



2025:DHC:9650



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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI****BEFORE****HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV**+ **O.M.P.(I) (COMM.) 213/2025**

Between: -

**RENEW WIND ENERGY (AP2) PVT. LTD.**

THROUGH MS. ABHILASHA KHANNA

REGISTERED OFFICE: 138 ANSAL CHAMBERS, BHIKAJI CAMA  
PLACE,

NEW DELHI – 110066

....PETITIONER

*(Through: Mr. Jayant Mehta, Sr. Advocate with Mr. Vishrov Mukherjee, Mr. Girik Bhalla, Ms. Sai Snigdha Nittala, Ms. Juhi Senguttuvan, Ms. Priyanka Vyas, Mr. Yashaswi Kant, Mr. Prayush Singh and Ms. Pallavi Arora Advocates, instructed by Trilegal.)*

AND

**SOLAR ENERGY CORPORATION OF INDIA**

THROUGH CHAIRMAN CUM MANAGING DIRECTOR,

REGISTERED OFFICE: 6TH FLOOR, PLATE – B, NBCC OFFICE  
BLOCK,

TOWER 2, EAST KIDWAI NAGAR, NEW DELHI.

....RESPONDENT

*(Through: Mr. M.G. Ramachandran, Sr. Advocate with Ms. Anushree Bardhan, Ms. Srishti Khindaria, Ms. Somya Sahni, Ms. Ritika Singh and Mr. Aneesh Bajaj, Advocates.)*

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Reserved on: 10.10.2025

Pronounced on: 03.11.2025  
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## JUDGMENT

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The petitioner, an energy “generating company” within the meaning of Section 2(28) of the Electricity Act, 2003 (hereinafter “**Electricity Act**”), has filed the instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter “**Arbitration Act**”) praying for an order restraining/injuncting the respondent, a “licensee” within the meaning of Section 2(39) of the Electricity Act, from unilaterally deducting amounts from the petitioner’s monthly invoices.

## **I. FACTUAL MATRIX**

2. The petitioner operates a 300 MW wind power project in Kutch, Gujarat. The respondent, Solar Energy Corporation of India (‘SECI’), is a Renewable Energy Implementing Agency (‘REIA’) designated by the Ministry of New and Renewable Energy (‘MNRE’).

3. The petitioner was selected by the respondent through a Request for Selection (‘RFS’) process and had executed a Power Purchase Agreement (‘PPA’) dated 23.05.2018 for the supply of 300 MW of power for 25 years from the Scheduled Commissioning Date i.e., 24.11.2019.

4. On 02.05.2025, SECI issued a notice to the petitioner alleging non-fulfilment of the minimum energy requirement of 946.08 MUs for the



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Financial Year 2024-25 and demanded, as compensation under Article 4.4.1 of the PPA, 75% of the cost of shortfall in energy terms, failing which, it claimed, the applicable amount would be deducted from the next month's energy invoice of the petitioner.

5. The petitioner states that the shortfall of generation to 632 MUs during FY 2024-25 occurred solely on account of *force majeure* events, which under Article 4.4.3 of the PPA, absolve the petitioner from liability of compensation. Apprehending coercive recovery before the constitution of the arbitral tribunal, the petitioner has approached this Court under Section 9 of the Arbitration Act seeking urgent interim protection by way of restraint against the operation of the impugned letter and any consequential deductions.

6. Upon issuance of notice, the respondent filed a comprehensive reply, raising several objections. The primary objection of the respondent pertains to the maintainability of the instant petition in light of Section 79(1)(f) of the Electricity Act.

7. For examining the maintainability of the present petition, this Court has analysed the referral and adjudicatory powers of the CERC. This Court has found that the instant petition is not maintainable on the ground that CERC has the exclusive power of referring disputes involving generating companies or transmission licensee for arbitration. The referral power of the CERC under Section 79(1)(f) of the Electricity Act, has been found to prevail over Section 11 and 8 of the Arbitration Act.

8. For the purposes of providing a comprehensive analysis, the



possibility of Section 94(2) of the Electricity Act acting as a statutory substitute to Section 9 of the Arbitration Act has also been explored. To provide guidance on considerations which ought to govern CERC's referral for arbitration, a claimant's right to seek a referral and the appropriateness of referring disputes for arbitration have also been examined.

9. Before delving into a substantive analysis of the above-narrated issues, the submissions made by the parties shall be detailed.

## **II. SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT**

10. Mr. M.G. Ramachandran, learned senior counsel appearing for the respondent contends that disputes concerning tariffs must be adjudicated by the appropriate commission, in this case, the Central Electricity Regulatory Commission ('CERC'). He further submits that only the CERC can refer such disputes to arbitration, if at all it is necessary. The submissions of Mr. Ramachandran may be summarised as under:

- (i) Article 4.4.1 of the PPA governs the right to contract capacity and energy, and stipulates that compensation for non-supply of minimum energy shall be determined by the appropriate commission/authority.
- (ii) Article 16.3.1 pertaining to dispute resolution provides that disputes relating to tariff determination, changes in tariff, or claims that could result in tariff changes must be adjudicated by the appropriate commission. He submits that this clause is broad in scope and covers the present dispute, rendering Article 16.3.2 (pertaining to arbitration) inoperative and non-est in law. He emphasized the term "involving"



in Section 79(1)(f) of the Electricity Act and referred to other clauses of the PPA to support his contention.

- (iii) Section 9 of the Arbitration Act is inapplicable due to Section 2(3) of the Arbitration Act, which excludes its application where another enactment, such as the Electricity Act, governs.
- (iv) Section 158 of the Electricity Act provides for arbitration only when directed by the appropriate commission, with the arbitrator nominated by the commission upon application by either party, thereby excluding the application of Sections 9 and 11 of the Arbitration Act.
- (v) Section 174 of the Electricity Act grants overriding effect to the Electricity Act over other laws, except those specified in Section 173, in case of inconsistency. Thus, the Electricity Act prevails over the Arbitration Act.
- (vi) Reliance was placed on decisions in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*<sup>1</sup>, *M.P. Power Trading Co. Ltd. v. Narmada Equipments (P) Ltd.*<sup>2</sup> *Coastal Andhra Power Ltd. v. Andhra Pradesh Central Power Distribution Company Ltd.*<sup>3</sup>, *PTC India Ltd. v. Jaiprakash Ventures Ltd.*<sup>4</sup> *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission and Anr.*<sup>5</sup>, *Solar Energy Corporation of India Ltd. v. Kerala State Electricity Regulatory*

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<sup>1</sup> (2008) 4 SCC 755.

<sup>2</sup> (2008) 4 SCC 755.

<sup>3</sup> 2012 SCC OnLine Del 3352.

<sup>4</sup> 2012 (130) DRJ 351.

<sup>5</sup> Appeal No. 94/95 of 2012 by the Appellate Tribunal.



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*Commission and Anr.*<sup>6</sup>, and *Umri Pooph Pratappur Tollways Pvt. Ltd. v. MP Road Development Corp.*<sup>7</sup>

### III. SUBMISSIONS MADE ON BEHALF THE PETITIONER

11. Mr. Jayant Mehta, learned senior counsel for the petitioner has made following broad submissions:

- (i) He has submitted that the respondent's attempt to bring the present dispute under the jurisdiction of the Appropriate Commission by broadly invoking the concept of "tariff" under Section 79(1)(f) is fundamentally flawed. He argued that mere reference to tariff-related clauses in the PPA does not transform all contractual disputes into regulatory ones. The claim here is for damages for non-supply of agreed quantum of electricity, not for modification or determination of tariff.
- (ii) Mr. Mehta made a clear distinction between Section 79(1)(f) and Section 86(1)(f) of the Electricity Act. While Section 86(1)(f) confers broad adjudicatory powers on State Commissions in disputes between licensees and generators, Section 79(1)(f) applies only to disputes that "involve" the functions in clauses (a) to (d) such as tariff regulation, scheduling, and generation by central government-owned entities.
- (iii) Since the present dispute does not relate to these functions, the Central Electricity Regulatory Commission has no jurisdiction.

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<sup>6</sup> Appeal No. 414 of 2022 by the Appellate Tribunal.

<sup>7</sup> (2025) SCC OnLine SC 1569.



