Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.20 of 2012

Dated:2nd Dec, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V.J TALWAR, TECHNICAL MEMBER

In the Matter of:
JSW Energy Limited.,
Jindal Mansion,
5-A, Dr. G Deshmukh Marg,
Mumbai-400 026

Appellant(s)

Versus

1. **Maharashtra State Electricity Distribution Co. Ltd.,**
   Prakashgad, 5th Floor,
   Bandra (East),
   Mumbai-400 051

2. **Maharashtra Electricity Regulatory Commission**
   World Trade Centre No.1,
   13th Floor,
   Cuffe Parade, Colaba,
   Mumbai-400 001

Counsel for the Appellant(s):Mr. M G Ramachandran,
Mr. Anand K Ganesan,
Ms. Swagatika Sahoo
Mr. Abinash Menon

Ms. Swapna Seshadri

Counsel for the Respondent(s): Mr. Subhan Srivastava
Ms. Deepa Chavan
Mr. Aditya Dewan
Mr. Ravi Prakash
Mr.Suyash Mohan Guru
Ms. Pooja Priyadarshini
Mr. Abhishek Mitra for R-1

Mr. Buddy A Ranganadhan for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. JSW Energy Limited is the Appellant herein.

2. The Appellant has filed a Petition before the Maharashtra State Commission claiming that the performance of the obligations of the Appellant under the Power Purchase Agreement dated 23.2.2010 entered into between the Appellant and the Distribution Licensee was discharged on account of the Force Majeure affecting the supplier of the coal by failing to supply to the Appellant due to Force Majeure event. The State Commission did not allow the said claim and dismissed the Petition on 16.11.2011.

3. As against this order, the Appellant has presented this Appeal.

4. The short facts are as under:

(a) The Appellant M/s. Jindal South West Limited (JSW) is a Generating Company.

(b) The Appellant has set up a 1200 MW coal based generating station in the Ratnagiri district of Maharashtra.

(c) The Maharashtra State Electricity Distribution Company Limited (MSEDCL), the first Respondent, is one of the distribution licensees having whole of state of Maharashtra.

(d) In the year 2007, the 1st Respondent, MSEDCL floated a bid for purchase of power under Section 63 of the Act as per bidding guidelines issued by the Ministry of Power.

(e) The Appellant participated in the bid intimating to the Distribution Licensee that the plant is based on imported coal to be procured from a coal supplier in Indonesia.

(f) Ultimately, the Appellant was selected as a successful bidder to supply 300 MW of power to the Distribution Licensee. The State Commission adopted the tariff quoted by the Appellant u/s 63 of the Act, 2003.

(g) In pursuance of the same, the Appellant and the Distribution Licensee entered into a Power Purchase Agreement dated 23.2.2010.

(h) At the time of the submissions of the bid and bidding process, the coal suppliers namely SBC in Indonesia had a valid and subsisting license to mine and supply coal to the Appellant.

(i) Accordingly, Fuel Supply Agreement was entered into between the Appellant and the Coal Supplier SBC on 26.12.2007.

(j) In the meantime, a dispute arose between the other Company in Indonesia namely M/s. Karya Bumi Company and the Coal Supplier.

(k) Ultimately in this dispute, the matter was taken up upto Hon'ble Supreme Court in Indonesia. The Hon'ble Supreme Court of Indonesia ultimately had confirmed the mine license granted to SBC the Coal Supplier rejecting the claim of the other Company namely Karya Bumi Company by the order dated 27.10.2008.

(l) The SBC Company later informed the Appellant by the letter dated 28.5.2010 that the license granted to it by the Hon'ble Supreme Court earlier by the order dated 27.10.2008 was cancelled and consequently,

the license of SBC was revoked and thereby the Appellant claimed the existence of the Force Majeure conditions for supply of coal under the Coal Supply Agreement.

(m) Pursuant to the letter dated 28.5.2010 sent by the Coal Supplier of Indonesia to the Appellant about the revocation of license, the Appellant by the letter dated 3.6.2010 informed the Distribution Licensee, the First Respondent that the coal could not be supplied to the Distribution Licensee due to the revocation of license affecting the Fuel Supply of the Appellant which amounted to Force Majeure conditions under the PPA.

