

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.254 OF 2012

Dated:05th Feb, 2014

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s. Jaiprakash Power Ventures Limited (JPVL),
Juit Complex, Waknaghat,
PO Dumehar Bani, Kandaghat,
Distt-Solan, Himachal Pradesh
PIN-173 215**

..... Appellant

Versus

**1. Himachal Pradesh State Electricity Board Ltd.,
(HPSEBL/Board)
Kumar House,
Shimla-171 004**

**2. Himachal Pradesh Regulatory Commission
Keonthal Commercial Complex,
Khalini, Shimla-171 002**

..... Respondent(s)

**Counsel for the Appellant : Mr. S B Upadhyay, Sr Adv.
Mr. Pawan Upadhyay
Mr. Jayesh Gaurav
Ms. Anisha Upadhyay
Mr. Kaustuv P Pathak
Ms. Sharmila Upadhyay**

**Counsel for the Respondent(s): Mr. Anand K Ganesan
Ms. Swapna Seshadri**

J U D G M E N T

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

1. M/s. Jaiprakash Power Ventures Limited is the Appellant herein.
2. Aggrieved by the Impugned Order dated 21.9.2012 passed by the Himachal Pradesh State Commission dismissing the Petition filed by the Appellant praying for a direction to the Electricity Board, the Respondent, to constitute an Assessing Committee for quantifying the damages towards Force Majeure claim made by the Appellant, this Appeal has been filed by the Appellant.
3. The relevant facts are as follows:
 - (a) The Appellant is a Generating Company. It is operating a 300 MW Baspa-II Hydro Electric Plant in the State of Himachal Pradesh.
 - (b) Himachal Pradesh State Electricity Board Limited (Electricity Board), is the First Respondent. Himachal Pradesh Electricity Regulatory Commission (State Commission) is the Second Respondent.
 - (c) A Memorandum of Understanding was signed on 23.11.1991 between the Government of Himachal

Pradesh and holding company of the Appellant for the development of the run-of-the-river 300 MW Baspa-II Project. The Implementation Agreement was also signed on 1.10.1992 for implementation of the project.

(d) The Power Purchase Agreement was entered into between the Appellant and the Electricity Board, the Respondent, on 4.6.1997.

(e) On 8.6.2003, the Commercial Operation of the project was achieved. On 5.7.2005, suddenly there was a flash flood. This caused damage to the barrage works and resulted in suspension of the generation of energy from 5.7.2005 to 10.7.2005.

(f) The Appellant had to incur capital expenditure amounting to Rs.67.88 Crores towards the restoration of the damaged works caused by the flash flood. As per the PPA, the event of Force Majeure has to be intimated to the Electricity Board within 7 days. Accordingly, the Appellant sent a notice notifying to the Electricity Board with regard to the Force Majeure event through the letter dated 9.7.2005. There was no response from the Electricity Board.

(g) After lapse of more than one year i.e. on 7.8.2006, the Electricity Board sent an intimation to the Appellant disputing the Force Majeure event.

(h) In view of the dispute raised as above, the Appellant issued intimation on 9.6.2007 as per Article 18 of the PPA to the Electricity Board, the Respondent, about the nomination of its representative to resolve the dispute through Good Faith Negotiations with the Electricity Board. The Electricity Board also on 30.1.2008 nominated its representative in pursuance of the Article 18 of the PPA to resolve the dispute on the status of the Force Majeure event and intimated to the Appellant. Thereafter, the Authorized Representatives of both the parties held several meetings and interaction with the Officers. Then, they made spot inspection also. Thereupon, the Representatives of both the parties, after spot inspection and discussion, prepared a detailed Report dated 24.1.2011 concluding and declaring that some damage was caused due to Force Majeure event. This Report was submitted to the Electricity Board, the Respondent for further action.

(i) As per the PPA, on receipt of the Report declaring the event as a Force Majeure, the Electricity Board was to constitute a Committee to assess the quantum of damages. But, no steps have been taken to constitute the said Committee. Since there was a delay in constitution of the Committee, the Appellant

sent a letter on 7.4.2011 to the Electricity Board praying for the constitution of the Assessing Committee.

(j) Despite the receipt of the said letter, there was no decision nor a positive response. Hence, the Appellant filed a Petition on 16.6.2011 in Petition No. 98 of 2011 before the State Commission praying for a suitable direction to be issued to the Electricity Board to expedite its approval of the Recommendation Report in terms of the provisions of the PPA in respect of capital expenditure incurred by the Appellant amounting to Rs.67.88 Crores for the restoration of the damages due to Force Majeure event.

(k) The said Petition came-up for hearing before the State Commission on 3.9.2011. The Electricity Board requested for adjournment to decide and to file the reply within four months. However, the State Commission gave two weeks adjournment to file its reply i.e. on or before 1.10.2011.

(l) In the meantime, the Electricity Board convened its meeting on 29.9.2011 participated by the whole time Directors of the Board. After considering all the aspects of the matter, the Board rejected the Recommendation Report which was submitted by the Representatives of the Electricity Board as well as the Appellant under Article 18(1)(b) of the PPA and

accordingly declared that the event was not a Force Majeure.

