IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 189 of 2017

Dated : 3rd September, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Tamil Nadu Electricity Board
Represented by its Chairman
144, Anna Salai, Chennai – 600 002 …Appellant

Versus

1. **PPN Power Generating Company Private Limited**
Represented by its Managing Director
III Floor, Jhaver Plaza,
1A, Nungambakkam High Road,
Chennai – 600 034

2. **Tamil Nadu Electricity Regulatory Commission**
Represented by its Secretary
19A, Rukmani LakshmiPathy Raod,
Egmore, Chennai – 600 008 …Respondents

Counsel for the Appellant(s) : Anusha Nagarajan for App. 1

Counsel for the Respondent(s): Jayant Bhushan Ld. Sr. Adv.
Sonakshi Malhan for Res. 1

JUDGMENT

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Appellant M/s. Tamil Nadu Electricity Board (referred to as "TNEB") has assailed, in this appeal, the order dated 2nd March, 2011 passed by 2nd Respondent, Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as "Commission") thereby setting aside/quashing the communication dated 20th March, 2010 issued by the Appellant to 1st Respondent PPN Power Generating Company Private Ltd. vide which the Appellant had sought to recover payment of Fixed Capacity Charges (FCC) amounted to Rs.32.57 crores for the period from 26th December, 2004 to 31st January, 2005 from the 1st Respondent on the contention that the said payment had been wrongfully made to the 1st Respondent.

2. There appears to be no dispute between the parties with regards to the facts and circumstances of the case which are narrated in brief herein below :-

(i) The 1st Respondent is an electricity generating company and is carrying on its business in the State of Tamil Nadu. It has set up a 330.5 MW power generating station in Pillaiperumainalur Village,

Tharangambadi Taluk, Nagapattinam District, Tamil Nadu where the electricity is generated by a Combined Cycle Gas Turbine Power Station.

(ii) The 1st Respondent has entered into Power Purchase Agreement (PPA) with the Appellant – TNEB on 3rd January, 1997 for sale of entire power generated in the above noted power station to the Board as per the terms and conditions contained in the PPA. The power project achieved the commercial operation on 26th April, 2011.

(iii) In terms of the provisions of the PPA, the Fixed Capacity Charges (FCC) for a particular year are payable by the Appellant to the 1st Respondent if the Plant Load Factor (PLF) for the relevant year is 68.4932 per cent (which is the standard PLF).

(iv) A Force Majeure event i.e. Tsunami occurred on 25th December, 2004. Even though, it did not affect the power plant as such, yet in order to ensure the integrity of its onshore and offshore facilities, the 1st Respondent issued a notice dated 26th December, 2004 intimating the Appellant about the said Force Majeure event.

(v) The Appellant released only pro-rata amount towards FCC for the year 2004-2005 but later on released the withheld amount of FCC also for the said year.

(vi) Subsequently, by way of letter dated 6th August, 2009, the Appellant informed the 1st Respondent that Accountant General (audit) has pointed out that the said payment of FCC to the generating company i.e. the 1st Respondent for the period 26th December, 2004 to 31st January, 2005 was not correct as per the provisions of PPA and, therefore, the said payment to the tune of Rs.32.57 crores, made to the 1st Respondent incorrectly, is proposed to be recovered from it along with the interest.

(vii) Vide letter dated 7th August, 2009, the 1st Respondent rejected the claim of the Appellant and set out the reasons why the proposal of the Appellant to recover the said amount of money was untenable and contrary to the provisions of the PPA.

(viii) Subsequently, vide letter dated 20th March, 2010, the Appellant informed the 1st Respondent that the said payment of FCC amounting to Rs.32.57 crores will be recovered along with interest from the ensuing bills of 1st Respondent without further notice.

3. It is in the circumstances that the 1st Respondent approached the Commission with a petition bearing DRP No. 7 of 2010 seeking setting aside/quashing the above noted communication dated 20th March, 2010 of the Appellant.

4. The Commission has accepted the contentions of the 1st Respondent and accordingly allowed the petition vide impugned order thereby setting aide the said communication dated 20th March, 2010 of the Appellant.

5. Hence, the Appellant had approached this Tribunal by way of the instant appeal.

6. We have heard Learned Counsels appearing for the Appellant and the 1st Respondent. We have also perused the impugned order as well as the written submissions filed on behalf of the parties.