(n) Denying this claim of the Appellant of the Force Majeure, the Distribution Licensee sent a reply that the said event cannot be construed to be a Force Majeure Event.

(o) Letters were exchanged between the parties and meetings were also held to resolve the dispute but, there were no fruitful results. Hence, the Appellant filed a Petition on 5.1.2011 before the State Commission for adjudication of the dispute between the Appellant and the Distribution Licensee under the

PPA in relation to the occurrence of the Force Majeure Event.

(p) The State Commission after inquiry, ultimately dismissed the Petition filed by the Appellant by the order dated 16.11.2011 on the ground that the action of the Hon'ble Supreme Court of Indonesia does not construe a Force Majeure event as the PPA covers only actions of the Indian Government and the authorities in India and not abroad. It further held that the Force Majeure clauses would apply only to the Contingent Contract but the PPA in question was not a contingent contract and that therefore, the relief cannot be granted to the Appellant.

(q) Aggrieved by this order rejecting the claim of the Appellant, this Appeal has been filed.

5. The Appellant has made the following submissions assailing the impugned order on following grounds:

(a) The State Commission has misconstrued the scope of Article 12.3 of the PPA which defines the term Force Majeure by holding that it does not apply to the revocation of a licence by virtue of the order of the Hon'ble Supreme Court of Indonesia without considering the two salient aspects of Article 12.3.

(b) The event affecting the coal supplier is to be taken as a Force Majeure affecting the Appellant in view of the specific provisions contained in the Article 12.2 of the PPA. As per Article 12.2, in an event of Force Majeure affecting the performance of the Seller's (Appellant) contractor shall be deemed to be an event of Force Majeure affecting the Appellant if it affects and results in delay in performance of the seller's contractor.

(c) The State Commission has merely proceeded on the basis that the event pleaded by the Appellant does not fall under the specific Clause provided in Article 12.3 of the PPA. This is erroneous for the reason that the State Commission did not consider the fact that Article 12.3 is in two parts. The first part deals with the total scope of Force Majeure Clause with a provision that the event that prevents or delays the affected party in performance of the obligation is to be the Force Majeure. The Second part deals with the Force Majeure event under the head "Natural Force Majeure Event" and "Non Natural Force Majeure Event". This is illustrative part and not exhaustive part. The definition of the term which is inclusive of specific instance is not exhaustive of the scope of the specific

instances. These two parts are related by the words used in the first part 'including those stated below'.

(d) The Force Majeure claim in the present case is cancellation of coal mining license of the supplier by the Government of Indonesia pursuant to the order passed by the Hon'ble Supreme Court of Indonesia in a Review proceedings initiated by the third party. Earlier, the license of coal supplier was consistently upheld by the Courts in Indonesia including the High Court of Medan on 2.10.2007 and also in the Hon'ble Supreme Court of Indonesia on 27.10.2008.

(e) Only on 28.5.2010, the Appellant was informed by the Coal Supplier that the licence was cancelled by the Government of Indonesia pursuant to the Order of the Hon'ble Supreme Court of Indonesia in the Review Proceedings initiated by the 3rd party. The above order was much after the execution of the Fuel Supply Agreement and much after the PPA which was executed between the Appellant and the Distribution Licensee. The decision of the Hon'ble Supreme Court of Indonesia was not within the control of the Appellant or the Coal supplier. Therefore, the same fully satisfies the basis of the Force Majeure condition that the event was not within the reasonable control of the party.

(f) The State Commission has not appreciated the fact that the PPA itself recognises the event of fuel supplier that results in delay in performance of obligation by fuel supplier to be a Force Majeure Event affecting the Appellant and wrongly interpreting the provisions of the Force Majeure in terms of the PPA. Cancellation of a license granted to the Fuel Supplier in pursuance of the order of the Hon'ble Supreme Court would amount to supervening impossibility which is a clear Force Majeure event under Article 12. Therefore, the impugned order is wrong.