(m) After taking the said decision, the Electricity Board filed a reply on 1.10.2011 before the State Commission reporting about their decision. In view of the above decision taken by the Electricity Board, the State Commission dismissed the said Petition and gave a liberty to the Appellant to seek remedy through the “Dispute Resolution Mechanism’ provided under the PPA.

(n) Thereupon, the Appellant on 14.10.2011 filed a Second Petition in Petition No.120 of 2011 before the State Commission praying for a suitable direction to the Electricity Board to constitute the Assessing Committee in terms of Article 17.7 of the PPA for quantifying damages after cancelling the decision dated 29.9.2011 taken by the whole time Directors of the Electricity Board and to declare the event as Force Majeure and in the alternative, refer the dispute to the Arbitration.

(o) The State Commission entertained the said Petition and issued a notice to the Electricity Board. The Electricity Board filed a reply dated 20.1.2012, before the State Commission stating that the Report submitted earlier by the authorized representatives of both the parties dated 24.1.2011 was required to be

further ratified by the whole time Directors of the Electricity Board and accordingly the said report dated 24.1.2011 was considered by the whole time Directors who in turn, rejected the report and that therefore, the prayer made by the Appellant cannot be granted.

(p) The State Commission heard both the parties. Since the issue related to the interpretation of Article 17 and 18 of the PPA, the State Commission decided to seek for the expert opinion on the interpretation of those Articles and referred it to a Retired Judge of High Court on 30.3.2012.

(q) Accordingly, the said Retired judge of the High Court gave the expert opinion on 13.6.2012 stating that the Report earlier submitted by the Authorized Representatives of both the parties, cannot be considered to be final in the absence of final settlement of the agreement between the parties and as such, the prayer for constituting an Assessing Committee was premature. On receipt of the same, the State Commission issued notice to both the parties to give their views with regard to the said legal opinion.

(r) In the meantime, the Appellant also obtained an expert opinion dated 3.8.2012 from the Retired Chief Justice of the Supreme Court giving the opinion in favour of the Appellant to the effect that the 1st Report

submitted by the Representatives of both the parties ought to be taken as a final Agreement. The Appellant filed this expert opinion before the State Commission for consideration. Both the parties made submissions on the basis of the respective legal opinions given by the two legal experts.

(s) After hearing the parties and considering the materials available on record, the State Commission dismissed the Petition filed by the Appellant through the Impugned Order on 21.9.2012 holding that the Petition seeking for direction to the Electricity Board to set-up an Assessing Committee in accordance with the Article 17.7 of the PPA could not be entertained in the absence of the ratification and the final written agreement by both the parties and as such, the Appellant was not entitled to get the relief sought for.

(t) On being aggrieved by this Impugned Order dated 21.9.2012, the Appellant has filed the present Appeal.

4. On behalf of the Appellant, the following grounds were urged in this Appeal seeking for the quashing of the Impugned Order.

(a) The State Commission having admitted that the claim for Force Majeure in the instant case was a non

political event caused by the flash flood, rendered a wrong finding that the dispute once referred for resolution under Article 18, the same shall have to be resolved only under Article 18 and not partly under Article 17 and partly under Article 18. This finding is erroneous interpretation of the provisions of the Article 17 and 18 of the PPA.

(b) The State Commission has wrongly held that the resolution of dispute by way of Good Faith Negotiations by the Senior Executive Officers of both the parties as required under Article 18.1 (a) is not enforceable. The State Commission concluded that the enforcement of the outcome of Good Faith Negotiations by the Senior Executive Officers has to be further ratified and reduced in writing through a separate Agreement by both the parties to the PPA. The above interpretation of the State Commission is not only erroneous but, also contravenes the provisions of the PPA.

(c) Having held that as per Article 18.1 (b) and 18.1 (c) of the PPA that if the parties executed a Written Settlement Agreement in accordance with Article 18.1 (c), the State Commission ought to have held that the dispute stands settled fully and thereafter there was no need to go for Article 18 (2). However, the State commission held that after signing of the

Written Settlement Agreement signed by the Representatives of both the parties under Article 18.1 (c) of the PPA there should be another Agreement by the parties since the reference to the term 'Party' in Article 18.1 (a) means the Parties to the PPA and not merely the nominees appointed by the parties for attempting Good Faith Negotiations. This interpretation is totally wrong.

(d) The State Commission has failed to appreciate that Clause 18 of the PPA contains three stages. The first stage deals with the circumstances where a dispute can be resolved by the representatives of both the parties. The second stage deals with the resolution of the dispute namely "Dispute Resolution Board Methodology". The 3rd stage is Arbitration Clause. As per Article 18.1 (a), it is clear that no dispute shall be subject to the provisions of the Clause 18.2 dealing with the resolution of the dispute through dispute resolution Board or to any litigation until the provisions of Article 18.1 (b) are fulfilled and the parties have failed to execute a written settlement agreement in accordance with Article 18.1(c) and 18.1(d).

(e) The Report signed by the Authorized Representatives of both the parties is binding on both the parties. Thereafter, either the Management of the

Appellant or the Electricity Board cannot reject the said Report. The issue before the parties under the Good Faith Negotiations was limited to the declaration of the event of a Force Majeure. Once the said issue is decided as Force Majeure, the same would go back to the stage of Article 17.7 and appropriate steps under the PPA would be initiated on the presumption that condition in Article 17.3 have been complied with.

