'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9212 OF 2019
(Arising out of SLP (C)No. 9750 of 2018

HINDUSTAN ZINC LIMITED (H.Z.L.) **Appellant (s)**

VERSUS

AJMER VIDYUT VITRAN NIGAM LIMITED **Respondent(s)**

J U D G M E N T

R. F. NARIMAN, J.

Leave granted.

The present appeal raises an important question as to the scope of arbitration proceedings under the Electricity Act, 2003 (hereinafter referred to as 'Electricity Act' for brevity), in particular, Section 86(1)(f) thereto read with Section 158.

The skeletal facts necessary to decide this case are as follows:

The appellant before us, Hindustan Zinc Limited, has four high tension electricity connections for its units at Chanderiya, Debari, Aghucha and Dariba, for which four

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contracts with the respondent were entered into for purchase of electricity.

The appellant also set up a captive power plant of 154 MW at Chanderiya, which was commissioned in February, 2005, and synchronized with the Rajasthan Vidyut Prasarran Nigam Limited Grid. Short term open access to transmission and distribution systems of this Grid was sought under the Regulations and requisite permission was obtained. Thereafter, the appellant entered into three open access agreements with the respondent on 10.03.2005 for wheeling of power from its captive power plant on the respondent's distribution system to the three units that were owned by it which were the units at Aghucha, Debari and Dariba respectively. Open access commenced on 24.03.2005 and the power generated at its captive power plant was injected at 132 KV and 220 KV at the grid substations at Chittorgarh from where it was transmitted on the respondent's transmission system and then supplied to the appellant's three units.

The dispute that arose between the parties was as to the unscheduled interchange charges which become payable under Clauses 8 and 9 of the three agreements dated 10.03.3005.

Clauses 8 and 9 read as follows:

"(8) Scheduling:

The following procedure is agreed upon by the parties for scheduling open access power at generation and drawl at the receiving point by Open Access Consumer:

……..

……..

(c) The Open Access Consumer at 10 AM each day shall furnish to Ajmer Discom schedule of drawl on 15 minute block basis which it intent to draw against the open access and on 15 minute block basis schedule against contract demand of existing connections, if any, separately. The drawl schedule of open access power shall be limited to the availability shown by the supplying generator in its schedule.

9. Settlement

(a) The parties agree that the settlement of mismatch between the schedule injection and actual injection by the generating station injecting open access power into State Transmission System of by the generating station embedded in the Distribution System for each 15 minute block shall be done in following manner.

(i) Unschedule generation not exceeding 5% of the generation/injection scheduled in any 15 minute block at UI price specified by the Commission for the state from time to time.

(ii) Generation exceeding 5% of the generation/injection scheduled in any 15 minute block shall be considered as zero and no UI charges shall be receivable by the generating station for such excess generation.

(iii) The mismatch between the schedule generation and actual generation shall be determined from the meter data down loaded through MRI and 15 minute block-wise schedule furnished for each day during the billing month.

……..

…….

(c) The mismatch in total drawl scheduled by consumer against open access and against existing contract demand and total actual drawl in each 15 minute block shall be done in following manner:

(i) Un-schedule drawl not exceeding 5% of the total schedule made by the consumer against open access and existing Discom connections in any 15 minutes block shall be priced at UI rate and payable/receivable by the Open Access Consumer.

(ii) The balance mismatch in scheduled and actual drawl shall be paid by the Open Access Consumer to the Ajmer Discom at the mutually agreed rates and in absence of any agreement such drawl would be treated as temporary supply and shall be charged the tariff for temporary supply as contained in Part III of the "Tariff for Supply of Electricity 2004": booklet for the applicable category.

(iii) The mismatch between the schedule drawl and actual drawl shall be determined from the meter data down loaded through MRI and 15 minute block wise schedule furnished for each day during the billing month.

It will be seen that each of the three units is described as an Open Access Consumer and that if generation exceeds 5% of the injection that is scheduled the day previous in any 15 minutes block, mismatch between scheduled generation and actual generation will then either be determined at mutually agreed rates or the excess supply will be treated as temporary supply and charged the tariff for temporary supply as contained in Part III of the Tariff for Supply of Electricity 2004 booklet for the applicable category. (If, however, mismatch does not exceed 5%, it

shall be priced at the unscheduled interchange charges rate that is either payable or receivable by the open access consumer.)