6. In order to substantiate his plea, the learned Counsel for the Appellant has cited the following decisions:

(a) M/s Dhanrajamal Gobindram v. M/s Shamji Kalidas & Co., (1961) 3 SCR 1020

(b) Smt. Sushila Devi and another –v- Hari Singh and Others, 1971 (2) SCC 288

(c) Jai Durga Finvest Pvt. Ltd –v- State of Haryana AIR 2004 SC 1484

(d) Easun Engineering Co. Ltd –v- The Fertilisers and Chemicals Travancore Ltd and Another AIR 1991 MADRAS 158

7. In reply to the above submissions, the learned Counsel for the Respondent while opposing the grounds of the Appellant on the issue of Force Majeure submitted that there was an existing dispute between the coal supplier and the 3rd party in Indonesia at the time when the Appellant entered into a Fuel Supply Agreement with the Coal Supplier and the Appellant should have been diligent and acted prudently at that time itself and therefore, the lack of diligence on the part of the Appellant would not entitle the Appellant to claim the benefit due to the Force Majeure Event.

8. The following is the reply made by the Respondent:

(a) The Fuel Supply Agreement was entered between the Appellant and the Coal Supplier on 26.12.2007. On this date, the litigation between the coal supplier and the 3rd party in Indonesia was pending. The Appellant was expected to be aware of these proceedings and it must have verified those particulars with due diligence.

(b) The Court at Jambi had partly granted relief to Karya Bhumi Party in Indonesia. The coal supplier as Defendant No.2 had appeared in the said proceedings. Thus, the coal supplier was well aware of the subject mine being under dispute and the claims made by the

3rd party in respect of the subject mine and the entire litigation.

(c) Clause 2.12 of the Contract enables the seller, the coal supplier to provide coal from the alternative source at the agreed price in case of inability to do so from the notified mines with the exception of force majeure event. The Agreement also contemplates that the Appellant is entitled to source the coal to meet its demand due to non-availability on the part of the coal supplier to adhere to its supply commitments. Therefore, the difference in price of coal sourced from any 3rd party by the Appellant is to be borne by the seller namely the coal supplier.

(d) The litigation between the 3rd party and the coal supplier in Indonesia or its conclusion cannot be the fact that was unknown to the parties on the date of contract. Various steps were contemplated under the Agreement in the event a party claims to be affected by the Force Majeure. No details have been furnished by the Appellant regarding the steps taken. Further, an amendment to the Original FSA dated 26.12.2007 was provided on record for the first time before the State Commission only on 31.3.2011. This amendment dated 10.7.2009 entered into by the Appellant and the

Coal Supplier has not been referred to in the original pleadings filed before the State Commission.

(e) The stand of the Appellant in giving its rights to be reimbursed the difference in price of coal in the event of failure on the part of the SBC to supply coal as per the original agreement is in election on the part of the coal supplier which has acquiesced of not being reimbursed of money resulting from such supply from alternative source. Therefore, the Appellant who is responsible for the consequences thereof, is not entitled to claim Force Majeure Event.

9. In the light of the above rival contentions, we shall consider the main questions which may arise for consideration in this Appeal as under:

(a) Whether the State Commission is right in holding that non-natural force majeure events cover actions by only Indian Governmental Instrumentalities and the cancellation of mining licence of the Fuel Supplier in Indonesia by Order of the Supreme Court of Indonesia does not amount to Force Majeure?

(b) Whether the State Commission is justified in holding that the PPA is not a contingent contract on fuel supply and, therefore, the PPA cannot be

said to be frustrated on account of the Fuel Suppliers inability to operate the identified mines and supply coal from the identified mines consequent to order of the Supreme Court of Indonesia leading to Force Majeure event?

10. Before deciding the issues, it would be appropriate to refer to the detailed relevant facts to understand the core of the issues. These facts are as follows:

(a) M/s Karya Bumi Belati (KBB) was awarded a contract of work by the Government of Indonesia for an area of 32,170 Ha, located in Sarolangun and Musirawas District in Indonesia on 13.10.1999.