(f) The scope of Article 18 would relate to the resolution of the Dispute. Once the Dispute referred to under Article 18 is to declare an event as Force Majeure by the Representatives of both parties, the scope of said reference cannot be enlarged by insisting for one more final written Agreement. Article 17.7 is a complete procedure. It deals with a constitution of a Committee to assess the damages. Once there is a declaration of event of Force Majeure, then the next stage for assessing the damages would automatically come. But this aspect has not been taken note of by the State Commission. Hence, the Impugned Order is liable to be set-aside.

5. In reply to the above grounds urged by the Appellant, the learned Counsel for the Respondent has made the following submissions:

(a) The contention of the Appellant that the Board of Directors and the Management of the Electricity Board is bound to accept the Good Faith Negotiations Report prepared by the Authorized Representatives of both the parties, is misconceived. This is contrary to the very structure by which the Electricity Board is governed by the Companies Act, 1956. The Electricity Board is governed by the Board of Directors which is the ultimate decision making authority of the Electricity Board. The powers of the Board of Directors cannot be curtailed or restricted by contending that the Board of Directors has no authority to reject the report sent by the Subordinate Authority.

(b) The PPA only deals with the rights and obligations of the Appellant and the Electricity Board. But, the final decision is to be taken by the Board which involves purely the internal procedures to be followed. This cannot be the subject matter of the provisions of the PPA. It is the discretion of the Electricity Board to take a final decision on the course of the action as deemed necessary.

(c) The claim of the Appellant is the declaration of the alleged Force Majeure events which in the present case is disputed by the Electricity Board. If the monetary claim made by the Appellant on the basis of

the Force Majeure event is allowed, then it would impose a financial burden on the Electricity Board and consequently the consumers at large in the State of Himachal Pradesh would suffer from the tariff shock. Any amount paid by the Electricity Board to the Appellant would become an automatic pass through in the Retail Supply Tariff to the consumers. The State Commission as the Regulatory authority is necessarily required to adjudicate the matters on merit and not merely leave it to be resolved by the parties.

(d) The Electricity Board being a Company is managed by the Board of Whole Time Directors which is the ultimate decision making authority. As per the delegation of financial powers of the Board, Senior Executive Officer of the Board has been appointed to send a report on Force Majeure claim after spot inspection signed by both the parties. This report has to be ultimately approved and ratified by the Management Committee of the Board. In the present case, after detailed deliberations and thorough scrutiny of the various reports, the Management of the Board ultimately took a decision not to accept the Report as well as the claim of the Appellant for treating the damage caused on account of Force Majeure Event. So this decision alone is final.

(e) One of the primary objectives of the State Commission is to protect the interests of the consumers and to ensure that only reasonable cost and expenses are loaded on to the consumer's tariff. Hence, the Impugned Order passed by the State Commission on the basis of the final decision taken by the Board is perfectly valid.

6. Having regard to the rival contentions of the parties, the core issue which has to be considered in this Appeal, is as follows:

“Whether the outcome of the Good Faith Negotiations by Authorized Representatives of both the parties and the terms of the settlement of which have been reduced in writing and signed by these Representatives of both the parties is binding on the parties in the absence of the ratification by the Whole Time Directors of the Electricity Board, the Respondent?”

7. Before discussing this core issue, let us refer to the issues framed and findings rendered in the Impugned Order by the State Commission:

(a) The State Commission has framed Four Issues for consideration. The Four issues are as follows:

(i) Whether the dispute shall be resolved in accordance with the provisions of the PPA or such dispute can be resolved under any other relevant law?

(ii) Whether the dispute arising under Article 17 of the PPA require to be settled/resolved under Article 18, can be settled in its entirety and finality under Article 18 only or it can be settled partly under Article 18 and partly under Article 17?

(iii) Whether the outcome of Good Faith Negotiations (GFN) as attempted by Authorized representatives of the parties, the terms of the settlement of which is reduced to writing and signed by those representative under Article 18(1)(b) is enforceable or both the parties are required to execute another written settlement agreement under Article 18(1)(a)?

(iv) Whether the parties can decline to execute written settlement agreement in accordance with Article 18(1) (c) where the Representatives of parties have resolved the dispute under Article 18 (1) (b) read with Article 18 (1) (c) and if so, what are the consequential steps to be taken?

(b) The State Commission decided the Issue No.1 in affirmative in favour of the Appellant. The crux of the findings on the First Issue is as follows:

“The PPA for the project provides for appropriate mechanism for resolution of dispute. In the present case, Article 17 and 18 of the PPA provide for resolution of the dispute. Therefore, the relationship between the parties in the present case is governed by the PPA. Therefore, for the purpose of resolution of dispute in this case, Article 17 and 18 of the PPA shall be followed. Any other law or the provisions of the Section 86 (1) (f) of the Electricity Act, 2003 need not be followed”.