When the disputes arose between the parties, the appellant and the respondent, by two orders passed by the Rajasthan Electricity Regulatory Commission dated 22.05.2006 and 23.06.2006, the Commission stated that it will itself decide the dispute between the parties.

However, by order dated 12.02.2007, the Commission appointed an Arbitrator under Section 86(1)(f) read with Section 158 of the Electricity Act, referring the following dispute to arbitration:

> **"…….to resolve the dispute rising out of the Open Access availed by M/s. HZL from its Captive Power Plant at Chanderia [Chittorgarh] to its other industrial units located within the area of AVVNL in the matter of UI charges billed by AVVNL. The Petitioner shall file an application along with complete details before the Arbitrator within one week from the date of receipt of the notice from the Arbitrator. The Arbitrator should endeavor to accord his award within a period of 4[four] months from the date of this Order. In all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996."**

By Award dated 25.08.2007, the learned Arbitrator raised 12 issues between the parties and struck down Clause 8(c) and 9 of the open access agreements dated 10.03.2005, as a consequence of which, the unscheduled interchange charges would be billed as per the agreements that were

earlier entered into between the parties.

This Award was challenged before the Commercial Court in a Section 34 petition under the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'Arbitration Act' for brevity), which was dismissed vide the Commercial Court's order dated 25.02.2017.

A Section 37 appeal was then decided vide the impugned judgment dated 05.04.2018 by the High Court of Judicature for Rajasthan, Jaipur Bench.

The High Court held that, in the peculiar facts of this case, the captive generating plant of the company situated at Chanderiya was to use, through open access, the distribution system of the respondent to wheel power to three of its own units which were situated at Aghucha, Debari and Dariba as aforestated. Given this fact, and given the fact that the three agreements were entered into with these three units, the High Court held that the hat worn by the appellant-company, which contained all four units, was that of an open access consumer and not that of a generating company. As a result of which, Section 86 (1)(f) of the Electricity Act would not be attracted. Consequently, the issue being one of inherent lack of jurisdiction, the High Court reversed the order of the Commercial Court, Ajmer, and set aside the entire Award stating that the dispute raised between the parties in the

present case would be outside Section 86 of the Electricity Act altogether. The High Court also went on to discuss the merits of the Award and, on several grounds, set aside the Award as being perverse on merits as well.

We have heard detailed arguments from Shri C.S.Vaidyanathan, learned senior counsel appearing on behalf of the appellant, and Shri Puneet Jain, learned counsel for the respondent.

Section 42 of the Electricity Act, 2003, is relevant for the purpose of discussion and set out hereunder:

> **Section 42. (Duties of distribution licensee and open access): --- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.**
>
> **(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:**
>
> **Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:**
>
> **Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :**
>
> **Provided also that such surcharge and cross subsidies shall be progressively reduced in the**

manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section (5), may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the

> **consumer within such time and in such manner as may be specified by the State Commission.**
>
> **(8) The provisions of sub-sections (5),(6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections."**

Section 86 which deals with the functions of the State Commission, and states as follows:

> **Section 86. Functions of State Commission.-(1) The State Commission shall discharge the following functions, namely: -**
> **(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:**
>
> **Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;**
>
> **……**
> **……**
>
> **(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;**

The bone of contention revolves around Section 86(1)(f).

Shri Vaidyanathan, learned senior counsel for the appellant, has argued that the challenge to the Award was only on merits before the learned Commercial Court, and no challenge was raised stating that the Arbitrator's appointment itself would be without jurisdiction, both the

parties having agreed to the order dated 12.02.2007 to refer the matter to arbitration. However, the said issue was argued and taken up before the High Court in First Appeal under Section 37 of the Arbitration Act.

We are of the view that it is settled law that if there is an inherent lack of jurisdiction, the plea can be taken up at any stage and also in collateral proceedings.

This was held by this Court in *Kiran Singh and Others* v. *Chaman Paswan and Others'* (1955) 1 SCR 117 as follows:

> **"…… It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was *coram non judice,* and that its judgment and decree would be nullities."**

Therefore, it is a little difficult to countenance Shri Vaidyanathan's argument that having consented, the respondent cannot now turn around and challenge the very appointment of the Arbitrator as being invalid and without jurisdiction.