(b) The Regional Authority Regent of Sarolangun (ROS) granted Exploration Mining Concession No. KW. 02KP210801 to Sungai Belati Coal (SBC) for an area 2200 hectare **on 13.09.2001**. **On 18.04.2002.** SBC was issued transportation authorization in respect of coal extracted during exploration activities in Maura Indung village.

(c) **On 20.05.2003 t**he Exploration Mining concession No. KW. 02KP210801 granted to SBC was renewed for 2 years for an area of 2001 hectares.

(d) M/s SBC was issued an Exploration Mining concession No. KW. 02KP210801 vide decree 03 of

2004 for 20 consecutive years for 500 hectares from ROS on **21.10.2004**. This action resulted in overlapping of the permit of PKP2B between KBB and SBC.

(e) RoS issued Exploration Mining Concession to SBC for exploration of coal over an area of 5000 hectares.

(f) KBB obtained renewal of its exploration activity permit from the Government of Indonesia **on 07.03.2006**. **On 02.10.2006** Further renewal obtained by KBB for PKP2B area.

(g) KBB vide Letter no. 41/KBB/IS/XI/2006 **dated 16.11.2006** protested to Directorate General of Geology and Mineral Resource, Indonesia about the problem concerning the area of PKP2B agreement between KBB and SBC.

(h) **On 11.12.2006 t**he Directorate of Mineral and Coal Business Strengthening delivered to ROS letter no. 2343/40/DPP/2006 seeking cancellation of the Decree no. 01 of 2001 dated 13.09.2001 to SBC being no. KW. 02KP210801.

(i) Competitive bidding process initiated by MSEDCL for procurement of power **during 2007**. 14

Bids were received. The Appellant was L-3 in that process.

(j) ROS forwarded Letter no. 660/02/LH-Temben **dated 3.01.2007** to Directorate General of Mineral and Geothermal Ministry to Energy and Mineral Resource this communication relating to the overlapping problem under contract of work (PKP2B) between KBB and SBC.

(k) ROS vide its letter dated **05.02.2007** had replied to KBB Claim no. 540/0344 EKO vide KBB letter dated 24.01.2007 No. 019/KKB/IS/I/2007 refusing to revoke the mining concession granted to SBC..

(l) The claim of KBB registered with the State Administrative Court of Jambi **on 13.02.2007** Thus, SBC was aware of the proceedings relating to the overlap of mining contract in respect of PKP2B and the claims of KBB from 13.02.2007 itself. Further, SBC relied upon this fact to contend that the claim filed by KBB is contrary to Article 55 of Law No. 5 of 1986 and therefore beyond the time limit.

(m) **On 13.02.2007 t**he State Administrative Court of Jambi accepted the intervention of the SBC relating to the disputed mining Concession No. KW. 02KP210801 dated 13.09.2001 was accepted. The

Court at Jambi granted relief to KBB. SBC which had been impleaded as Defendant no. 2 and appeared in the said proceedings and had been inflicted with legal cost also along with ROS.

(n) **On 02.10.2007 t**he State Administrative High Court of Medan passed it's ruling on 2.10.2007 and cancelled the ruling of the State Administrative Court of Jambi dated 30.05.2007 and dismissed the petition filed by the KBB. The final decision of the State Administrative High Court of Medan was notified to KBB and ROS on 15.11.2007

(o) **On 26.12.2007** Coal supply Agreement entered into by SBC with the Appellant for supply of coal for 4 x 300 MW power plant of the Appellant at Ratnagiri.

(p) **On 27.10.2008 the Hon'ble Supreme Court of Indonesia refused to entertain, the Petition filed by KBB against the decision of the High Court and dismissed the claim of KBB. The Supreme Court of Indonesia had upheld the Mining Exploration Concession of the SBC.**

(q) **The Coal Supply Agreement between the Appellant and SBC was amended on 10.07.0229**

(r) **On 27.08.2009 t**he judgment and order passed by the Supreme Court of Republic of Indonesia in

judicial review granting relief to KBB that the mining Concession No. KW. 02KP210801 granted by ROS to SBC violates the prevailing laws. **ROS issued decree on 05.01.2010** in execution of the judgment and order of the Supreme Court of Republic in Indonesia.

(s) **On 23.02.2010** PPA was entered into between the Appellant and the Respondent.