- (iv) Responding to the reliance on Section 158 of the Electricity Act by the respondent, Mr. Mehta argued that this provision is procedural in nature and applies only where the Act mandates arbitration. He stressed that in the present case, the arbitration is invoked under the contractual clause in the PPA, not under any statutory obligation. Therefore, Section 158 has no application to this dispute, and cannot be used to override the arbitration agreement.
- (v) He firmly asserted that where a valid arbitration clause exists, parties are entitled to invoke the arbitration mechanism under the Arbitration Act.
- (vi) The Electricity Act does not bar or exclude arbitration for disputes of a contractual nature, particularly where no tariff determination or regulatory adjudication is involved. Hence, the petitioner is well within its rights to seek arbitration for its claims under the PPA.
- (vii) Reliance was placed on decisions in *Madhya Pradesh Power Management Company Ltd. v. Damodar Valley Corporation and Anr.*<sup>8</sup>, *Damodar Valley Corporation v. Madhya Pradesh Power Management Company Ltd. v. Anr.*<sup>9</sup>, *MB Power (Madhya Pradesh) Ltd. v. State Bank of India and Ors.*<sup>10</sup>, *Global Energy Pvt. Ltd. v. Jindal Power Ltd.*<sup>11</sup>, *Punjab State Power Corporation Ltd. v. NTPC Ltd. and Anr.*<sup>12</sup>, *Haryana Vidyut Prasaran Nigam Ltd. v. Union of*

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<sup>8</sup> 2024 SCC OnLine APTEL 76.

<sup>9</sup> Civil Appeal No. 10480 of 2024, Order Dt. 23.09.2024 by the Supreme Court.

<sup>10</sup> 2023 SCC OnLine Del 149.

<sup>11</sup> 2015 SCC OnLine Del 14691.

<sup>12</sup> Petition No. 262/MP/2020 by the CERC, New Delhi.



*India and Ors.*<sup>13</sup>, and *Maharashtra State Electricity Distribution Company Ltd. v. Maharashtra Electricity Regulatory Commission and Ors.*<sup>14</sup>.

#### IV. ANALYSIS

12. The learned senior counsels appearing for the parties have been heard at length, the written submissions and compilation of judgements submitted by them have also been examined.

13. It is appropriate to begin the Court's analysis by referring to Section 9 of the Arbitration Act. It reads as under:

*“9. Interim measures, etc., by Court.—(1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*

*(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*

*(ii) for an interim measure of protection in respect of any of the following matters, namely:—*

*(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*

*(b) securing the amount in dispute in the arbitration;*

*(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the*

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<sup>13</sup> Petition No. 252/MP/2021 by the CERC, New Delhi.

<sup>14</sup> (2022) 4 SCC 657.



*purpose of obtaining full information or evidence;*

*(d) interim injunction or the appointment of a receiver;*

*(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*

*(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.*

*(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”*

14. A plain reading of Section 9 indicates that a party may seek interim measures before, during, or after arbitral proceedings but before the enforcement of an award under Section 36. Naturally, a petitioner seeking interim measures/protections under Section 9 must establish a right to invoke arbitration proceedings.

15. The scope of judicial scrutiny while considering a Section 9 application has been dealt with by the Supreme Court in various decisions. A detailed examination thereof may not be necessary at this stage except to state that an objection pertaining to statutory bars/exclusions to proceeding under the Arbitration Act can be gone into by a Court acting under the jurisdiction conferred by Section 9 of the Arbitration Act.

16. Distinct from contractual exclusions which may be attached to a given



dispute resolution clause, the Arbitration Act allows and provides for statutory exclusions under Section 2(3) of the Act. It reads as under:

“2. ...

*(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.”*

17. It is clear that Section 2(3) of the Arbitration Act accounts for the possibility of a special statute prevailing over the Arbitration Act and providing for a different mechanism to deal with a category of dispute(s) arising within the domain of the exclusionary legislation. Disputes made non-arbitrable by legislative command cannot then be privately adjudicated by parties' consent. Further, a given statute may also provide for arbitration through a specialised procedure. In such a scenario, while arbitration as a mode of dispute resolution is not ousted, the manner in which it is to be invoked may be governed by a special statute. Thus, the preliminary objection that the dispute raised by the petitioner herein shall be governed by the special procedure under the Electricity Act, including arbitration thereof in the manner required by the Electricity Act, requires consideration.

18. In the instant case, it is contended that Section 79(1)(f) read with Section 174 of the Electricity Act acts as a statutory exclusion under Section 2(3) of the Arbitration Act, and in turn precludes the application of the Arbitration Act to the present dispute.

#### **A. ADJUDICATORY & REFERRAL POWERS OF CERC**

19. Section 79(1)(f) of the Electricity Act reads as under:



**“Section 79. Functions of Central Commission.**

(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) *to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;*
- (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 for arbitration;***
- (g) *to levy fees for the purposes of this Act;*
- (h) *to specify Grid Code having regard to Grid Standards;*
- (i) *to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*
- (j) *to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*
- (k) *to discharge such other functions as may be assigned under this Act.*

(2) *The Central Commission shall advise the Central Government on all or any of the following matters, namely:--*

- (i) *formulation of National electricity Policy and tariff policy;*
- (ii) *promotion of competition, efficiency and economy in activities of the electricity industry;*
- (iii) *promotion of investment in electricity industry;*
- (iv) *any other matter referred to the Central Commission by that Government.*

(3) *The Central Commission shall ensure transparency while exercising its powers and discharging its functions.*

(4) *In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”*

*(Emphasis supplied)*

20. On a *prima facie* reading of Section 79(1)(f), it would appear that the two-fold functions of the Central Commission, namely adjudication of



disputes and referring them for arbitration, are to be performed simultaneously. Understandably, it would be absurd and counterproductive to hold so as the Commission cannot be expected to both adjudicate and refer a dispute for arbitration at the same time. Therefore, it is apposite to clarify that under Section 79(1)(f), the word “and” which appears between the words “*clauses (a) to (d) above*” and the words “*to refer any dispute for arbitration*” is to be read as “or”. This reading of Section 79(1)(f) is in accordance with the principle declared by the Supreme Court in ***Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.*** (supra) (hereinafter “**GUVNL**”) in the context of Section 86(1)(f), which is, in this context, *pari materia* to Section 79(1)(f). The material portion of the judgement reads as under:

*“26. ...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”.*”

21. Section 79(1)(f) is in two parts — the first part refers to the adjudicatory powers of the CERC and the second deals with the referral powers of the Commission. Importantly, the power to refer disputes for arbitration under the second part of the provision is broader than the power to adjudicate disputes. While the adjudicatory powers are constrained and restricted to disputes connected with matters enumerated under Section 79(1)(a)-(d), the referral power extends to “*any dispute*” involving



generating companies or transmission licensee.

## **B. THE TWO FACETS OF THE CERC'S REFERRAL POWER**

22. The referral power of the CERC has two facets—*first* is the power to refer such disputes for arbitration which the CERC is itself capable of adjudicating, these being disputes connected with clauses (a) to (d) of Section 79(1); and *second*, the power to refer a dispute for arbitration which it is not capable of adjudicating. Both these aspects deserve separate consideration.

### **(i). The First Facet: Referring Disputes for Arbitration which the CERC is Itself Capable of Adjudicating**

23. The power of CERC, *qua* the first facet, is discretionary in nature, thereby allowing the Commission to choose whether to adjudicate upon the dispute or to refer it for arbitration.

24. Thus, in a case before the CERC involving generating companies or transmission licensee, where the dispute is connected with matters listed under Section 79(1)(a)-(d), the CERC may choose to itself adjudicate upon the dispute or refer the same for arbitration.

25. This discretionary power has been recognised by the Supreme Court in *GUVNL*, in the context of a similarly worded provision for the State Commissions under Section 86(1)(f). The relevant paragraphs of the judgement read as under:

*“30. Shri Jayant Bhushan, learned counsel for one of the parties in the connected case submitted that Section 86(1)(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. v. 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.*

*(Emphasis supplied)*

26. It is noteworthy that the mere existence of an arbitration clause in the agreement between the parties would not have a determinative effect on the CERC's decision while exercising its discretionary power under this provision. The insistence of the parties to seek a mandatory referral for arbitration on the strength of the arbitration clause would conflict with the discretionary powers of the CERC under Section 79(1)(f).

27. Evidently, in this situation Section 79(1)(f) would serve as a statutory exclusion to the application of the Arbitration Act. The Electricity Act in this case, being the special law enacted by Parliament, would de-operationalise the provisions of the Arbitration Act to the extent they are inconsistent (*generalia specialibus non derogant*). In this context the



Supreme Court in **GUVNL** has held as under:

“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.”

28. Similarly, in **Umri Pooph Pratappur Tollways Pvt. Ltd. v. MP Road Development Corp.** (supra) the Supreme Court held as under:

**“12.2. It is trite law that parties cannot contract out of a statutory obligation enacted in furtherance of public interest. In Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd, this Court held that arbitration is not permissible where the legislature has reserved adjudication of disputes to a special forum. The relevant observation is as follows:**

**“35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.”**

(Emphasis supplied)

**(ii). The Second Facet: Referring Disputes for Arbitration which the**



## **CERC is Not Capable of Adjudicating**

29. The Court may now come to the second aspect of the referral power. This relates to the power of the CERC to refer such disputes for arbitration which fall outside the scope of Section 79(1)(a)-(d). Naturally, this referral shall take place when there exists an arbitration clause, on the basis of which CERC can refer a given dispute for arbitration. Thus, in such a situation, while the CERC cannot adjudicate upon the dispute, it can nevertheless refer the same for arbitration.