7. Before adverting to the rival submissions of the Learned Counsels, we find it apposite to quote Article 13.1 (a), 13.2, 13.3 & 13.5(a) of the PPA dated 3rd January, 1997 executed between the Appellant and 1st Respondent which are very material. The same are as under:-

> *"13.1 <u>Definition of Force Majeure.</u>*
>
> *(a) "Force Majeure" shall mean any event or circumstance or combination of events or circumstances that adversely affects, prevents or delays any party in the performance of its obligations in accordance with the terms of this Agreement, but only if and to the extent that such events and circumstances are not within the affected Party's reasonable control, directly or indirectly, and which the affected Party could not have prevented through the employment of Prudent Utility Practices or, in the case of construction activities, through reasonable skill and care, and which the Party cannot*

remedy by exercise of due diligence including but not limited to, the expenditure of reasonable sums of money. Any events or circumstances meeting the description of Force Majeure which have the same effect upon the performance of any Contractor shall constitute Force Majeure with respect to the Company.

13.2 Restrictions Notwithstanding that an event of Force Majeure may otherwise exist, the provisions of Article 13 shall not in any event excuse any failure to pay or delay in paying money due and owing under this Agreement.

13.3 Notification Obligations

(a) The Party claiming Force Majeure shall give notice to the other Party of an event of Force Majeure as soon as reasonably practicable. The affected Party shall thereafter furnish weekly reports with respect to its progress in overcoming the adverse effects of such event or circumstance and as soon as reasonably practicable shall submit to the other Party information supporting the claim for relief under this Article 13.

(b) The Party claiming Force Majeure shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure and (ii) the cessation of the effect of such event of Force Majeure on the enjoyment by such Party of its rights or the performance by such Party of its obligations under this Agreement as soon as practicable after becoming aware of the events described in each of clause (i) through (ii) above.

13.5 Continuing Payment Obligations:

(a) Upon the occurrence and during the continuance of any event of Force Majeure, the Tariff and all other payment obligations of the Parties hereunder shall continue to be payable as set forth below:

(i) For Direct Indian Political Event the Project is deemed to be operating at the Standard PLF and FCC shall be paid by TNEB.

(ii) For Indirect Indian Political Event the Project is deemed to operate at the Standard PLF and the Company is entitled to the FCC except the Return on Equity.

(iii) For Non-Political Force Majeure no FCC will be paid by TNEB to the Company. However the Company may seek to receive the FCC except the Return on Equity which will be returned to TNEB by the Company with interest determined pursuant to Article 10.6. The said amount will be refunded to TNEB with interest on the earlier to occur of (i) Company achieving the Standard PLF in a year ; or (ii) at the end of the Year."

8. It appears from the perusal of the impugned order of the Commission that after noting as well as discussing these material provisions of the PPA, it held that as soon as the plant achieves standard PLF at any time during the year, the generator recoups to the full FCC for the prior period also despite the fact that at certain time during that year, it may have fallen short of standard PLF even on account of non-political Force Majeure. The Commission, further observes that the PLF achieved by 1st Respondent for the year from 1st April, 2004 to 31st March, 2005 is 83.11 per cent which is far higher than the standard PLF and, therefore, the generator is entitled to FCC for the whole year in terms of the conjoint reading of various provisions of the PPA. Accordingly, it set aside the communication dated 20th March, 2010 issued by the Appellant to the 1st Respondent.

9. Learned Counsel for the Appellant argued that the findings of the Commission contained in the impugned order are not only contrary to

the relevant provisions of the PPA but also inherently self-contradictory as well as devoid of any reasoning. He would submit that the Commission has effectively re-written the bargain agreed to between the parties under the PPA which is not permissible in law and on this aspect he cited the judgement of Hon'ble Supreme Court in Rajasthan State Industrial Development and Investment Corporation and Anr. Vs. Diamond & GEM Development Corporation Ltd. and Anr. (2013) 5 SCC 470. It is further argued by Learned Counsel that 1st Respondent itself had invoked the Force Majeure clause of the PPA by issuing a notice dated 26th December, 2004 and, therefore, once the Force Majeure clause has been invoked, full effect has to be necessarily given to stipulation in Article 13.5(a)(iii) of the PPA which expressly states that no FCC is payable for the Force Majeure period. He further argued that admittedly the power plant of the 1st Respondent was under shutdown due to the said Force Majeure event from 26th December, 2004 to 31st January, 2005 and, therefore, it was under an obligation under Article 13.5(a)(iii) of the PPA to refund the FCC for the said period which has been paid wrongfully to it by the Appellant. On this aspect, the Learned Counsel invoked Section 72 of the Indian Contract

Act, 1872 and also relied upon the judgement of Hon'ble Supreme Court in The Sales Tax Officer, Banaras and Others vs. Kanhaiya Lal Makund Lal Saraf and others" 1958 SCC online SC 28.