(t) **SBC, the Coal supplier informed the Appellant on 28.5.2010 about cancellation by the Supreme Court of Indonesia judgment and ROS decree claiming force majeure in accordance with clause 6 of FSA between them.**

(u) **On 03.06.2010** Letter addressed by the Appellant to MSEDCL notifying that coal could not be supplied due to purported force majeure condition.

(v) **On 05.01.2011 the Appellant filed a** Petition before the Commission raising their claim. The State Commission passed the Impugned order on 16.11.2011 rejecting the claim of the Appellant. Hence this Appeal.

11. The above facts would establish the following aspects:

(a) The procurement of power by the Respondent, MSEDCL was under a Competitive Bidding process.

The Appellant had bid for the same and was declared successful bidder.

(b) Neither the RFP nor the Power Purchase Agreement specify any particular source for procuring fuel (in this case coal).

(c) The fact of which Force Majeure claim is raised by the Appellant is an outcome of litigation between the coal supplier of the Appellant and another Indonesian company and this litigation has commenced much prior to the Appellant itself entering into an Agreement for fuel supply with its supply of coal.

(d) The Appellant had agreed to an amendment which materially affected the claim of the Appellant with its fuel supplier for fuel from alternative source or price difference reimbursement.

(e) The Respondent, MSEDCL had denied the claim of the Appellant under Article 17.2 when the Appellant had approached for the same. The Respondent, MSEDCL was at that time not aware of the various details including Agreements, amendments to Agreements and other facts which have been brought on record by the Appellant subsequently pursuant to orders of the Commission in that regard.

(f) The Appellant seems to have accepted the communication of its Indonesian Fuel supplier that it was precluded by Force Majeure from fulfilling its obligations. This unqualified acceptance by the Appellant does not bind the Respondent, MSEDCL.

(g) Article 12 of the PPA, defines Force Majeure. It is necessary to comprehend what are the elements of this concept of Force Majeure. In that sense, Article 12 of the PPA incorporates the settled factors of Force Majeure event. They are as follows:

(i) Force Majeure contemplates occurrence of an event or circumstance.

(ii) It results in the affected party being wholly or partly prevented or unavoidably delayed in the performance of its obligations.

(iii) It should not be within the reasonable control directly or indirectly of the affected party.

(iv) It should not be of such a nature that the affected party could have avoided it with reasonable care or upon compliance with prudent utility practices.

(h) In the light of the above factors/element comprising Force Majeure event, it is necessary to appreciate the fact that the Force Majeure event as

claimed by the Appellant as an affected party, would imply for the sake of argument that the source of fuel was identified in the PPA. The PPA was not contingent on a particular source of fuel.

(i) Further, an outcome of litigation albeit unknown, the commencement of litigation itself renders the entire action of the Appellant as lacking reasonable care and exercise of prudent utility practices.

(j) In contractual jurisprudence, the law on this subject was predominantly settled in what are commonly termed as charter party judgments involving carriage of goods by a particular route during was or as a result of requisitioning. Interestingly, in these judgments the question was whether shipment was prevented by war or force majeure within the meaning of the contract.

(k) The present case is in fact on a higher pedestal as MSEDCL has not specified any specific source of fuel either in the RFP or in the PPA. It is in this context that the State Commission which is a quasi judicial body deals with the contract being contingent or not. For the sake of argument, assuming without admitting that the Respondent No.1, Commission ought not to have referred to and dealt with the concept of contingent contract in its impugned

judgment, the fact remains that source of fuel was not contingent for the performance of the contract. In this context the principles enshrined in Section 99 of the Code of Civil Procedure which enunciates the principle to be adopted in hearing Appeals needs to be considered.

12. In the light of the above aspects, we shall now consider the submissions made by both the parties.

13. We have noticed from the oral arguments as well as from the written submissions of the Respondent that the Respondent did not raise the issue of actions by Indian Governmental Instrumentality Vis-a-vis by actions of foreign Governmental Instrumentalities as contemplated in Clause 12.3 of the PPA.