(c) The Second issue would relate to the question whether the dispute can be resolved partly under Article 17 and partly under Article 18 or can be settled only under Article 18. The State Commission, while admitting that the claim of the Force Majeure was a non-political event caused by the flash flood under Article 17(1) (a) of the PPA, rendered a finding that the dispute, once referred for resolution under Article 18, shall have to be resolved only under Article 18 and not partly under Article 18 and partly under Article 17. The crux of the finding is as follows:

“The claim on Force Majeure is a non-political event namely floods. Hence only the provisions under Article 17 and 18 are required to be analyzed. Under Article 17.1 the meaning of the term Force Majeure is any event or circumstance or combination of events of circumstances, which includes the events and circumstances and their consequences. The contents of the notice issued under Article 17.6 (c) should have information containing reasonable details of the nature, duration and impact on the Company of the Force Majeure Event. Those details are given in the communication sent by the Petitioner Company through the letter dated 22.5.2006. But, the Electricity Board disputed the above notice through its reply letter dated 7.8.2006 stating that the damages referred to in the notice were not the consequences of the Force Majeure Event. This communication was under Article 17.6.(d) which is Force Majeure Notice as per Article 17.6(e). In response to the notice of the Electricity Board, the Petitioner sent another letter to the Electricity Board proposing for the matter to be resolved as per Article 18 and informing about the nomination of its Senior Executive Officer. Once the Petitioner Company

has disputed such notice and sought recourse through Article 18, the subsequent provisions of Article 17.6 i.e. provisions of article 17.6(h) and 17.7 would cease to operate. While undertaking the provisions of Article 18, it requires either party to give to another written notice. Such a notice will provide material particulars of the dispute. Therefore, the entire dispute is referred for resolution under Article 18 and not any part thereof. Therefore, the dispute once referred for resolution under Article 18, shall have to be resolved only under Article 18 which is a self-contained code providing for resolution of any dispute in its totality and finality. It cannot be resolved partly under Article 17 and partly under Article 18 of the PPA. The good faith negotiation committee under Article 18.1(b) or Dispute Resolution Board under Article 18.2 and Arbitration mechanism under Article 18.3 would consider the Force Majeure event and its consequences and the relief sought by the parties in totality while resolving the dispute. The disputes once referred for resolution under Article 18 would have to be resolved under Article 18 only, which was a self contained code providing

for resolution of any dispute and to its totality and finality.

(d) The third issue is with reference to the question whether the outcome of Good Faith Negotiations by the authorized Representatives of both the parties is enforceable. On this issue, the State Commission gave a finding that the Good Faith Negotiations by Senior Executive Officer of the parties as required under Article 18.1 (a) is not enforceable in the absence of the ratification by the Management of the Electricity Board and thereafter signing of a separate written Agreement by both the parties. The crux of the findings is as follows:

“Justice D P Sood, the Retired Judge of the High Court engaged by the State Commission as an expert to get legal opinion regarding the interpretation of Article 17 and 18 of the PPA gave the following opinion. “The settlement arrived at by the First Settlement Committee consisting of the authorized representatives of both the parties, is not final. As such the same is not binding on the parties. It is merely a pre-condition to the stage at which the parties are required to execute another written settlement agreement”. The analysis of Article 17 and 18

would show that the “Party” i.e. the Management of the Board has to authorize its nominee to make an attempt in Good Faith Negotiations to resolve the dispute. Article 18 (1) (c) provides that the Senior Executive Officer will record in writing the outcome of their attempt to resolve the dispute by way of Good Faith Negotiations and sign it. If as per the understanding of the Senior Executive Officer the dispute is resolved, there need not be any provision under Article 18 (1) (c) as to what would be the consequential action of their attempt. The Article 18.1 is made only for settlement of dispute by Good Faith Negotiations before proceedings to next stage. The entire provision under Article 17 is for Good Faith Negotiations. Only when it fails, Article 18 is invoked. Since Article 18 is meant for all disputes under the PPA, the process of Good Faith Negotiations in Force Majeure case is required to be repeated to meet the procedural requirement. Therefore, the State Commission is of the view that the resolution of the dispute by way of Good Faith Negotiations by the Senior Executive Officers the recourse to Article 18(1)(a) has to be taken and the decision under Article 18.1(a) has to be taken by the parties to the PPA.

Therefore, the resolution of dispute by way of Good Faith Negotiations by Senior Executive Officers is not enforceable.”

(e) The Fourth Issue is relating to the situation wherein the parties decline to execute a final Written Settlement Agreement when the representatives of both the parties have earlier resolved the dispute under Article 18 (1) (b). With regard to this issue, the State Commission gave a finding that after signing a first written agreement under Article 18.1 (c) of the PPA, there should be another agreement by the authorities since reference to term “Party” in Article 18.1 means the actual parties to the PPA only and they are not the nominees appointed by the parties for attempting Good Faith Negotiations. The findings on the 4th issue is as follows:

“The plain reading of the Article 18(1) (a) indicates that if the parties execute a written settlement agreement in accordance with the Article 18.1 (c), the dispute stands settled fully. In that event, there is no need to go into Article 18.2. A careful perusal of the Article 18.1 (a) would indicate the reference to the term “Party” in this Article means to the ‘Parties to the PPA’ and not their nominees appointed by the parties for

attempting Good Faith Negotiations. Therefore, as Justice D P Sood correctly suggests that the Report of Good Faith Committee is not final and binding on the parties to the PPA but, the 'Parties to the PPA' should sign another written Settlement Agreement and such written settlement may be in conformity with the terms of settlement agreed to by the Senior Executive Officer to the extent the dispute resolution attempted to have been solved. But, when the one of the 'Parties' to the PPA does not agree with the attempted resolution of the dispute by the Senior Executive Officers, the process under Article 18.1 (b) and (c) has been concluded and the next course to be adopted is under Article 18.2. As per Article 18.2, the Board will be the lead partner to negotiate the process and facilitate timely completion of the dispute resolution proceedings. If one party i.e. Management of the Electricity Board does not sign such written settlement agreement, the dispute is not resolved. Therefore, the dispute shall be referred for resolution of the dispute to the Dispute Resolution Board under Article 18.2. Hence, the prayer sought for by the Petitioner cannot be granted. Consequently, the Petitioner

has to resort to Dispute Resolution Mechanism under Article 18.2 of the PPA”.