30. Significantly, the CERC is bound to refer a dispute for arbitration if there exists an arbitration clause in the agreement relied upon by the parties before it, and the dispute which is agitated does not relate to matters connected with Section 79(1)(a)-(d). There is, in this context, no discretion vested with the CERC. Thus, once it is ascertained that the nature of dispute falls beyond the matters enumerated in Section 79(1)(a)-(d) and there exists an arbitration clause in the agreement entered into between the parties, the CERC is bound to refer the same for arbitration.

31. This reading of the expression “*to refer any dispute for arbitration*”, as including the power to refer for arbitration such disputes which the CERC is not capable of adjudication, has been vociferously opposed by Mr. Mehta. He submits that if CERC does not have the jurisdiction to adjudicate upon a dispute, owing to it not being connected with matters enumerated under Section 79(1)(a)-(d), it cannot then refer that very dispute for arbitration. Further, in the note submitted by Trilegal on behalf of the petitioner, titled ‘Response to Contentions that may be Raised by SECI’, the following



submissions have been made:

*“(a) As evident from Orders of this Hon’ble Court and CERC, the power of CERC to adjudicate disputes under Section 79(1)(f) is limited to matters under Section 79(1)(a) to (d). It is the Petitioner’s case that the present dispute being a solely contractual dispute, CERC does not have jurisdiction. Hence, if there is no jurisdiction to adjudicate the dispute, there is no question of CERC having jurisdiction to refer the matter to arbitration.*

*(b) Even to refer the dispute, the CERC would have to adjudicate whether it is a tariff or a non-tariff issue. This cannot be done in the absence of jurisdiction under Section 79(1)(f).*

*(c) Even CERC vide Order dated 08.02.2023 in Petition No. 252/MP/2021 (Para 17) has held that, “if a dispute is not amenable to adjudicatory jurisdiction under Section 79(1)(f), the question of reference to arbitration does not arise”.*

*(d) CERC vide Order dated 08.02.2023 in Petition No. 252/MP/2021 (Para 13-14) and Order dated 20.01.2024 in Petition No. 262/MP/2020 (Para 19, 21-22) has held that “power to regulate” may be of wide amplitude, however, it cannot extend to functions to be carried out under other provisions of the Electricity Act.*

*(e) If SECI’s submission were to be accepted, the Petitioner would be rendered remediless.”*

32. To answer this objection, at the outset, it may be seen that the decision of APTEL in ***Madhya Pradesh Power Management Company Ltd. v. Damodar Valley Corporation and Anr.*** (supra), relied upon by Mr. Mehta, supports the conclusion reached by this Court and goes against the argument advanced by the petitioner. In the said decision, APTEL found the dispute between the parties therein to be a non-tariff dispute and, therefore, not capable of adjudication by the Commission. Regardless, relying upon the arbitration clause in the agreement of the parties, the Commission was directed to appoint an arbitrator and to refer the dispute for arbitration. The material portion of the judgement reads as under:

*“22. Thus, it is seen that the concept of arbitration is not alien to the*



disputes arising under various provisions of Electricity Act, 2003 and in appropriate cases, where a valid arbitration agreement exists between the parties and the dispute does not concern the regulatory functions of the Commission, the Commission would be not only justified but also bound to refer the dispute the dispute for arbitration.

...

33. In case it is to be held that all the disputes brought before the Commission are to be adjudicated upon by it and the Commission does not have power to refer any dispute for arbitration even though it finds a valid arbitration agreement existing between the parties, it would render the above noted expressions used in Section 79(1) and 86(1) of the Electricity Act, 2003 as well as its Section 158 totally redundant. It is manifest that the Parliament while passing the Electricity Act, 2003 did not intend to completely rule out the applicability of provisions of A&C Act, 1996 to the disputes under the Electricity Act, 2003. Had it been intention of the Parliament to make all the disputes under the Electricity Act immune to Arbitration, it would have made a specific provision in this regard in the Act like Section 145 which totally bars the jurisdiction of Civil Courts to entertain any suit or proceedings of any matter which is to be decided by an assessing officer or an appellate authority or the adjudicating officer appointed under the Act.

...

37. In the instance case, there is undisputedly a valid and subsisting arbitration clause contained in the PPAs. We have already held that the dispute between the parties primarily relates to the termination of the PPAs which is a non-tariff dispute and thus, referable to arbitration.

38. Hence, we find the impugned order of the Commission unsustainable in the eyes of law. Same is hereby set aside. The appeal stands allowed.

39. The Commission, shall within one month from this order, appoint an arbitrator and refer the dispute to him for adjudication as per law.”

(Emphasis supplied)

33. Further, to accept the submission of the petitioner on this issue, the Court would be required to read the words ‘connected therewith’ or a synonymous expression after the words “to refer any dispute” in Section



79(1)(f). Acceding to this argument would require this Court, illustratively, to read Section 79(1)(f) in the following manner:

*“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 **connected therewith** for arbitration”*

34. Needless to state, such words are absent in the said provision. Incidentally, a provision of a similar nature, worded in the fashion sought to be advanced by the petitioner, existed in the erstwhile Electricity Regulatory Commissions Act, 1998. Section 13 of the said Act, similar to Section 79 of the Electricity Act provided for ‘Functions of Central Commission’. It read as under:

**“13. Functions of Central Commission.—***The Central Commission shall discharge all or any of 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 energy including tariff of the transmission utilities;*

*(d) to promote competition, efficiency and economy in the activities of the electricity industry;*

*(e) to aid and advise the Central Government in the formulation of tariff policy which shall be—*

*(i) fair to the consumers; and*

*(ii) facilitate mobilisation of adequate resources for the power sector;*

*(f) to associate with the environmental regulatory agencies to develop appropriate policies and procedures for environmental regulation of the power sector;*

*(g) to frame guidelines in matters relating to electricity tariff;*

***(h) to arbitrate or adjudicate upon disputes involving generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) above;***

*(i) to aid and advise the Central Government on any other matter*



*referred to the Central Commission by that Government.*

*(Emphasis supplied)''*

35. Under this provision, the scope of adjudication and arbitration was on the same footing. Thereby meaning, only those disputes which could be adjudicated upon by the Central Commission, could be referred by it for arbitration. However, under the Electricity Act, the legislature has made a conscious departure. The change in law may be seen as under:

<b>Electricity Regulatory Commissions Act, 1998</b>	<b>Electricity Act, 2003</b>
<i>Section 13. Functions of Central Commission</i> ... <i>(h) to arbitrate or adjudicate upon disputes involving generating companies or transmission utilities in regard to matters connected with clauses (a) to (c) above;</i>	<i>Section 79. Functions of Central Commission</i> ... <i>(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 for arbitration;</i>

36. A comparative reading of the aforementioned provisions reveals that the statutory language, and consequently the powers of the CERC, have undergone a material change. In Section 79 of the Electricity Act, the powers of adjudication and arbitration are distinct in nature; the latter, as concluded above, being broader. The Legislature's choice of words must be presumed deliberate and cannot be disregarded unless it produces absurd results. Where the language has been consciously altered, courts cannot interpret the provision so as to nullify that change. The interpretation advanced by the petitioner runs contrary to the plain wording of the statute.

37. The next point raised in the written submissions filed on behalf of the



petitioner reads as “(b) *Even to refer the dispute [for arbitration], CERC would have to adjudicate whether it is a tariff or a non-tariff issue. This cannot be done in the absence of jurisdiction under Section 79(1)(f)*”.

38. While not correctly framed, perhaps, the argument sought to be made is as follows—the CERC’s jurisdiction under Section 79(1)(f) is attracted only when a dispute relates to tariff, since in the instant case the dispute does not relate to tariff, the CERC is precluded from determining whether it relates to tariff or not. The said submission deserves to be noted, but only to be rejected. The CERC would remain competent to refer a given dispute for arbitration, even if the same is found to not relate to tariff.

39. Even otherwise, in principle, it may be seen that if an authority has the power to decide upon its jurisdiction, a party cannot claim before a separate forum that the requirements for conferring jurisdiction upon the said authority have not been fulfilled and, therefore, a given dispute should not be referred to that authority. If such an argument were to be accepted, all statutory provisions empowering authorities/bodies to decide upon their jurisdiction shall become otiose and redundant.