14. The learned Counsel for the Respondent also did not contest the claim of the Appellant that the illustrative list given in clause 12 of the PPA is inclusive and not the exhaustive list. The Respondednt's main ground was that the Appellant ought to have known the pending litigation involving the coal mine in Indonesia and the Appellant should have acted with the desired degree of diligence as expected from it being a major corporate body in the power sector. The learned Counsel for the Respondent centered around the fact that the Fuel Supply Agreement had been amended diluting the rationale of Appellant in giving up its

right under the original agreement in respect of new mines, by diluting the same and permitting SBC make best efforts has to be seen in light of the pending litigation, balancing equities and requirement of due diligence. The learned Counsel for the Respondent concluded that this act proves nothing but the fact that at the time of this purported amendment to the Original Agreement both Appellant and SBC were aware of the pending litigation.

15. Let us now quote the relevant findings of the State Commission in the Impugned Order which are as under:

> *"The action on the part of the Appellate Division of the Supreme Court of Indonesia to revoke the license of the fuel supplier for mining and supply of coal is not an action by an* ***Indian Governmental Instrumentality*** *as the Appellate Division of the Supreme Court of Indonesia is not an Indian Governmental Instrumentality****. Hence, the Petitioner cannot claim Force Majeure event under Article 12.3 ii I (a) or (c).***
>
> *…*
>
> *19. From an analysis of the clauses governing force majeure events in the PPA, the Commission is of the view that the petitioner does not have a case to claim relief under force majeure. As regards the contention of the petitioner that the PPA is frustrated and hence can be avoided, the Commission is on the view that the question whether the PPA could be avoided could arise only if the PPA is a contingent contract. A "Contingent Contract" u/s 31 of the Indian Contract Act, 1872 is a contract to do or not to do something, if*

some event, collateral to such contract, does or does not happen. In the present case, the PPA was not contingent upon the supply of fuel at the specified price from the fuel supplier of Indonesia. In a case where it could be gathered that the PPA itself contains impliedly or expressly a term, according to which it would stand discharged on the failure of supply of fuel by the fuel supplier, the dissolution of the PPA would take place under the terms of the PPA itself. However, no such term has been placed before the Commission. As has already been seen from the analysis of Article 12 of the PPA, there is an express exclusion of unavailability or change of price of fuel from force majeure. In the circumstances, the doctrine of discharge by frustration cannot be available. The commercial difficulty faced by the Petitioner on account of unavailability of fuel from its fuel supplier cannot be a ground for not performing the PPA. If a person enters into a contract on the basis that the raw material available to the person on the date of the contract is Rs. x such a person cannot rescind the contract on the basis that the raw material on the date of performance of the contract or during the performance of the contract has increased from Rs. x. The risk, therefore, has to be entirely borne by the party who has so contracted. The only exceptions are force majeure events. It has already been seen from the above that revocation of licence of the fuel supplier by Indonesian authorities is not within the scope and ambit of force majeure under Article 12 of the PPA."

16. Let us now come to the question whether the State Commission has considered the relevant articles relating to the issue of Force Majeure Event by giving appropriate interpretation.

17. The relevant Article of the PPA dated 23.2.2010 is as under:

*"**ARTICLE 12: FORCE MAJEURE***

12.2 Affected Party

.....

Any event of Force Majeure affecting the performance of the Seller's contractors, shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Project; or

a delay in the performance of any of the Seller's contractors.

12.3 Force Majeure

A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

"12.3 (i) Natural Force Majeure Events:

Act of God, including, but not limited to lighting, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, floor, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the lat hundred (100) years."

ii. ***Non-Natural Force Majeure Events:***

Direct Non-Natural Force Majeure Events

Nationalization or compulsory acquisition by any Indian Governmental Instrumentality of any material assets or rights of the Seller or the Seller's contractors; or

The unlawful, unreasonable or discriminatory revocation of, or a refusal to renew, any Consent required by the Seller or any of the Seller's contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/ operation of the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

Any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality which is directed against the Project. Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

"12.3 (ii) (2) ***Indirect Non-Natural Force Majeure Events***

(a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or

(b) Radio active contamination or ionizing radiation originating from a source in India or resulting from another indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the affected party or those employed or engaged by the affected party.