10. On behalf of the 1st Respondent, it was argued by its counsel that the 1st Respondent would have been liable to refund the FCC amount to the Appellant only in case it was paid as an advance under Article 13.5(a)(iii) of the PPA whereas in the instant case, standard PLF had already been achieved and, therefore, the said Article of the PPA has no application. It is submitted by the Learned Counsel that the 1st Respondent had inter-alia raised two invoices for the periods 13th December, 2004 to 13th January, 2005 and 13th January, 2005 to 13th February, 2005, both of which encompassed to the period of Force Majeure and in these invoices Deemed Generation had not been claimed for the Force Majeure period as provided under the PPA. It was further submitted that the 1st Respondent had achieved standard PLF even without considering the Deemed Generation during the Force Majeure period and, therefore, became eligible for entire FCC for the billing period/year in respect of each of these invoices. The PLF

achieved at each of the billing dates after the date of commencement of Force Majeure event has been given in the following table at page 7 of the written submissions filed on behalf of the 1st Respondent :-

As at	Billing Period	PLF
13.01.2005	13.12.2004 to 13.01.2005	92.5194%
13.02.2005	13.01.2005 to 13.02.2005	86.5401%
13.03.2005	13.02.2005 to 13.03.2005	86.6154%
31.03.2005	13.03.2005 to 31.03.2005	83.1112%

11. Learned Counsel further argued that the sole intention of the Appellant is to unjustly enrich itself by taking advantage of an observation made by the Accountant General (Audit). On these submissions, he urged for dismissal of the appeal.

Our Analysis

12. After hearing the Learned Counsel for the Parties, we find that the case involves the interpretation of the three conditions enumerated in Article 13.5 (a) of the PPA executed between the parties, which has already been quoted herein above.

13. We may note that Article 13.2 of the PPA casts an obligation upon the Appellant to pay the entire money due under the agreement to the 1st

Respondent notwithstanding any Force Majeure event. Thus, it is manifest that the Appellant had to continue making due payments to the 1st Respondent even during the Force Majeure period. Clause 13.5 of the PPA sets out the conditions for payment of FCC by the Appellant to the 1st Respondent in the event of occurrence of any Force Majeure event. Clause (i) of Article 13.5 (a) provides that in case of Direct Indian Political Event as Force Majeure, the power project shall be deemed to be operating at standard PLF and FCC shall be paid by the Appellant Board, even though, the plant remains physically shut down. Similarly, as per Clause (ii) of the said Article, in case of Indirect Indian Political Event as Force Majeure also, the power project shall be deemed to be operating at standard PLF although the plant remains physically shut down during the Force Majeure period but the generator shall be entitled to FCC except the return of equity. Both these conditions assures financial liquidity for the generating unit during these two types of Force Majeure event.

14. Clause(iii) of Article 13.5(a) is with regard to a non-political Force Majeure event and provides an altogether different picture. During such a Force Majeure event no FCC is payable by the Appellant Board to a

generating company. As per this clause, the generating company may ask for and receive the FCC from the Appellant board except return of equity which has to be refunded by it to the Board along with the interest on achieving standard PLF for that year and in case the standard PLF is not achieved in that year, the FCC amounts so received by the generating company would have to be refunded to the Board at the end of the year. Thus, this clause merely entitles a generating company to receive the FCC amount as an advance, subject to the condition that it would be refunded either on achieving the standard PLF or at the end of the year, whichever is earlier. This arrangement contemplated under the said clause is indicative of the fact that the PLF during the occurrence of such Force Majeure event will be deemed to zero as against the standard PLF in the other two cases covered by clauses (i) and (ii) stated herein above.

15. What is also very pertinent to note here is that in order to claim any benefit of Force Majeure event (be it Direct Indian Political Event or Indirect Indian Political Event or non-political event), Article 13.3(a) requires the affected party to issue a notice in this regard to the other party as soon as reasonably practicable. Article 13.3(b) requires the

affected party claiming relief under any such Force Majeure event to again notify the other party about the cessation of the concerned Force Majeure event and also about the cessation of the effect of such Force Majeure event on the enjoyment by such party of its rights or the performance by such party of its obligations under the PPA. Admittedly, in the instant case, no such notices were issued by the Appellant Board to the 1st Respondent to claim relief under Clause (iii) of Article 13.5(a) of the PPA with regards to Tsunami as Force Majeure event. Therefore, the appellant Board cannot claim that it was not liable to pay FCC to the 1st Respondent for the period of Force Majeure i.e. 26th December, 2004 upto 31st January, 2005. It was argued on behalf of the Appellant that since 1st Respondent has issued the Force Majeure notice regarding the same event, the Appellant was not required to issue any such notice. We are unable to accept such argument. Even though, the 1st Respondent had issued the notice regarding such Force Majeure event to the Appellant, it was for the Appellant also to issue notice to the 1st Respondent as required under Article 13.3(a) to be entitled to relief for such event. In the absence of any such notice, the 1st Respondent cannot be attributed with knowledge that the Appellant intended to claim relief

for such Force Majeure event under Article 13.5(a)(iii) of the PPA. Instead of issuing these mandatory notices, the Appellant paid FCC to the 1st Respondent for the period of said Force Majeure also. Thus, it cannot be said that Appellant has paid FCC to the 1st Respondent for such period under any mistake, as claimed by it.