40. The petitioner sought to buttress its argument by relying upon paragraph 17 of the judgement of the CERC dated 08.02.2023 in Petition No. 252/MP/2021. The said paragraph reads as under:

*“17. As per the above judgement, whenever there is a dispute between a generating company and licensees, the State Commission or the Central Commission, as the case may be, or the arbitrator or arbitrators appointed by the concerned Commission shall resolve such dispute. Therefore, it is the discretion vested in the Commission to either adjudicate the dispute or refer the dispute to arbitrator or*



*arbitrators appointed by it. Since we have come to the conclusion in this order that the present dispute is not amenable to adjudicatory jurisdiction under Section 79(1)(f) of the Act, the question of reference of the dispute to arbitration does not arise.*

*(Emphasis supplied)*

41. In the opinion of this Court, this decision of the CERC is based on an incorrect appreciation of the legislative intent of Section 79(1)(f), the change in statutory language from Section 13(h) of the Electricity Regulatory Commissions Act, 1998 to Section 79(1)(f) of the Electricity Act, the express words of the provision, as also the precedents of the Supreme Court and APTEL. The conclusion reached by the CERC in this order, therefore, does not deserve to be accepted.

42. It is also relevant to highlight a concerning facet pertaining to the petitioner's reliance upon this order of the CERC. This order was canvassed, and used by the petitioner in its note, being oblivious to the fact that a review was pending against this judgement of the CERC.

43. A similar lack of diligence was evident from the petitioner's reliance on *MB Power (Madhya Pradesh) Ltd. v. State Bank of India and Ors.* (supra), without advertence to the fact that a Special Leave Petition is pending before the Supreme Court against this judgement of the High Court. This omission was rightfully highlighted by the instructing counsels for the respondent through learned senior counsel Mr. Ramachandran.

44. After the judgement in the instant case was reserved vide order dated 10.10.2025, this Court on its own accord discovered that the Review Petition No. 38/RP/2023 in Petition No. 252/MP/2021 was admitted vide order dated



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17.05.2024 and that the judgement in the said review was reserved vide order dated 16.09.2025.

45. Subsequently, whilst the present judgement remained reserved, the final order dismissing the said review petition was delivered by the CERC on 27.10.2025.

46. It is true that the review petition now stands dismissed and the Supreme Court in the SLP proceedings has not stayed the operation of the High Court judgement. Indeed, nothing presently turns on these disclosures. However, at the time of reliance, the petitioner could not have known whether the review would be allowed or rejected; had it been allowed, the petitioner would have been citing an order later set aside in review. Therefore, such disclosures are expected from parties, seeking to rely on a decision as laying down the correct position of law.

47. This Court does not expect learned senior counsels to personally investigate each judgement which they would cite before a court of law, and to check whether a review, appeal or revision is pending against the same. That duty rests upon the counsel or firm instructing the senior counsels.

48. The instructing and briefing counsels/law firms, are expected to diligently and sincerely verify authorities before they cite them in a Court. Reliance upon a decision that is under review or appeal, without disclosing such pendency, amounts to lack of candour to the Court and may mislead the adjudicatory process. Such conduct falls short of the standard of fairness and completeness that is expected from officers of the Court.



49. The justice delivery system functions on mutual trust between the Bar and the Bench. Each stakeholder, the litigant, the counsel, and the Court, bears a shared responsibility towards upholding its integrity. Any lapse, diminishes confidence in the system as a whole.

50. The Court does not propose to dwell further on the issue. During the hearing, Mr. Mehta, learned senior counsel, submitted that the non-disclosure of the pendency of the SLP was inadvertent and *bona fide*, and the Court accepts his explanation in that spirit.

51. Needless to say that these comments do not in any manner affect the merits of the petitioner's case.

52. From the above-detailed discussion on the interpretation of Section 79(1)(f) and the rejection of the plaintiff's submissions, it is hereby concluded that the CERC has the power to refer a dispute, which falls outside the scope of Section 79(1)(a)-(d), for arbitration when there exists an arbitration clause in the agreement involving generating companies or transmission licensee. This power needs to be mandatorily exercised, and the party seeking the referral has, in such a situation, a right to be referred for arbitration.

### **C. THE REFERRAL POWERS OF THE CERC BEING EXCLUSIVE TO THE COMMISSION**

53. The next issue that falls for the determination of this Court is whether the referral power of the CERC under Section 79(1)(f) of the Electricity Act is a power exclusive to the Commission. Meaning thereby, whether Courts and other authorities are precluded from referring disputes involving



generating companies or transmission licensee for arbitration. For this purpose, Sections 158, 173-175 of the Electricity Act may be analysed. The same are reproduced as under:

**“Section 158. (Arbitration).**

*Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.*

**Section 173. (Inconsistency in laws).**

*Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.*

**Section 174. (Act to have overriding effect).**

*Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

**Section 175. (Provisions of this Act to be in addition to and not in derogation of other laws).**

*The provisions of this Act are in addition to and not in derogation of any other law for the time being in force.”*

54. A conjoint reading of Section 79(1)(f) and Section 158 of the Electricity Act would reveal that the CERC’s referral power, as also the act of referring parties for arbitration, is effectively a trigger mechanism for invoking the provisions of the Arbitration Act. In other words, it is through Section 79(1)(f) that the Arbitration Act gets operationalised.

55. Would provisions under the Arbitration Act which initiate arbitration



be in conflict with provisions of the Electricity Act which trigger arbitration? At first blush, the answer would appear to be in the negative.

56. It is possible to argue that there is no conflict between these provisions as the ultimate outcome remains a referral to arbitration. A petition under Sections 11 or 8 of the Arbitration Act filed before a Court/authority other than the CERC seeking a referral for arbitration serves the same purpose that Section 79(1)(f) does under the Electricity Act, it being the initiation of arbitration proceedings.

57. This argument would seem particularly attractive when a referral court could possibly, before making that referral, satisfy itself that the concerned dispute does not relate to matters enumerated under Section 79(1)(a)-(d) and therefore falls outside the adjudicatory jurisdiction of the CERC.

58. However, for two reasons, this Court would be unable to accept this argument. Firstly, it is important to stress and give sufficient weight to Parliament's wisdom to empower the CERC to refer disputes involving generating companies or transmission licensee for arbitration. Parliament, by a special statute, has conferred this referral power on the CERC for disputes between a defined category of litigants. Permitting any other Court or authority to exercise powers under Sections 8 or 11 of the Arbitration Act in the same field would displace the forum chosen by the special law and render Parliament's wisdom nugatory.

59. Secondly, independent of the abovementioned reason, relating to giving effect to Parliament's intention; doctrinally, Section 79(1)(f) read



with Section 158 of the Electricity Act provides a special statutory route to reach the destination, which is arbitration. Any other general route, such as the one provided for under Sections 8 or 11, would inherently conflict with this special route, even though the ultimate outcome remains the same. In this regard, it would be apposite to reiterate the time-tested proposition that when the law prescribes a certain way to perform a certain act, it must be done in that way alone.

60. Thus, the referral power of the CERC under Section 79(1)(f) whereby, it can refer disputes involving generating companies or transmission licensee for arbitration, conflicts with the power of a Court/Authority, other than the CERC, under Sections 11 or 8 of the Arbitration Act.

61. The Supreme Court in *GUVNL* has held that provisions of the Electricity Act prevail over the Arbitration Act insofar as the latter is found to be in conflict, both implied and express, with the former. The material portion of the judgement reads as under:

*“57. In our opinion the principle laid down in Section 174 of the Electricity Act, 2003 is the principal or primary whereas the principle laid down in Section 175 is the accessory or subordinate to the principal. Hence Section 174 will prevail over Section 175 in matters where there is any conflict (but no further).*

...

*58. In our opinion Section 174 and Section 175 of the Electricity Act, 2003 can be read harmoniously by utilising the samanjasya, badha and gunapradhana principles of Mimamsa. This can be done by holding that when there is any express or implied conflict between the provisions of the Electricity Act, 2003 and any other Act then the provisions of the Electricity Act, 2003 will prevail, but when there is no conflict, express or implied, both the Acts are to be read together.”*



62. Applying the ratio of the *GUVNL* to the issue at hand would lead to the inexorable conclusion that the referral powers of the CERC under Section 79(1)(f) would preclude any other Court/authority, other than the CERC, from referring disputes involving generating companies or transmission licensee for arbitration.

63. This analysis aligns with the well settled principles that—(1) a special law, including the specialised procedure contained within it, prevails over a general law, and the general procedure it contains; and (2) where law, for instance a statute, prescribes an act to be done in particular way, it must be done in that way alone.

64. Additionally, this conclusion also finds a clear affirmation in *GUVNL*, where the Supreme Court, while construing Section 86(1)(f), held that the special adjudicatory and referral mechanism under the Electricity Act overrides the general provisions of the Arbitration Act. The relevant portions are reproduced below:

*“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.***

...  
*59. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission **or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and***



**Conciliation Act, 1996, the court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail)."**

60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. **Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996.** However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.