(c) Industry wide strikes and labor disturbances having a nationwide impact in India."

12.6 Duty to perform and duty to mitigate

To the extent not prevented by a Force Majeure event pursuant to Article 12.3, the Affected party shall continue to

perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.

12.7 Available Relief for a Force Majeure Event

Subject to this Article 12:

No Party shall be in breach of its obligations pursuant to this Agreement to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

Every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.5.

……."

18. In the light of the above Articles, the issue has to be discussed.

19. According to the Distribution Licensee, the Appellant ought to have sourced the coal from alternative source; there was no force majeure and further the Appellant ought to have known about the litigation pending in Indonesia on the mining license of the Coal Supplier and therefore the cancellation of the mining lease would not amount to a force majeure condition and having known about that, the Appellant cannot claim that the cancellation of the mining license would amount to Force Majeure.

20. It is also argued by the learned Counsel for the Distribution Licensee that the Amendment Agreement entered into between the Appellant with the Coal Supplier diluted the rights of the Appellant on the obligation of the coal supplier

and the risk purchase by the Appellant and these amounted to imprudent practices on the part of the Appellant.

21. At the outset, it shall be stated that the State Commission did not deal with these issues raised by the Respondent before this Tribunal but it merely decided the matter only on the ground that the events pleaded by the Appellant do not fall under the specific illustrative events of force majeure and on the ground of PPA not being a contingent contract.

22. As pointed out by the Appellant, in the absence of any Appeal being filed by the Respondent in regard to these issues to support the rejection of the claim of force majeure, the Distribution Licensee cannot be permitted to advance these arguments.

23. The Force Majeure claimed by the Appellant is the inability of the Coal Supplier to supply coal on account of cancellation of Mining Lease in pursuance to the order of the Supreme Court of Indonesia in a review petition though the Supreme Court held in favour of the Coal Supplier earlier in the main order. In terms of Article 12.2 and 12.3 of the PPA the Force Majeure to be considered in the present case is of the Coal Supplier, as the PPA clearly and specifically provides that Seller's contractor's force majeure will be treated as force majeure of the Seller.

24. According to the Respondent, the Coal Supplier was required to provide coal from alternative source even in the case of Force Majeure conditions. But, this contention is not tenable. Even under the Fuel Supply Agreement between the Appellant and the Coal Supplier as in the case of PPA with the Distribution Licensee, the Force Majeure Event results in a situation wherein the authorities cannot perform their contractual obligation.

25. The another contention raised by the Respondent is that there is an amendment agreement signed by the Coal Suppliers which dilutes the rights. According to the Appellant, there is no difference whatsoever with regard to the obligation of the Force Majeure Condition in the Original Fuel Supply Agreement dated 26.12.2007 and the Amendment Agreement dated 10.7.2009.

26. This aspect is required to be re-considered. The main point is whether the Appellant was at any point of time aware or ought to be aware of the pending proceedings of cancellation of the mining license of the coal supplier.

27. According to the Appellant the license of the coal supplier was valid and it was in force at the time of the signing of the FSA by the Appellant with the Coal supplier and in fact, the mining license was upheld even by the Hon'ble Supreme Court and it was only revoked later in the Review

proceedings that too after the execution of the PPA between the Appellant and the Distribution Licensee. In view of the above statement of the Appellant, the aspect of the knowledge of the pending proceedings before the Courts in Indonesia of the Appellant is a very important point to be considered to decide this issue.

28. In order to understand the importance about the knowledge of the Appellant during the pendency of the proceedings, the following factual events are quite relevant to be considered:

(a) **On 13.02.2007 t**he State Administrative Court of Jambi accepted the intervention of the SBC relating to the disputed mining Concession No. KW. 02KP210801 dated 13.09.2001 was accepted. The Court at Jambi granted relief to KBB. SBC which has been impleaded as Defendant no. 2 and had appeared in the said proceedings and had been inflicted with legal cost also along with ROS.

