (+) 5% situated in U.P. and the said agreement was acted upon by both the States. In the meetings held in September 2005 and June 2007 at Lucknow, the UP Power Corporation Ltd. (UPPCL) agreed to pay compensation amount after the reconciliation of accounts against the retention of Madhya Pradesh's share of power from the Rihand and Matatila Hydrel Power Stations respectively; and supply of additional 15% power to Madhya Pradesh to clear the backlog. This is not the case of mere sale of electricity, but it is the supply of the share of power on cost, which has been agreed upon by Uttar Pradesh as the right of Madhya Pradesh in high level meetings. Therefore, the present case is related to Inter-State Transmission of Electricity, and consequently, the same falls under the ambit of the Central Commission's jurisdiction under Clause 79(1)(c) and 79(1)(f) of the Act, and as such, the Impugned Order is perfectly justified."***

14. Both the Counsel have also cited a number of authorities to substantiate their respective pleas for our consideration.

15. We have given our thoughtful consideration to the respective submissions made by the learned counsel for the parties on either side and also gone through the Impugned Order passed by the Central Commission and other records.

16. The main contention of the Learned Counsel for the Appellant is that the Central Commission does not have jurisdiction to deal with the matter u/s 79(1)(c) of the Act, as the dispute does not relate to regulation of Inter-State Transmission of Electricity and it

is only a transaction of sale of electricity between two parties who are trading licensees.

17. On the other hand, it is the contention of the Learned Counsel appearing for Respondent No.2, the MP Power Trading Co. that this is not a case of sale of electricity, but it is a case of the share of supply of electricity to be given by U.P. to M.P. as per the agreements entered into between these two Governments, and consequently, it attracts Clause 79(1)(c) of the Act which deals with the regulation of Inter-State Transmission of Electricity.

18. In view of the rival contentions referred to above, it would be appropriate to quote the relevant Sections, namely Section 79(1)(a) to (d), and Section 79(1)(f). The following is the provision:

Section 79(1): ***“The Central Commission shall discharge the following functions, namely:***

- (a) to regulate the tariff of generating companies owned or controlled by the Central Government.***
- (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;***
- (c) to regulate the Inter-State transmission of electricity;***
- (d) to determine tariff for Inter-State transmission of electricity;***
- (e)***
- (f) To adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute or arbitration;***

19. As indicated above, the finding given by the Central Commission accepting the contention put forward by the Counsel for the Madhya Pradesh PTC is that the issue falls under Section

79(1)(c) as it related to the regulation of Inter-State Transmission of Electricity, thereby, the Central Commission has been vested with the powers to deal with the matter u/s 79(1)(f) of the Act.

20. A perusal of the Sections quoted above would indicate that the Central Commission can adjudicate on the dispute relating to any of the matters falling under Clauses 79(a) to (d). Therefore, it is necessary to examine as to whether the dispute would relate to the matter falling under Section 79(1)(c) attracting Section 79(1)(f).

21. For adjudication of the said dispute, it is necessary to consider the question as to whether it is a mere sale between two trading companies as projected by the Counsel for Appellant, or it is for supply of the share of power as per agreement between the Governments of M.P. and U.P. Of course, the UP Power Corporation denies the existence of any formal agreement, but as correctly indicated in the Impugned Order there are umpteen number of public records to indicate that the two States namely U.P. and M.P. had agreed for sharing of electricity generated at the Rihand and Matatila Hydel Power Stations in U.P., with M.P. This is quite evident from the records placed before this Tribunal.

22. As a matter of fact, the UP Power Corporation itself has filed a reply before the Central Commission admitting that under the transfer scheme of the U.P. Government, M.P. was to be supplied the entire energy generated by the above-referred two stations located in U.P., on whom rested the responsibility of honouring the commitment for ensuring supply of the share of energy to M.P. The transfer scheme as admitted by the U.P. Government is statutory in nature as per the notification issued by that U.P. State Government, which enjoins upon the Appellant to honour the commitment of the State Government for supply of the agreed

share of power generated from the aforesaid stations to Madhya Pradesh.

23. It is not the case of the State of U.P. that it did not agree to share the power in the above proportion with the State of M.P. In the light of the above factual situation, it is now to be found out whether the supply of share of power by U.P. to M.P. involves inter-state transmission as referred to in Clause 79(1)(c) of the Act.

24. The Inter-State Transmission System has been defined under Section 2(36) of the Act, which is as under:

Section 2(36):

- i. any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State.*
- ii. The conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
- iii. The transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.*

25. On a perusal of Section 2(36), it is clear that any system used for conveyance of electricity by means of main transmission lines from the territory of one State to another State qualifies to be categorized as Inter-State transmission system. It therefore, follows that the conveyance of electricity from the territory of one State to the territory of another States amounts to inter-State transmission.

26. The powers of the Central Commission under Sub-Clause is to regulate Inter-State Transmission of Electricity i.e. the power to rule, direct and control all other ancillary matters connected with

Inter-State Transmission of Electricity. In the present case, as indicated above, the supply of electricity from the two power stations in U.P. is made to M.P. as its share and the same is not disputed. When such is the case, it cannot be contended that the power which flows from the two power stations in U.P. to the State of M.P. is not in the range of inter-State transmission.