61. **We make it clear that it is only with regard to the authority which can adjudicate or arbitrate disputes that the Electricity Act, 2003 will prevail over Section 11 of the Arbitration and Conciliation Act, 1996.** 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 conflicting provision 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..."**

(Emphasis supplied)



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65. It may be seen that paragraph 59 of the said judgement is not limited to an analysis of Section 86(1)(f). The express words “*or the Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it*” squarely apply to Section 79(1)(f). Thus, by the sheer weight of precedent, it can safely be concluded that the referral powers of Section 79(1)(f) preclude the application of any provision of the Arbitration Act, including Section 11, which trigger arbitration or change the authority which is making the referral for arbitration.

66. However, even if the declaration in *GUVNL qua* Section 79(1)(f) is considered as *obiter*, the reasoning for the apex court’s conclusion on the referral powers under Section 86(1)(f) equally applies to Section 79(1)(f).

67. The contra-submissions of the petitioner may at this stage be briefly mentioned, as the same would get rejected by the analysis which shall follow.

68. Learned senior counsel for the petitioner contends that this judgement cannot apply to Section 79(1)(f) as it was delivered in the context of Section 86(1)(f) which evidently is broader in scope. Upon laying great stress on the manner in which the provision is worded, Mr. Mehta contended that the broad declaration in *GUVNL* ought to be constrained to Section 86(1)(f), which is unqualified, and should not be made to apply to Section 79(1)(f).

69. In the note submitted on behalf of the petitioner titled ‘Response to Contentions that may be Raised by SECI’, the submissions made in relation to *GUVNL* read as under:



“a) GUVNL SC Judgment was in context of an arbitration clause under the PPA executed prior to the enactment of the Electricity Act 2003 and the effect the Electricity Act would have on such PPAs.

(b) It was in context of adjudicatory powers of the State Commission under Section 86 of the Electricity Act, which is unqualified and broader in comparison to powers of the Central Commission under Section 79.

(c) The Hon’ble Supreme Court in the GUVNL SC Judgment (Para 60) has clarified that all disputes and not merely those pertaining to matters pertaining to Clauses (a) to (e) and (g) to

(k) in Section 86(1), between the licensee and generating company can be resolved by the State Commission or arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of dispute.”

Same submissions have been made in the petitioner’s note titled ‘Response to judgements relied upon by the respondent’ and also in paragraph 5 of its rejoinder.

70. There is no doubt that Section 86(1)(f) is broader than Section 79(1)(f) of the Electricity Act. The two provisions are reproduced as under:

Section 86(1)(f) of the Electricity Act	Section 79(1)(f) of the Electricity Act
Section 86. Functions of State Commission ... (h) adjudicate upon the disputes between the licensees, and generating companies and <b><u>to refer any dispute for arbitration;</u></b>	Section 79. Functions of Central Commission ... (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and <b><u>to refer any dispute for arbitration;</u></b>

71. A comparison of the aforementioned provisions would reveal that the adjudicatory powers of the State Commission are significantly broader than those of the CERC. The State Commission has been empowered to adjudicate upon any dispute between the licensees, and generating



companies, while the CERC can exclusively adjudicate upon disputes connected with matters enumerated under Section 79(1)(a)-(d).

72. The difference in scope of powers has also been noted by the Supreme Court in *Torrent Power Ltd. v. U.P. ERC and Ors.*<sup>15</sup>, the relevant paragraphs of which read as under:

*“49. The adjudicatory functions of ERCs are specifically governed by Sections 79 and 86 respectively of the Act, 2003. The ERCs also have the discretion to refer disputes to arbitration. Adjudicatory jurisdiction of the Central Commission is specified under Section 79(1)(f) and is limited to adjudication of disputes involving generating companies or transmission licensee, in regard to matters connected with clauses (a) to (d), which are extracted below:*

- 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.*

*50. The State ERCs have a comparatively broader jurisdiction under Section 86, to adjudicate upon all disputes between the licensees and generating companies, without being limited to categories specified in (a) to (d) of Section 79...”*

*(Emphasis supplied)*

73. However, a closer look at these provisions would also reveal that whereas, the adjudicatory powers may be different, however, the referral powers are similarly worded. Both contain the expression “*and to refer any dispute for arbitration*”. This Court has already concluded above that the powers of the CERC extend to referring disputes for arbitration which fall

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<sup>15</sup> 2025 SCC OnLine SC 1410.



outside the scope of its adjudicatory limits. Thus, *qua* referral powers, neither the CERC nor the State Commission is bound by the nature of dispute before them. To that extent, the scope of powers is the same.

74. The conflict which the Supreme Court addressed in *GUVNL* pertained to the referral powers under Section 86(1)(f) of the Electricity Act vis-à-vis Section 11 of the Arbitration Act. Since the scope of referral powers under Section 79(1)(f) and 86(1)(f) are same, the dictum of *GUVNL* would squarely apply to the conflict between Section 11 of the Arbitration Act and Section 79(1)(f). Naturally, the referral powers under Section 79(1)(f) would prevail over Section 11 of the Arbitration Act.

75. A similar conclusion relating to the applicability of *GUVNL* to Section 79(1)(f) of the Electricity Act has been reached by this High Court in the case of *Coastal Andhra Power Ltd. v. Andhra Pradesh Central Power Distribution Company Ltd.* (supra) (hereinafter “*CAPL*”). In the said case, a petition under Section 9 of the Arbitration Act was filed seeking a direction preventing the respondent therein from invoking a bank guarantee furnished by the petitioner therein in terms of the PPA executed between them. While the petitioner therein claimed the dispute to be arbitrable, the respondents claimed that the same was covered by Section 79(1)(a)-(d), and therefore, deserved to be adjudicated by the CERC.

76. Finding the petition to not be maintainable, this Court observed that the petitioner must first approach the CERC. In reaching this conclusion, this Court applied the dictum of *GUVNL* to the referral powers under Section 79(1)(f). The material parts of the judgement read as under:



“17. In the present case, while the issue concerning increase in price of the Indonesian coal and the consequent invocation of the force majeure clause by CAPL may not be strictly construed as a dispute arising from a claim by either party “for any change in or determination of the tariff or any matter related to tariff”, it is not as if the change in the price of coal will not affect the tariff at all. It is possible that the determination of such dispute could result in a change in the tariff. Such a dispute can then be said to have arisen within the ambit of Article 17.3.1. **Therefore, one way of approaching the problem would be for CAPL to approach the CERC which will, in terms of Section 79(1)(f) of the EA, determine which part of the dispute between the parties is referable to arbitration. The words “and to refer any dispute for arbitration” occurring at the end of Section 79(1)(f) of the EA contemplates such a course. This power to refer any dispute to arbitration, which is common to both the CERC under Section 79(1)(f) and the SERC under Section 86(1)(f), has to be seen in addition to the power of the CERC to decide the disputes arising under Sections 79(1)(a) to (d). Where the CERC is of the view that the dispute actually relates to the determination of tariff, it will exercise its jurisdiction and decide such dispute. On the other hand, a dispute not involving the tariff can be referred to arbitration. This interpretation harmonises Section 79(1)(f) of the EA with Article 17.3.1 of the PPA. Although the decision of the Supreme Court in GUVNL case concerned the scope of the powers of the SERC, it would equally apply to the interpretation of Section 79(1)(f) of the EA insofar as it concerns the power of the CERC to refer disputes to arbitration.**

18. **Resultantly, CAPL will have to first approach the CERC as regards the dispute arising out of the letter dated 15th March 2012 of the APSPDCL. Therefore, the present petition under Section 9 of the Act is not maintainable at this stage.** The preliminary objection of the Respondents as regards maintainability of the petition is accordingly upheld.

(Emphasis supplied)

77. Further, the Division Bench of this Court in *Coastal Andhra Power Ltd. v. Andhra Pradesh Central Power Distribution Co. Ltd. and Ors.*<sup>16</sup>, while dismissing the appeal from the order of the learned Single Judge in CAPL, concluded its observations by noting the following:



“29. In light of the above discussion we find:

a. that the appellant has failed to make-out a prima facie case in its favour for grant of any interim relief in relation to the bank guarantees, since change in Indonesian law and consequential increase in price of coal in Indonesia does not prima facie amount to force majeure under the Agreement;

**b. that the remedy for the appellant’s disputes lies before the CERC and/or the arbitral tribunal to which the CERC may refer any part of such disputes; and**

c. that the appellant is not entitled in law, and we are not inclined in the facts and circumstances of this case, to extend the interim relief earlier granted to the appellant against invocation of bank guarantees.”

(Emphasis supplied)

78. Similarly, this court in *PTC India Ltd. v. Jaiprakash Ventures Ltd.* (supra) has held that it is the CERC which shall, under Section 79(1)(f), decide which dispute is to be referred for arbitration. This determination on referral has been declared to be the exclusive prerogative of the CERC. The material portion of the judgement reads as under:

**“48. Under Section 79(1)(f) it is possible for CERC while discharging its functions “to refer any dispute for arbitration”. In other words, it is the CERC which will decide which dispute, if any, involving a generating company has to be referred to arbitration. That is the prerogative of CERC. The Petitioner could have validly raised an objection to the Tribunal examining the question whether the PPA was void since the jurisdiction to decide such issue was solely within the purview of CERC. The Tribunal has in by the impugned Award decided a dispute which was “not capable of settlement by arbitration” and therefore liable to be set aside under Section 34(2)(b)(i) of the Act. The question raised in Issue No. (ii) is therefore answered in the affirmative.”**

(Emphasis supplied)

79. Thus, from the above discussion, it is clear that the CERC has the

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<sup>16</sup> 2019:DHC:265-DB.