(b) **On 02.10.2007 t**he State Administrative High Court of Medan passed it's ruling on 2.10.2007 and cancelled the ruling of the State Administrative Court of Jambi dated 30.05.2007 and dismissed the petition filed by the KBB. The final decision of the State Administrative High Court of Medan was notified to KBB and ROS on 15.11.2007

(c) **On 26.12.2007** Coal supply Agreement entered into by SBC with the Appellant for supply of coal for 4 x 300 MW power plant of the Appellant at Ratnagiri.

(d) **On 27.10.2008 the Hon'ble Supreme Court of Indonesia refused to entertain, the Petition filed by KBB against the decision of the High Court and dismissed the claim of KBB. The Supreme Court of Indonesia had also upheld the Mining Exploration Concession of the SBC.**

(e) **Power Purchase Agreement initialed by the Appellant and the Respondent no. 1 on 15.1.2009.**

(f) **The Coal Supply Agreement between the Appellant and SBC was amended on 10.07.0229**

(g) **On 27.08.2009 t**he judgment and order passed by the Supreme Court of Republic of Indonesia in judicial review granting relief to KBB that the mining Concession No. KW. 02KP210801 granted by ROS to SBC violates the prevailing laws.

29. Perusal of the above facts of the case would establish that the there was an on-going litigation involving the mining rights of the coal supplier at the time of signing of coal supply agreement with the 3rd party.

30. The learned Counsel for the Distribution Licensee, the Respondent contended that these facts ought to have been known to the Appellant.

31. On the other hand, the Appellant has submitted that the Distribution Licensee (Respondent) did not raise these issues before the State Commission and without dealing with those issues the State Commission has merely dealt with the issue from action of Foreign Government instrumentality and held that Clause 12.3 of the PPA permits only the action by the Indian Government instrumentality to be a ground for force majeure and not the abroad.

32. These factual aspects admittedly, have not been placed before the State Commission by the Distribution Licensee.

33. Thus, the State Commission admittedly did not deal with the various factual aspects raised by the Distribution Licensee before this Tribunal for the first time especially with reference to knowledge of the Appellant regarding the pendency of the litigation and the amendment to the Coal Supply Agreement.

34. <u>Summary of Our Findings</u>

(a) **The aspect of the knowledge of the pending proceedings before the Courts in Indonesia of the Appellant is a very important point to be considered to decide this issue.**

(b) Perusal of the above facts of the case would establish that the there was an on-going litigation involving the mining rights of the coal supplier at the time of signing of coal supply agreement. The learned Counsel for the Distribution License contended that these facts ought to have been known to the Appellant. On the other hand, the Appellant has submitted that the Distribution Licensee (Respondent) did not raise these issues before the State Commission and without dealing with those issues the State Commission has merely dealt with the issue from the action of Foreign Government instrumentality and held that Clause 12.3 of the PPA permits only the action by the Indian Government instrumentality can be the ground for force Majeure. These factual aspects admittedly, have not been placed before the State Commission. Thus, the State Commission did not deal with the various factual aspects raised by the Distribution Licensee before this Tribunal for the first time especially with reference to knowledge of the Appellant about the pendency of the litigation and the amendment to the Coal Supply Agreement.

35. As stated above, the issue raised before this Tribunal by the Distribution Licensee is very important and the same has to

be considered by the State Commission on the strength of the full details given by both the parties.

36. In view of our above summary of our findings, we feel that this matter be remanded to the State Commission for examining the issue raised by the Distribution Licensee regarding the knowledge of the Appellant on the on-going litigation and amendment to the Coal Supply Agreement and the facts thereon.

37. Accordingly, we remand the matter back to the State Commission with the direction that these issues must be considered afresh in the light of the materials to be furnished by both the parties and decide the same in accordance with the law.

38. The State Commission is directed to go into the issue in the light of the observations made above. Both the parties must cooperate with the State Commission for the expeditious disposal of the matter by furnishing all the details to the Stat Commission.

39. Thus, the impugned order is set aside. The Appeal is allowed. However, there is no order as to costs.

(V.J Talwar) **Technical Member**

(Justice M. Karpaga Vinayagam) **Chairperson**

Dated: 2nd Dec, 2013

√REPORTABLE/~~NON REPORTABLE~~