Coming now to Section 86 of the Act, it is clear that

the adjudication upon disputes can only be between licensees and generating companies and not between licensees and consumers, which is provided for in an open access situation by Section 42.

We may also hasten to add that under the Open Access Regulations of 2004, clause 29, in particular, gives a three-tier hierarchy of challenge when it comes to disputes raised between distribution licensees and consumers in relation to matters *qua* open access.

This is quite apart from the separate mechanism provided in Section 42(6) of the Electricity Act, where a representation for redressal of grievances may be made to the Ombudsman appointed or designated by the State Commission, which, as has been pointed out by Shri Puneet Jain, has already been set up.

The matter is no longer *res integra*. This Court, in *Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.* (2008) 4 SCC 755 had occasion to construe the language of Section 86 (1)(f) of the Act of 2003, in the following terms:

> **26. It may be noted that 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 'Principle of Statutory Interpretation' 9th Edition, 2004 page 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.**

What becomes clear on a reading of this judgment is that the expression 'and' occurring in Section 86(1)(f) must be read as 'or'. But this is only because, as has been pointed out in the judgment, the State Commission cannot both decide the dispute itself and also refer it to an Arbitrator. Otherwise also, reference of any dispute for arbitration can only be between the licensees and generating companies and not otherwise.

This being the case, the High Court is right in stating that the Arbitrator could not, in law, have been appointed by the State Commission under Section 86 of the Electricity Act. The Award based on such appointment would

be *non est* in law.

However, the High Court did not stop with a finding on this issue, but went on to discuss the merits of the Award. We may only state that in case the appellant wishes to avail of any other remedy in law, none of the observations made by the High Court will stand in its way.

The appeal stands disposed of accordingly.

……., J.
[ROHINTON FALI NARIMAN]

……., J.
[ANIRUDDHA BOSE]

……., J.
[V. RAMASUBRAMANIAN]

New Delhi;
December 04, 2019.

CIVIL APPEAL NO. 9212 OF 2019
(Arising out of SLP (C)No. 9750 of 2018

ITEM NO.2 COURT NO.4 SECTION XV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No. 9750/2018

(Arising out of impugned final judgment and order dated 05-04-2018 in DBCMA No. 2803/2017 passed by the High Court of Judicature for Rajasthan at Jaipur)

HINDUSTAN ZINC LIMITED (H.Z.L.) Petitioner(s)

VERSUS

AJMER VIDYUT VITRAN NIGAM LIMITED Respondent(s)

(FOR ADMISSION and I.R.)

(With IA No. 54985/2018 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT, IA No. 55120/2018 - EXEMPTION FROM FILING O.T., IA No. 54986/2018 - EXEMPTION FROM FILING O.T., IA No. 70846/2018 - FOR PLACING ON RECORD SUBSQUENT EVENTS and IA No. 55119/2018 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date : 04-12-2019 This matter was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE ROHINTON FALI NARIMAN
HON'BLE MR. JUSTICE ANIRUDDHA BOSE
HON'BLE MR. JUSTICE V. RAMASUBRAMANIAN

For Petitioner(s)
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Mr. P. S. Sudheer, AOR
Mr. Rishi Maheshwari, Adv.
Ms. Anne Mathew, Adv.
Mr. Bharat Sood, Adv.
Ms. Shruti Jose, Adv.

For Respondent(s)
Mr. Puneet Jain, Adv.
Ms. Christi Jain, Adv.
Mr. Harsh Jain, Adv.
Ms. Ankita Gupta, Adv.
Mr. Harshit Khanduja, Adv.
Mr. Abhinav Deshwal, Adv.
Mr. Pankaj Sharma, Adv.

Ms. Pratibha Jain, AOR

UPON hearing the counsel the Court made the following

O R D E R

Leave granted.

The appeal stands disposed of in terms of the signed reportable judgment.

Pending applications stand disposed of.

(NIDHI AHUJA)	**(NISHA TRIPATHI)**
COURT MASTER (SH)	**BRANCH OFFICER**

[Signed reportable judgment is placed on the file.]