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exclusive powers to refer any dispute involving generating companies or transmission licensee for arbitration. The referral power of the CERC is evidently without a subject matter bar and any such bar cannot be carved out by way of a judicial construction.

80. At this stage, two decisions of this Court canvassed by the learned senior counsel for the petitioner may be analysed, being *MB Power (Madhya Pradesh) Ltd. v. State Bank of India and Ors.* (supra) (hereinafter “*MB Power*”) and *Global Energy Pvt. Ltd. v. Jindal Power Ltd and Anr.* (supra) (hereinafter “*Global Energy*”). It needs to be seen whether the said decisions are inconsistent with any of the conclusions reached by this Court above and the perspective in which these decisions are to be understood.

#### **D. CONSIDERATION OF VIEWS IN *GLOBAL ENERGY* AND *MB POWER***

81. In *Global Energy*, which is also relied upon in *MB Power*, an appeal was filed from the judgement of a learned Single Judge dated 28.09.2015 passed in CS(OS) No. 2964/2015. The learned Single Judge, vide the said order, found the suit filed by the appellant/plaintiff therein to be not maintainable. Before dealing with the order of the Division Bench, the judgment of the co-ordinate bench, which also details the facts of the case therein, may be analysed.

82. As the order narrates, the suit filed therein was for declaration and permanent injunction. The respondents raised a preliminary objection on the maintainability of the suit claiming that the dispute therein is to be adjudicated by the CERC under Section 79(1)(f) of the Electricity Act.



83. Significantly, no plea was made for referring the dispute for arbitration, nor was the existence of an arbitration agreement, if any, highlighted. The judgement, therefore, is not an authority on the referral powers of the CERC. In fact, there is no mention of the same in the judgement. The issue therein concerned the applicability of the adjudicatory powers. The Court relying upon the judgement of the Supreme Court *GUVNL* found that the dispute is covered by Section 86(1)(f) of the Electricity Act and resultantly, the suit of the plaintiff was found to not be maintainable. The material parts of the judgement read as under:

*“This is a dispute between the “licensee” and “Electricity Generating Company” pursuant to the Agreement executed between them. Section 86(1)(f) of the Act vests power in the State Commission to adjudicate upon the disputes between the “licensees” and “generating companies” and to refer any dispute for arbitration. Appeal against the order of State Commission lies before the Appellate Tribunal under Section 111 of the Act; whereas against the order of Appellate Tribunal, appeal lies before the Supreme Court under Section 125 of the Act. The Electricity Act, 2003 is a complete code in itself as has been held in Gujarat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. (2008) 4 Supreme Court Cases 755. In the said case, disputes between the “licensee” and “generating company” were referred to arbitration by the High Court of Gujarat. In paras 60, 61 and 62 Supreme Court has held as under:-*

XXXX

*In view of the above discussions, I am of the view that suit is not maintainable. Accordingly, plaint is rejected. Miscellaneous applications are disposed of as infructuous. Plaintiff will be at liberty to take all legal remedies as may be available to it under the Act.”*

84. The Division Bench in *Global Energy* decided the appeal. While remanding back the matter, the Court noted that two issues ought to have been determined—first, whether Section 86(1)(f) or Section 79(1)(f) of the Electricity Act applies; and second, if the latter applies, under which sub-



clause of Section 79(1) would the dispute fall. Naturally, at the threshold stage itself it needs to be determined whether Section 79(1)(f) or Section 86(1)(f) of the Act gets attracted. If Section 79(1)(f) is the provision governing the issue, and there does not exist an arbitration clause, the narrow adjudicatory powers of the CERC would have to be analysed.

85. A respondent seeking a matter to be referred to CERC for adjudication under Section 79(1)(f) must satisfy the Court under which sub-clause of Section 79(1) the dispute falls. This obligation falls upon the respondent as the adjudicatory powers of the CERC are neither as broad those of the State Commission, nor as broad as its referral powers. The said decision perfectly aligns with the conclusions reached by this Court.

86. The material portions of the judgement of the Division Bench in *Global Energy* read as under:

*“4. The learned Single Judge had to consider the provisions of the Electricity Act, 2003 concerning a dispute between an electricity generating company and a company having a license to trade in electricity, with further fact that the generating company is in one State and the company purchasing the power is in another State. The learned Single Judge had to consider the applicability of Section 86 in twin context. Whether the State Commission had the power to adjudicate a dispute between a power generating company in one State and a trader of power in the other State. With reference to the Central Commission, the learned Single Judge had to take note of and decide, with reference to Section 79 of the Indian Electricity Act, 2003, whether the Central Commission have the power to adjudicate a dispute between a generating company and a trading company. The learned Single Judge had to keep in mind that the power of the Central Commission was limited to clause (a) to (k) of sub-Section 1 thereof. Under which clause, if at all, the dispute between the parties was within the domain of the Central Commission had to be discussed.*

*5. Since the learned Single Judge has not considered the relevant issues which arose and has not adverted to the legal provisions, we are*



*constrained to set aside the impugned order and restore the suit by making it clear that if the issue of jurisdiction of a civil court is raised the same shall be decided by the learned Single Judge by noting the contentions, the law applicable and precedents if any.”*

87. In **MB Power**, an application was filed by the respondents therein under Order VII Rule 11 of the Civil Procedure Code, 1908 (‘CPC’) contending that the suit is barred by Section 79(1)(f) of the Electricity Act. The argument canvassed by the respondents therein, and decided upon by this Court, was whether the dispute fell within the adjudicatory powers of the CERC. The Court rightly found that in order for a dispute to fall within the adjudicatory powers of the CERC, it must relate to tariff. The issue relating to the referral powers of the CERC under Section 79(1)(f) was, in the opinion of this Court, not decided in the said judgement as it simply did not arise. The relevant parts of the judgement read as under:

*“54. The issue which need to considered is whether the dispute falls within the ambit of Section 79(1)(b) to enable the CERC to adjudicate the same under Section 79(1)(f).*

...

*63. It is in this background, the jurisdiction of the CERC has to be seen. Sub clauses (a), (c) and (d) of Section 79(1) have no applicability to the present issue. In fact, it is the case of defendant Nos. 2 and 3 that the dispute relates to Section 79(1)(b), as it involves a generating company (plaintiff) having a composite scheme for generation and sale of electricity in more than one state, and as such, the same needs to be adjudicated in terms of Section 79(1)(f) by the CERC. Section 79(1)(b) stipulates the functions of the CERC to include regulating the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies entered into or otherwise, have a composite scheme for generation and sale of electricity in more than one state. In the case in hand, the agreement for procurement of electricity between the plaintiff and the applicant which is a trading company, stood terminated, and in that sense, there is no agreement or a composite scheme governing the plaintiff and defendant No. 2 for generation and sale of electricity. In fact, it is the submission of Mr. Sethi that it has not commenced. This*



*plea is not disputed. So, in the absence of any agreement/scheme governing the plaintiff and the defendant No. 2/applicant, there exists no dispute with respect to tariff to be adjudicated by the CERC.*

*64. The functions of CERC are limited to matters covered by clauses (a) to (k) of Sub-Section 1 of Section 79 of the Act. In fact, as noted in paragraph 11 above, it is the plea of Mr. Kishore that Section 79(1)(b) will come into play only when a PPA for supply to more than one State is in place. It follows, if the PPA has not commenced, then Section 79(1)(b) is not attracted. This has been held by the Division Bench of this Court in the Judgment in the case of Global Energy Pvt. Ltd. (supra) which is reproduced as under:—*

*“3. The learned Single Judge had to consider the provisions of the Electricity Act, 2003 concerning a dispute between an electricity generating company and a company having a license to trade in electricity, with further fact that the generating company is in one State and the company purchasing the power is in another State. The learned Single Judge had to consider the applicability of Section 86 in twin context. Whether the State Commission had the power to adjudicate a dispute between a power generating company in one State and a trader of power in the other State. With reference to the Central Commission, the learned Single Judge had to take note of and decide, with reference to Section 79 of the Indian Electricity Act, 2003, whether the Central Commission have the power to adjudicate a dispute between a generating company and a trading company. The learned Single Judge had to keep in mind that the power of the Central Commission was limited to clause (a) to (k) of sub-Section 1 thereof. Under which clause, if at all, the dispute between the parties was within the domain of the Central Commission had to be discussed.”*