16. Further, it needs to be emphasized that as per clause (iii) of Article 13.5(a) of the PPA, during a non-political Force Majeure event, the FCC minus return on equity is payable by Appellant Board to a generating company only on the request of the later. In the absence of any such request from the generating company, no FCC is payable by the Board to the generating company during such Force Majeure event.

17. In the instant case, we note that the 1st Respondent had never requested or sought FCC from the Appellant Board during the period of non-political Force Majeure event i.e. Tsunami from 26th December, 2004 to 31st January, 2005. It appears that the Appellant Board, on its own, had itself released pro-rata amount towards FCC for the said financial year 2004-05 and later on released the withheld amount of FCC also for the said year itself. We have already noted the submissions made on behalf of the 1st Respondent to the effect that the generating company

has achieved standard PLF even without considering the deemed generation during the Force Majeure event in question which is also evident from the table reproduced herein above in paragraph No. 10.

18. The contents of this table have not been disputed on behalf of the Appellant Board. It appears that since the 1st Respondent had already achieved the standard PLF for the relevant year, it found itself entitled to receive entire FCC even during the period of Force Majeure event and therefore did not made any request to the Appellant Board in this regard as required under clause (iii) of Article 13.5(a) of the PPA. It would appear that for the same reason, the Appellant did not stop payment of FCC to the 1st Respondent during the said Force Majeure event and released the entire FCC for the said period also in two instalments.

19. Thus, manifestly, Article 13.5(a)(iii) is not applicable to the instant case as it was not invoked either by the Appellant or by the 1st Respondent. As a consequence, it cannot be said that the FCC amount paid by the Appellant to the 1st Respondent during the period of said Force Majeure event was an advance contemplated under Article 13.5(a)(iii) of PPA and was to be refunded by the 1st Respondent. This is for the simple reason that the said amount was paid by the Appellant to the 1st Respondent *de hors* the clause (iii) of Article 13.5(a).

20. We find that for these very reasons, the Appellant did not seek refund of such FCC amount from the 1st Respondent till the year 2009 when Accountant General (Audit) is stated to be pointed out that said payment of FCC to the 1st Respondent for the period 26th December, 2004 to 31st January, 2005 has been made wrongly and was not as per the provisions of the PPA. The Appellant is seeking refund of the said FCC amount from the 1st Respondent merely on the basis of objection raised in this regard by the Accountant General (Audit). It is for the Appellant to satisfy the Accountant General (Audit) as to why and in what circumstances was such payment made to the 1st Respondent.

21. From the conduct of the Appellant Board itself, it does not appear that payment of FCC for the period in question had been made wrongly. It did not issue any notice to the 1st Respondent under Article 13.3(a) & (b) of the PPA expressing intention of claiming relief under Article 13.5(a)(iii) of the PPA and continued to pay FCC to the respondent even during the period of Force Majeure. Release of such payment in two instalments indicates that it was done after due deliberation, with proper knowledge of the provisions of the PPA and taking into account the fact that 1st Respondent had already achieved standard PLF for the relevant year. Further, no audit officer also discovered said alleged wrongful

payment till the year 2009. It is not the case of Appellant that there was no audit between the years 2005 and 2009. Thus, only logical conclusion which can be drawn in these circumstances of the case is that the payment of FCC for the period in question was made by the Appellant to the 1st Respondent correctly and validly.

22. Hence, we are of the opinion that since the FCC for the period from 26th December, 2004 upto 31st January, 2005 was not paid by the Appellant to the 1st Respondent as an advance in terms of clause (iii) of Article 13.5(a) of the PPA, it cannot seek refund of the said amount. There was no reason or occasion for the Appellant to issue communication dated 20th March, 2010 to the 1st Respondent seeking to recover said FCC from the ensuing bills of the 1st Respondent. The same has been correctly set aside by the Commission vide impugned order.

23. We do not find any merit in the Appeal. The same is hereby dismissed.

Pronounced in the open court on this 3rd day of September, 2024.

(Virender Bhat) Judicial Member	(Sandesh Kumar Sharma) Technical Member (Electricity)

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