8. Keeping in view of the findings of the State Commission on various issues as referred to above, we shall now discuss the core issue framed above by us in the light of the decision taken by the State Commission rejecting the prayer made by the Appellant. The Core Issue is reiterated hereunder:

“Whether the outcome of the Good Faith Negotiations by Authorized Representatives of both the parties and the terms of the settlement of which have been reduced in writing and signed by these Representatives of both the parties is binding on the parties, in the absence of the ratification by the Whole Time Directors of the Electricity Board?

9. While discussing this issue, we have to take note of the findings rendered by the State Commission with regard to the 1st issue relating to the question as to whether the dispute between the parties in the present case shall be resolved under the PPA or under any other law.
10. As mentioned above, the State Commission decided this question accepting the contention of the Appellant to the effect that the relationship between the parties to the PPA is

governed by the terms and conditions of the PPA only and not under any other law.

11. In the light of the decision of the State Commission on the said issue let us discuss the Core Issue which has been framed above and decide the same by interpretation of relevant Articles of the PPA without resorting to the provisions u/s 86 (1) (f) of the Act, 2003.
12. The Article 17 and 18 of the PPA are relevant for the resolution of the Dispute.
13. The relevant portion of Article 17 is as under:

Article 17: FORCE MAJEURE

17.1 DEFINITION OF FORCE MAJEURE:

Force Majeure shall mean any event or circumstances or combination of events or circumstances referred to in this Clause 17.1 that wholly or partly prevents or unavoidably delays any Party in the performance of its obligations under this Agreement, but only if and to the extent that such events and circumstances are not within the reasonable control, directly or indirectly, of the affected Party and could not have been avoided even if the affected party had taken reasonable care. Force Majeure includes the following events and circumstances to the extent they, or their consequences, satisfy the above requirements:

- (a) *Non Political Force Majeure Events*
 - (i) *Any material effect of the natural elements or other acts of God, including lightning, fire, earthquake, volcanic eruption, floods,*

landslide, storms, cyclones, typhoons, tornado.

(ii) xxx xxx xxx xxx xxx xxx xxx xxx xxx

17.3 NOTIFICATON OBLIGATIONS

(a) *The party claiming Force Majeure shall give notice in writing to the other Party of the occurrence of the Force Majeure event Such notice shall include full particulars of the event of Force Majeure, of its effects on the Party claiming relief and the remedial measures proposed;* xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx

(b) *If the Party in receipt of Force Majeure Notice disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be settled as per Article 18.*

(c) xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx

17.5.1 FAILURE OR DELAY CAUSED BY FORCE MAJEURE – GENERAL CONSEQUENCES

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(c) *The parties shall co-operate, negotiate in good faith and develop and implement a plan of remedial and reasonable alternative measures to remove/remedy Force Majeure Event to enable the performance of the affected party.*

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(f) Notwithstanding anything contained in this Agreement during any Non-political Force Majeure and indirect Political Force Majeure Event as per section 17.1 (a) and 17.1 (b) (i) to (iv), if the Company cannot operate the station at all or cannot operate the station at declared capacity, the Board shall pay to the Company the capacity charges calculated on the basis from the date of commencement of Force Majeure Event, till the effect of Force Majeure Event is completely over.

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17.6 OTHER CONSEQUENCES OF FORCE MAJEURE CONDITONS UDNER SECTION 17.1 (b)

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(c) After the COD of the Project, if the operation of the project is seriously and adversely affected for a continuous period of365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (i to iv), the Company may, for so long such any of the Political Force Majeure Event is continuing, deliver a notice to the Board informing the Board in reasonable detail of the nature, duration, and impact on the Company of the Force Majeure Event.

(d) After the COD of the Project, if operation of the Project is seriously and adversely affected for a continuous period of 365 days

or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (I to iv), the Board may, for so long as such Force Majeure is continuing, deliver a notice to the Company informing the Company in reasonable detail of the Board's understanding of the nature, duration, and impact on the Board of the Force Majeure Event.

(e) Any notice delivered in accordance with Section 17.6 (a), 17.6 (b), 17.6 (c) or 17.6 (d) shall be referred to as a Force Majeure (FM) Notice”.

(f) If the Party in receipt of the FM Notice, within thirty (30) Days of its receipt, disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be dealt as per provisions of Article 18.