*(emphasis supplied)*

*65. For the above reason, the submission of Ms. Nagarajan that since the composite scheme for generation and sale arises out of the PPAs entered into by the plaintiff such as the PPA dated October 28, 2021, the disputes forming the subject matter of the present suit arising out of the PPA is clearly in regard to matters connected with generating companies having a composite scheme for generation and sale of electricity in more than one State, as provided in Section 79(1)(b), and as such needs to be adjudicated by the CERC under section 79(1)(f) is also liable to be rejected. For this Court to accept this submission, it must be apparent that the dispute between the parties essentially relates to tariff of the generating company, i.e., the plaintiff. Ms. Nagarajan has endeavored to show that the present issue has had an impact on*



*tariff, as the actions of the plaintiff have prevented the applicant from supplying power to the defendant No. 3 under the PSA, and as such the defendant No. 3 has been forced to secure power from the open market at rates much higher than the tariff determined. This contention would be wholly irrelevant and cannot be taken into consideration while deciding this application filed under Order VII Rule 11 of the CPC, as the same has been raised in the written statement of the defendant No. 3 and does not flow from the plaint or the documents of the plaintiff. Even otherwise, as stated above since the PPA has not commenced, surely PSA cannot be put in operation and as such no issue relating to tariff arises in the Suit for determination by CERC.”*

88. It is, therefore, discernible that both ***Global Energy*** and ***MB Power*** are decisions concerning the adjudicatory powers of the CERC and could be relied upon to hold that a party seeking the relegation of any dispute to CERC for adjudication thereof must satisfy that the dispute is of the nature enumerated in Section 79(1)(a)-(d). The said decisions are, thus, unconnected with the powers of the CERC to refer the disputes for arbitration.

#### **E. SECTION 94(2) OF THE ELECTRICITY ACT A STATUTORY SUBSTITUTE FOR SECTION 9 OF THE ARBITRATION ACT**

89. Although, the above analysis, coupled with the decisions of this Court in ***PTC India Ltd. v. Jaiprakash Ventures Ltd.*** (supra) and ***CAPL***, which specifically is concerned with a Section 9 petition, are sufficient to dismiss the present petition, and declare the same to be not maintainable, however, this Court finds it appropriate to deal with two more issues so as to reflect a comprehensive consideration of the matter at hand.

90. The first issue pertains to the claim made by the petitioner that it would be left remediless if the objections of SECI are accepted. The said issue emanates from the petitioner’s note titled ‘Response to Contentions



that may be Raised by SECI’, wherein it has been contended:

***“(e) If SECI’s submission were to be accepted, the Petitioner would be rendered remediless.”***

(Emphasis in original)

91. The issue highlighted is indeed serious. Section 9 of the Arbitration Act allows a party to seek interim protection, *inter alia*, before the commencement of the arbitration proceedings. In the instant case, this Court has concluded that CERC has the exclusive power to refer parties for arbitration, and while doing so, to operationalise the provisions of the Arbitration Act. *Prima facie*, it would appear that this conclusion would make a claimant seeking interim protection before the constitution of the arbitral tribunal remediless. However, it is not so.

92. Section 94(2) of the Electricity Act would in such a scenario come to the rescue of a claimant. The said provision reads as under:

*“Section 94. (Powers of Appropriate Commission).*

*(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -*

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) discovery and production of any document or other material object producible as evidence;*
- (c) receiving evidence on affidavits;*
- (d) requisitioning of any public record;*
- (e) issuing commission for the examination of witnesses;*
- (f) reviewing its decisions, directions and orders;*
- (g) any other matter which may be prescribed.*

***(2) The Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the***



*Appropriate Commission, as that Commission may consider appropriate.”*

*(Emphasis supplied)*

93. Evidently, Section 94(2) would allow a party to seek, during the pendency of its petition under Section 79(1)(f) or Section 86(1)(f) as the case may be, interim reliefs of the kind provided for in Section 9 of the Arbitration Act.

94. The scope of Section 94(2) further appears to be broad enough to allow an interim direction to be passed which shall stay in operation till the constitution of the arbitral tribunal or till the arbitral tribunal does not conclusively decide on a given issue. Thus, the claim of the petitioner that accepting the submissions of the respondent would make the petitioner remediless is found to be untenable.

#### **F. CONSIDERATIONS GOVERNING REFERRAL FOR ARBITRATION**

95. The second issue which this court is not required to decide, but for the purposes of providing some degree of guidance, considers it appropriate to briefly analyse is — what considerations ought to govern the referral for arbitration. Needless to state that the observations on this aspect are *prima facie* and the CERC, if at all it is called upon to entertain this dispute, shall not be bound by them.

96. It would be convenient to analyse this under two distinct considerations—first, the *right* of the petitioner to seek a referral for arbitration; and second, the *appropriateness* of referring the dispute for arbitration.



**(i). The Right to Seek a Referral**

97. As has been observed above, a petitioner has a right to seek a referral for arbitration from the CERC if the dispute does not relate to matters connected with Section 79(1)(a)-(d) and an arbitration clause in the agreement of the parties covers their dispute. Thus, a petitioner must establish, both a contractual right under the PPA between the parties and a statutory right.

98. The dispute resolution clause under the PPA between the petitioner and the respondent demarcates disputes into two categories—(1) disputes sought to be resolved through the appropriate commission (Article 16.3.1); and (2) disputes sought to be resolved through arbitration (Article 16.3.2).

99. The material portion of the PPA reads as under:

***“16.3 Dispute Resolution***

***16.3.1 Dispute Resolution by the Appropriate Commission***

***i) Where any Dispute (a) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or (b) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.***

...

***16.3.2 Dispute Resolution through Arbitration***

***If the Dispute arising as per Article 16.2.1 is not amicably resolved & such dispute is not covered in Article 16.3.1(i), such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as provided below:***

...”



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(Emphasis supplied)

100. A bare perusal of the above-mentioned articles would reveal that the parties have contractually demarcated certain issues which would be amicably submitted for adjudication by the Commission and those which would be resolved by arbitration. The arbitration clause contained in clause 16.3.2 of the PPA is framed as a residuary dispute redressal mechanism, which gets attracted when a given dispute does not fall within the contours of clause 16.3.1(i). While clause 16.3.1(i) does cover disputes relating to change in or determination of tariff, it also covers a wider set of claims as suggested by the expression “*any matter related to tariff*”, thereby leaving only non-tariff matters out of its purview. As a natural corollary, for a dispute to fall within the scope of the arbitration clause under clause 16.3.2, it must not have arisen from “*any matter related to tariff*” and thus, must be a non-tariff matter. By way of clause 16.3.2, the parties have agreed upon a self-imposed limitation insofar as the referral of disputes to arbitration is concerned.

101. In the instant dispute, if the CERC were to find the dispute to be covered by the arbitration clause, for there to be a *right* to invoke arbitration proceedings, it also needs to be considered whether the dispute is unconnected with matters enumerated under Section 79(1)(a)-(b), and specifically in the instant case, whether it is a dispute with “*regard to matters connected with*” the regulation of tariff.

102. Quite a few precedents have been cited by the learned senior counsels on the scope of the expression ‘regulation of tariff’. A few may be



considered by this Court.

103. In *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission Anr.* (supra), the APTEL declared that Section 79 of the Electricity Act deals, not merely with tariff, but also the terms related to tariff. The material parts of the judgement read as under:

*“31. As pointed out by the learned Counsel for the NTPC, the term ‘Regulate’ used in Section 79(1)(f) of the Act has got a wider scope and implication not merely confined to determination of tariff.*

*32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.*

*33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing but terms and conditions of supply.*

*(Emphasis supplied)*

104. In *Solar Energy Corporation of India Ltd. v. Kerala State Electricity Regulatory Commission and Anr.* (supra), the APTEL similarly found the expression ‘Regulation of Tariff’ to be broad and including terms and conditions related to tariff. Further, at paragraph 25, the appellate tribunal holds that the powers of the CERC under Section 79(1)(f) extend not only to regulation of tariff but also to disputes or differences which necessarily



impact the regulation of tariff. While not mentioned in explicit terms, this finding of the APTEL seems to arise not just from an interpretation of the terms ‘regulation of tariff’ but also the expression “in regard to matters connected with” as it appears in Section 79(1)(f). The material parts of the judgement reads as under:

*“22. It is notable that Clauses (a)(b)&(c) of Section 79(1) of the Act begin with the expression “to regulate”. It is only the clause (d) which begins with the term “to determine tariff”. Regulation of Tariff is totally distinct from “Determination of tariff. Regulation of Tariff includes all the necessary terms and conditions relating to the tariff such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.*

