

Arbitration under Section 86 of Electricity Act can only be between licensees and generating companies; a plea of lack of inherent jurisdiction can be taken at any stage, even collateral proceedings (Supreme Court of India)

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Hindustan Zinc Limited v. Ajmer Vidyut Vitran Nigam Ltd.

Court: Supreme Court of India | **Case Number:** CA No. 9212 of 2019 | **Citation:** 2019 SCC OnLine SC 1683 | **Bench:** RF Nariman, Aniruddha Bose & V Ramasubramanian JJ | **Date:** 28 November 2019

Section 86(1)(f) of the Electricity Act, 2013 (“Electricity Act”) empowers the State Electricity Regulatory Commission to adjudicate disputes between licensees and generating companies, and to refer any dispute for arbitration.¹

When disputes arose between the parties, the Rajasthan Electricity Regulatory Commission appointed an Arbitrator under Section 86(1)(f) read with Section 158 of the Electricity Act.

An award was made. It was challenged in a Section 34 petition under the Arbitration and Conciliation Act, 1996, (“ACA”), which was rejected.

In appeal the High Court: –

- (a) Determined that Hindustan Zinc was, in the facts, an open access consumer and not a generating company.
- (b) And, therefore, it set aside the award concluding that the arbitrator lacked inherent jurisdiction because Section 86(1)(f) of the Electricity Act was not attracted.

The Supreme Court affirmed the High Court’s decision and held the award was *non est* in law because the arbitrator could not have been appointed²: –

- (a) It first rejected the argument that the appointment could not be challenged after initially accepting it³ noting that if there is an inherent lack of jurisdiction, the plea can be taken up at

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

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

² However, the court said the observations on merit will not stand in way if any other remedy is availed.

³ The challenge was first made in appeal after the set-aside application was rejected.

any stage, even in collateral proceedings [citing *Kiran Singh v. Chaman Paswan* (1955) 1 SCR 117].

- (b) It held that under Section 86(1) (f) of the Electricity Act, adjudication upon disputes can only be between licensees and generating companies and not between licensees and consumers, which is provided for in an open access situation by Section 42 (for which there is a separate mechanism).
- (c) In the section, the word ‘and’ means ‘or’ (“disputes between the licensees, and generating companies *and* to refer any dispute for arbitration”) [noting the issue is no longer *re integra* following *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* (2008) 4 SCC 755].