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(h) In case of Force Majeure Event after the completion of any unit(s)/project, the parties shall take actions as per sub-para (d) above and in such a situation the additional capital cost required for remedial and alternative measures to remove/remedy the Force Majeure Event shall be added to the project completion cost for all purposes including, but, not limited to tariff calculation for subsequent period of operation. Additional capital cost shall be worked out after deducting receivables from insurance proceeds from the total cost of additional works, subject to provisions of section 17.7.

17.7 PROCEDURE TO SETTLE FORCE MAJEURE CLAIMS

17.7.1 Neither party shall raise any claim on account of Force Majeure for value of less than Rupees ten lacs at any instance, during construction period. Any claim exceeding Rupees ten lacs shall be referred to a committee comprising one representative each from the Board and the Company and one more representative nominated jointly by the parties.

17.7.2 The aforesaid committee shall verify/examine and decide such claims and its decision/award shall be final and binding on both the parties.

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17.7.4 During operation of the project, each individual claim above only Rupees one crore after adjustment of receivables from insurance at a time shall be referred to the committee and any excess expenditure by the Company over Rupees one crore to overcome the Force Majeure event and as agreed by the Committee shall be added to the capital cost of the project for the subsequent period of operation for the purpose of computation of tariff and other purposes of this Agreement.”

- 14.** The above Article namely 17 of the PPA provides for the details of the procedure to be followed when the Force Majeure Event had occurred and reported to the parties to decide about the Force Majeure Event and provide relief to

the parties to claim the loss suffered due to the Force Majeure Event.

15. The gist of the procedure as provided in the above Article in brief, is as follows:

(a) The party claiming Force Majeure shall give notice to the other party about the Event within 7 days after the said event had occurred as per Article 17.3(a).

(b) Such notice shall contain the full particulars of the event of Force Majeure and its effects on the Party claiming relief and the remedial measures proposed.

(c) According to Article 17.(b), if the party on receipt of the Force Majeure notice, disputes the degree to which the said event has affected the construction or operation of the project, such dispute shall be settled as per Article 18.

(d) According to Article 17.6 (c), after the Commercial Operation Date of the Project, if the operation of the project is seriously and adversely affected for a continuous period of 365 days or more due to occurrence of Force Majeure event under Non Political Force Majeure event under Section 17.1 (a), the Company may deliver a notice to the Board informing the nature, duration and impact on the

Company of the Force Majeure event. Such notice shall be referred to as Force Majeure Notice(Article 17.6(e)).

(e) Similarly in the circumstances described above at (d) above, the Board may deliver a notice to the Company informing the Board's understanding of the nature, duration and impact on the Board of the Force Majeure Event. Such notice shall also be referred to as Force Majeure Notice(Article 17.6(d) & (e)).

(f) If any Party on receipt of the Force Majeure Notice disputes the degree to which the Force Majeure Event has affected the operation of the Project, such dispute shall be dealt as per the provisions of Article 18.

(g) Article 17.6(h) provides that in case of Force Majeure Event after the completion of Unit(s)/projects, the parties shall take action as per Article 17.6(d) and in such situation the additional capital cost on account of impact of the Force Majeure Event will be recoverable through tariff, etc.

(h) Article 17.7 describes the procedure to settle Force Majeure claims provided the impact of Force Majeure Event has been accepted by both the parties. The claim of above Rs.1 crore to overcome the Force Majeure Event shall be referred to a Committee comprising one representative each from the Board

and the Company and one more representative nominated jointly by the parties. This Committee has to verify/examine and decide such claims and its decision/award shall be final and binding on the parties.

- 16.** The above procedure would reveal that the Force Majeure Event can be disputed by the party immediately on receipt of the notice of the Force Majeure Event.
- 17.** On a plain reading of the above Clause of the PPA, it is crystal clear that once a Force Majeure Notice under Article 17.6(c) is issued by the Company and received by the Electricity Board, it could raise the dispute at that stage if it disputes the degree of the effect of the event. Then both the parties shall resolve the dispute according to provisions of Article 18.
- 18.** If the Electricity Board decides to accept the said Report declaring the event as a Force Majeure and does not dispute the same in terms of Article 17.6 (f), then an Assessment Committee has to be constituted comprising one representative each from the Board and the Company and one more representative nominated jointly by the parties under Article 17.7 whose report under Article 17.7.2 of the PPA becomes final and the same is binding on both the parties.
- 19.** In the light of the above procedures contained in the provisions, we shall now analyze the factual aspects.

- 20.** In the present case, the Appellant as per Article 17.3 issued notice to the Electricity Board on 9.7.2005 informing that due to the flash flood on 5.7.2005, the Power House was closed and a lot of damage to the project had caused and a detailed assessment of the damages would be intimated to the Electricity Board along with the proposed measures to be taken.
- 21.** Under Article 17.3 (b), the Electricity Board, the Respondent, could dispute the notice issued by the Appellant by invoking the provisions of Article 18 for Dispute Resolution. In this case, the Electricity Board at that stage, did not dispute the notice of the Appellant dated 9.7.2005.
- 22.** On 22.5.2006, the Appellant sent a communication to the Electricity Board with the details of works already undertaken and proposed to be undertaken along with the details of the proposed restoration works and their estimated cost worked out to Rs.67.50 Crores and sought the approval of the cost of restoration works from the Electricity Board. This Notice is purported to have been issued under Article 17.6 (c) and Article 17.6 (e) as a Force Majeure Notice.
- 23.** The term “Force Majeure” has been defined in Article 17.1. The definition of the Force Majeure provides the meaning of the term that any event or any circumstance or combination of events or circumstances including their consequences. In the present case, the contents of the Notice through

communication dated 22.5.2006 which refers to the earlier communication dated 9.7.2005, would reveal that it contains the events and consequences, the nature and scope of remedial measures executed and proposed to be executed, cost incurred and proposed to be incurred.