27. Prior to the re-organization of the U.P. State Electricity Board (UPSEB), the generation, transmission and distribution were being performed by the UPSEB as a deemed licensee. In the year 2001, under the transfer scheme of the Govt. of U.P., the State Government and the Appellant herein was vested with the transmission and generation function along with the duties and obligations of the erstwhile UPSEB. Similarly, till May 2005, the function of generation, transmission etc. was being performed in the State of M.P. by the Madhya Pradesh Electricity Board (MPEB) as a deemed licensee. Thus, the function of the Electricity Board performing the function of generation, transmission and distribution of electricity, prior to its reorganization in U.P., has now been vested with the Appellant namely the UP Power Corporation Ltd., and the MP Power Trading Company in M.P. by their respective State Governments.

28. As pointed out in the earlier paragraphs, the Madhya Pradesh PTC has a share of supply of electricity from the two power stations, namely the Rihand and Matatila Hydel projects, for 45 MW and 10 MW respectively. By virtue of the agreement between the States of U.P. and M.P. and the various minutes of meetings held by the officials of both the State Governments, the supply of power from the Rihand and Matatila Hydel Projects have been made by U.P. to M.P. Those two power stations located in U.P. fall within the ambit of Inter-State Generating Stations.

29. As per the MOU dated 18/12/2000 which came into effect from 24/12/01, the agreed share of energy generated by the Rihand and Matatila Projects in U.P. are to be supplied by the Appellant. Hence it is the responsibility of the Appellant to honour that commitment to supply power to M.P. as its share in generation from the above two projects.

30. In the above context, it would be worthwhile to refer to the Clause 2(72) of the Act, whereby the term *Inter-State Transmission Lines* has been defined as follows:

Section 2(72) "Transmission Lines" – means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switchgear and other works necessary to and used for the control of such cables and overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switchgear and other works.

31. In the light of the above definition, if we look at the records relating to the agreements and minutes of meetings, it is evident that the allocation of power from the two projects in U.P. to M.P. is required because the land, trees, forests, houses etc. in the Rewa District of M.P. got submerged. Therefore the State of U.P. and its organs were obliged to honour the agreement between the two States by ensuring the supply of power from the above-referred two power projects located in U.P.

32. When such being the situation, the contention of the Learned Counsel for the Appellant that both are trading companies and that it is merely a sale and supply of energy is not tenable, especially in the light of the Govt. of M.P.'s notification dated 3/6/06 according to which the rules were made for regulating transfer and vesting of

funds relating to bulk purchase and bulk supply of electricity along with related agreements. Therefore, the MP Power Trading Company is the successor in interest of the erstwhile MPEB, the State Electricity Board for looking after the rights and liabilities of bulk power sale and purchase made earlier by the erstwhile electricity Boards of the respective States.

33. As indicated above, as per Clauses 2(36) and 2(72) respectively, any system used for conveyance of electricity by means of the main transmission lines from the territory of one State to the territory of another State qualifies to be categorized as Inter-State Transmission System. It follows that the conveyance of electricity from the territory of one State to the territory of another State amounts to Inter-State Transmission.

34. As the power from the two power stations situated in U.P. has to be carried outside that State, i.e. to the State of M.P. by using the transmission lines, it falls within the scope of Inter-State Transmission System.

35. As referred to in the order impugned, the geographical location of the power stations in question does not decide the jurisdiction. The present case is a case where the Appellant has failed to honour and implement the binding agreement for the supply of energy to the State of M.P.

36. As a matter of fact, the erstwhile UP State Electricity Board, abiding by the agreements entered into between the two States earlier had paid an amount of Rs. 28.61 crores as per the demand of compensation by the State of M.P., due to non-supply of M.P.'s share of power from the Rihand and Matatila Hydel projects to the MPEB during the period 1992-2000. It is also an admitted fact that in the meetings held in 2005 and 2007 at Lucknow, the

Appellant UP Power Corporation Ltd. agreed to pay the compensation amount after reconciliation of the amount against retention of M.P.'s share from the two power stations. These things show that the agreement between these States have been acted upon.

37. As pointed out above, this is not the case of mere sale of electricity, but this is a case of share of supply of power on cost, as per the agreement between the States of U.P. and M.P. If there is no supply of power by U.P. to M.P. of its legitimate share from the Rihand and Matatila Hydel Power Stations as per the agreement entered into between the two States, the flow of expected quantum of power through the Inter-State Transmission system will be affected.

38. Under those circumstances, it has to be safely concluded that the finding rendered by the Central Commission to the effect that the issue falls under Clause 79(1)(c), which attracts Section 79(1)(f) and as such the Central Commission alone has got jurisdiction to deal with the case is, in our view, perfectly justified and as such, no interference is called for.

39. Though Both the Counsel have cited several authorities to substantiate their pleas, we felt it unnecessary to refer to those decisions as the facts and issues raised in this Appeal are different from the facts and issues in the said decisions.

40. In the light of the above conclusion, the Appeal assailing the impugned order regarding jurisdiction is liable to be dismissed and is accordingly dismissed. There is no order as to costs.

(A.A. Khan)
Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 9th January, 2009.