*XXXX*

*25. We are further of the opinion that a close and meaningful interpretation of the provisions of Section 79 & 86 of the Act, would indicate that the adjudicatory powers of the Central Commission under 79(1)(f) are not restricted to only determination of tariff as well as the Regulation of tariff but include the other disputes or differences between generating companies and transmission licensees which necessarily impact the regulation of tariff. This would include fulfillment/non-fulfillment of conditions precedent as well as conditions subsequent, claim for extension of time in commissioning all projects on the ground of Force Majeure events etc. Even though disputes on these subjects do not specifically relate to determination or the regulation of tariff but these would necessarily have a direct bearing upon the regulation of tariff and, therefore, would come under the purview of the Central Commission under Section 79 of the Act.”*

105. This Court, in **MB Power**, found the dispute between the parties therein to be unconnected with tariff and resultantly not capable of adjudication by the CERC under Section 79(1)(f). This conclusion was reached by the Court as there was no subsisting agreement between the parties therein, thus precluding the possibility of a dispute affecting tariff. While deciding upon this issue, a few material observations were made by



this Court which deserve reproduction:

*“63. It is in this background, the jurisdiction of the CERC has to be seen. Sub clauses (a), (c) and (d) of Section 79(1) have no applicability to the present issue. In fact, it is the case of defendant Nos. 2 and 3 that the dispute relates to Section 79(1)(b), as it involves a generating company (plaintiff) having a composite scheme for generation and sale of electricity in more than one state, and as such, the same needs to be adjudicated in terms of Section 79(1)(f) by the CERC. Section 79(1)(b) stipulates the functions of the CERC to include regulating the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies entered into or otherwise, have a composite scheme for generation and sale of electricity in more than one state. In the case in hand, the agreement for procurement of electricity between the plaintiff and the applicant which is a trading company, stood terminated, and in that sense, there is no agreement or a composite scheme governing the plaintiff and defendant No. 2 for generation and sale of electricity. In fact, it is the submission of Mr. Sethi that it has not commenced. This plea is not disputed. So, in the absence of any agreement/scheme governing the plaintiff and the defendant No. 2/applicant, there exists no dispute with respect to tariff to be adjudicated by the CERC.”*

106. In ***Madhya Pradesh Power Management Company Ltd. v. Damodar Valley Corporation and Anr.*** (supra), the APTEL came close to declaring a test for the purpose of determining when a dispute could be considered as being connected with the regulation of tariff. The appellate tribunal held that those matters which would have a bearing upon the tariff for a generating company would constitute “tariff disputes”. It, thereafter, listed disputes which it considers would fall within this category. The material paragraph of this judgement is reproduced as under:

*“25. At this juncture, we would again revert to Section 79(1) of the Electricity Act, 2003. Section 79(1) empowers the Commission to adjudicate upon the disputes relating to regulation of tariff for the generating companies as well as inter-state transmission of electricity and to determine tariff inter-state transmission of electricity as provided under clause (1) to (d) therein. We wonder how the dispute*



*relating to termination of PPAs would be regarded as a dispute relating to tariff or regulation of tariff of the generating companies, as held by the Commission in the impugned order. **To understand this aspect, it is necessary to determine what constitutes tariff and non-tariff disputes. In our considered opinion, all the matters which would have a bearing upon the tariff for a generating company would constitute “tariff disputes” namely disputes related to Change in Law, delayed completion of projects, invocation of Force Majeure events etc. Such matters impact the tariff for a generating company directly and, therefore, fall solely within the jurisdiction of the Central Commission under Section 79(1) of the Electricity Act, 2003.** However, the disputes related to termination or breach of contract which do not impact the tariff either directly or indirectly, can be considered as non-tariff related disputes referable to arbitration.”*

*(Emphasis supplied)*

107. It is important to clarify that the words used by APTEL “*disputes related to termination or breach of contract*” must be considered in the context of the preceding finding as well in conjunction with the following words in the same sentence. Meaning thereby, the disputes related to termination or breach of contract, without impacting the tariff either directly or indirectly, would qualify as non-tariff disputes. Merely because a dispute has arisen from a breach of contract would not necessarily be determinative of the nature of dispute.

108. The position of law which, thus, emerges is that the word ‘regulation’ is of wide amplitude and that Section 79(1)(f) of the Electricity Act would attract, not merely a strict regulation of tariff, but also disputes “*connected with*” the regulation of tariff.

109. In the opinion of this court, the test for determining whether Section 79(1)(f)’s adjudicatory powers are attracted is the requirement of a nexus between the dispute between the parties and the regulation of tariff. The



powers of the CERC under the said provision are broad enough to cover disputes which affect considerations that had led to the fixation of tariff and further entitlements, charges, rights and obligations the determination of which utilises tariff as an input function.

**(ii). The Appropriateness of Referring Parties for Arbitration**

110. It has been concluded by this court above that CERC has powers to refer disputes for arbitration, which it has powers to adjudicate upon, as also those which fall outside the outside the purview of its adjudicatory jurisdiction. In appropriate cases, therefore, CERC can refer matters for arbitration even though they bear a nexus with tariff.

111. This determination, it is true, falls within the discretion of the CERC as identified by the Apex Court in *GUVNL* at paragraph 30 and 31; however, the exercise of this discretion must be sound. The CERC must not, merely because it has jurisdiction to adjudicate a given dispute, reject a prayer for referral for arbitration. The nature of the dispute, the connection it has with the regulatory functions of the CERC, and the requirement of specialised adjudicators shall, *inter alia*, determine whether a given dispute is to be adjudicated by the CERC itself or is to be referred for arbitration.

112. The decision of the APTEL in *Southern Power Distribution Company of AP Ltd. v. Andhra Pradesh Electricity Regulatory Commission and Anr.*<sup>17</sup> has made material observations on this issue. They are reproduced as under:

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<sup>17</sup> 2022 SCC OnLine APTEL 110.



*“35. Experience has shown that though the law permits reference of the disputes “for arbitration” - under Section 79(1)(f) or Section 86(1)(f), the Commissions have generally opted to retain the litigation with themselves for adjudication, contrary examples being very rare. On first blush, it would appear that technically no fault can be found with such approach in as much as it is a choice given to the Regulatory Commission by the law. On closer scrutiny, however, in particular context of special regime of sector-specific Electricity Act, we find that the choice between adjudication by the Regulatory Commission and arbitration is being exercised capriciously. This is not a happy state of affairs. The exercise of option has to be properly guided, informed and be in accord with law. In cases which require resolution of dispute that may not involve exercise of any regulatory power - illustratively, by availing power to relax or power to remove difficulties or power to amend (regulatory frame-work), it might be advisable that the Regulatory Commissions choose the course of making reference to arbitration which is permitted by the afore-quoted provisions read with Section 158 of Electricity Act, 2003, in as much as it would ensure effective and expeditious adjudicatory process relieving them, at the same time, of the burden enabling them to focus energies more vigorously on regulatory functions.*

XXXX

*48. Given the objective and scheme of time-bound adjudication of claims envisaged by the Electricity Act, particularly in matters which have an impact on tariff and hence also on carrying cost/late payment surcharge payable, it may be desirable to consider adapting the principles enunciated by the Hon'ble Supreme Court in its judgment in the case of Afcons Infrastructure (supra); particularly because they were formulated and envisaged to apply to all “cases of civil nature” regardless whether pending in civil courts “or other special tribunals/forums”.*

113. It is, thus, evident that the CERC and arbitral tribunals are not rival or competing fora but complementary mechanisms designed to achieve the common objective of efficient and expert dispute resolution. The Commission, while exercising its discretion under Section 79(1)(f), must, therefore, recognise that the power to adjudicate and the power to refer are coexistent and operate harmoniously within the statutory scheme.



114. The Commission’s role is not to monopolise adjudication but to ensure that each dispute is resolved before the most appropriate forum—whether regulatory or arbitral—depending upon the character of the dispute, the need for regulatory oversight, and the imperative of timely, specialised, and efficacious adjudication.

## V. CONCLUSION

115. The conclusions reached by the Court may be summarised as under:

- a. Section 79(1)(f) of the Electricity Act vests two distinct powers with the CERC, them being, adjudicatory powers and referral powers. The CERC in exercise of its adjudicatory powers can only adjudicate upon disputes connected with Section 79(1)(a)-(d). However, while exercising its referral powers, it can refer “*any*” dispute for arbitration;
- b. The power of the CERC to refer a dispute involving generating companies or transmission licensee for arbitration prevails over the referral powers of a Court/authority other than the CERC, under Sections 8 or 11 of the Arbitration Act; and
- c. The CERC has the exclusive power and prerogative under Section 79(1)(f) of the Electricity Act to refer disputes concerning generating companies or transmission licensee for arbitration.

116. The instant petition is, therefore, not maintainable and deserves to be dismissed. Ordered accordingly. The petitioner shall be at liberty to institute



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appropriate proceedings in accordance with law, if so advised.

**(PURUSHAINDR KUMAR KAURAV)**  
**JUDGE**

**NOVEMBER 03, 2025**

*nc*