- 24.** In reply to the notice of the Appellant under Article 17.6 (c), the Electricity Board has to send the intimation to the Appellant under Article 17.6 (d) which should contain the Electricity Board's understanding about the nature, duration and impact on the Board of the Force Majeure Event.
- 25.** Thus, these provisions indicate that such notice shall contain the nature of Force Majeure event, its consequences and its impact in terms of the cost implication.
- 26.** In the present case, the Electricity Board disputed the above notice dated 22.5.2006 through its letter dated 7.8.2006 stating that the damages caused were not the consequences of the Force Majeure Event. This communication is under Article 17.6 (f).
- 27.** Thereupon, on receipt of this notice, the Appellant disputed this notice of the Electricity Board and issued letter dated 9.6.2007 in terms of Article 18 (1) (b) of the PPA proposing that the matter be resolved through the Good Faith Negotiations after nominating its Senior Executive Officer one Mr. R L Gupta on behalf of the Appellant.

28. In response to that, the Electricity Board through its reply dated 30.1.2008, nominated its representative in pursuance of the Article 18 to resolve the dispute on the consequence of the Force Majeure Event.
29. The reading of Article 17.6 would indicate that once the party, on receipt of Force Majeure Notice has disputed such a notice, it would entitle to recourse under Article 18. The said recourse has been resorted to in this case.
30. Article 18 deals with the Resolution of the Dispute.
31. Let us now quote Article 18 which is as under:

ARTICLE 18: RESOLUTION OF DISPUTES

18.1 GOOD FAITH NEGOTIATIONSS

In the event of dispute, disagreement or difference (a "Dispute") arising out of or relating to this Agreement between the Parties, in respect of which a procedure for the resolution of the Dispute is not otherwise provided for in this Agreement, the following provisions shall apply :-

- (a) the dispute shall not be subject to the provisions of Section 18.2 dealing with resolution of disputes through Dispute Resolution Board or to any litigation unless and until the provisions of Section 18.1(b) are fulfilled and the Parties have failed to execute a written settlement agreement in accordance with Section 18.1(c) and 18.1 (d);*

(b) either Party shall give to the other a written notice setting out the material particulars of the Dispute and requiring an authorized senior executive officer each from both the Board and the Company to meet personally at Shimla, Himachal Pradesh, India or at any other mutually agreed place within ten (10) working days of the date of receipt of such notice by the relevant Party to attempt in Good Faith Negotiations, and using their best endeavors at all times, to resolve the Dispute; and

(c) if the Dispute is not resolved as evidenced by the terms of the settlement being reduced to writing and signed by the senior executive officers of both the parties within 20 (Twenty) working Days (settlement period) after the date of receipt of the notice described in Section 18.1(b), then the provisions of Section 18.1 (d) shall apply (unless the settlement period is mutually extended).

(d) The Chief Executive Officers of both the parties shall meet at Shimla or at any other mutually agreed place within ten (10) working days after the expiry of the 20 days (Twenty) period as mentioned in 18.1 (c) to attempt in Good Faith Negotiations and using their best endeavor at all times to resolve the dispute within a further period of 20 (twenty) days and if the dispute is still not resolved as evidenced by the terms of the settlement being reduced to writing and signed by both the Chief Executive Officers, then the provisions of Section 18.2 shall apply

unless the settlement period is mutually extended.

18.2 DISPUTE RESOLUTION BOARD

(a) All disputes relating to the Agreement which cannot be settled as per Section 18.1 shall be referred to the Dispute Resolution Board hereinafter referred to as DRB.

(b) DRB shall consist of one nominee each of the Board and the Company. Nominees shall agree to one umpire who will preside over DRB.

(c) DRB shall use settlement/ mediation/ conciliation/ other procedure for fast settlement of the dispute.

(d) The decision of DRB shall be final and binding on both the parties in respect of disputes having total financial implication of up to Rs. Five (5) Crores.

For disputes involving financial implication of more than Rs. Five (5) Crores, parties may mutually agree to the award. In case of non-agreement, matter shall be referred to Arbitration as per Section 18.3.”

32. The reading of the above Article would indicate the following details.

33. In the process of Resolution of dispute, either party shall give to other party a written notice setting out the material particulars under the dispute and requiring an authorized Senior Executive Officer each from the Appellant Company and the Electricity Board to have a Good Faith Negotiations to resolve the dispute.

- 34.** If the dispute is not resolved by the terms of settlement being reduced to in writing and signed by both the Chief Executive Officers, then the provisions of Article 18.2 would apply.
- 35.** Article 18.2 would refer to the Dispute Resolution Mechanism. This would deal with the situation where the dispute has not been settled as per Section 18(1), the dispute shall be referred to the Dispute Resolution Board which adopts the settlement procedure for final settlement of the dispute. The decision of the Dispute Resolution Board shall be final and binding on both the parties.
- 36.** While invoking Article 18.1, it requires either party to give a written notice to have Good Faith Negotiations. If this is not settled under Article 18.1, then the question of referring to the dispute to the Dispute Resolution Board under Article 18.2 would arise. In this case, the Good Faith Negotiations resulted in the settlement reduced in writing and signed by both the authorized representatives holding that there was a Force Majeure Event.
- 37.** So, the dispute, as far as the Good Faith Negotiations is concerned, has been arrived at a settlement. In that event, the question of referring to Article 18.2 would not arise.
- 38.** But the main question which arises for consideration in this case is whether the settlement arrived at by the authorized

representatives of both the parties with regard to the damage caused by the Force Majeure Event is binding upon both the parties in the absence of the ratification by the Management of the Board.

- 39.** According to the Appellant, once the settlement is arrived at by the authorized representatives of the parties with regard to the status of the Force Majeure, the Whole Time Directors of the Board and the Management of the Electricity Board are bound to accept the Good Faith Negotiations entered into between the parties and therefore, the Board of Directors have no authority to reject the report submitted by the authorized representatives of both the parties.
- 40.** In short, the Appellant's contention is that the Board of Directors of the Electricity Board has no authority to reject the recommendations submitted by the Authorized representatives of both the parties through its Report and hence, the decision of the Board of Directors to reject the Report has to be ignored.
- 41.** In the light of the above contention of the Appellant, let us reiterate some of the sequence of the events:
- (a) On 5.7.2005, there was a Flash Flood in the river Baspa. There was damage caused to the Generating Station of the Appellant.

(b) On 9.7.2005, within 7 days of occurrence of flash flood, the Appellant notified the Force Majeure Event to the Electricity Board, the Respondent, in terms of Articles 17.3 (a) of the PPA. Thereafter, on 22.5.2006, the Appellant sent a notice to the Electricity Board under Article 17.6(c).

(c) On 7.8.2006, the Electricity Board disputed the event as a Force Majeure as claimed by the Appellant. When such a dispute had been raised by the Electricity Board under Article 17.6(f), the first remedy available to the parties is to refer the dispute for Good Faith Negotiations under Article 18.1.

(d) Accordingly, on 9.6.2007, the Appellant requested the Electricity Board, the Respondent, to constitute Good Faith Negotiations Committee in terms of Article 18(1) of the PPA. In the same letter, the Appellants nominated its authorized Representative to resolve the dispute. Similarly, the Electricity Board also nominated its Representative in pursuance of the PPA on 13.1.2008.

(e) Then the Authorised Representatives of both the parties held various meetings and had interaction with the officers and examined the documents and other materials produced by the parties. They also had a spot inspection.

(f) Thereafter, the Report was prepared by both the representatives on 24.1.2011 holding that occurrence causing certain damages would fall under Force Majeure and the same was sent to the Board. However, there was no response from the Electricity Board about further action to be taken with regard to the approval of the said report.

(g) Therefore, the Appellant on 16.6.2011 filed a Petition before the State Commission in Petition No.98 of 2011 praying for a direction to be issued to the Electricity Board to expedite its approval of the report submitted by the representatives of both the parties.

(h) This Petition was entertained by the State Commission. In this Petition, a specific prayer made by the Appellant is to expedite the approval of the Report submitted by the representatives of both the parties. When the matter came-up for inquiry, the Electricity Board prayed for adjournment for four months for taking decision with regard to the approval of the report.

(i) But, by the order dated 3.9.2011, the State Commission granted only two weeks' time to the Electricity Board to file the reply explaining the inordinate delay in taking decision on the recommendation of the authorized representatives of the parties. The relevant portion of the Order is as follows:

“2. Keeping in view the fact that the representatives of the Petitioner and the Respondent Board submitted their recommendation/findings on 24.01.2011 under the provisions of Clause 18.1 (b) of the PPA and thereafter considerable time has already elapsed, the Commission feels that further adjournment of the admission of this Petition for further period of four months as prayed by the Respondent Board, would not be justifiable and conducive. The representative of the Respondent Board, therefore, prays for time to file the Board’s response to the Petitions.

3. The Commission after taking into consideration the circumstances, facts and nature of this case, and also the consumer interest involved therein, allows the Respondent Board two weeks to file its response, specifically explaining, the inordinate delay in decision on recommendations of authorized senior executive officers of the parties within 20 days as envisaged in Clause (c) of Article 18.1 of the PPA and the reasons for the constitution of another expert Committee and if so necessitated the steps to be taken to expedite its report so as to decide the issue without any further delay.

List this case for hearing on 01.10.2011 at 2.30 pm or soon thereafter.”

42. From the facts enumerated above, two important aspects are emerged:

- (a) The **First Aspect is this:** The Good Faith Negotiations Committee consisting of Representatives of both the parties prepared a Report on 24.1.2011

declaring that the Event was a Force Majeure and sent the same to the Electricity Board on the same date for further action. Since there was no further action taken by the Electricity Board despite the receipt of this Report, the Appellant wrote a letter dated 7.4.2011 praying the Electricity Board to set-up the Committee under Clause 17.7 of the PPA to assess the damages. Even thereafter, there was no response. Therefore, the Appellant filed a Petition before the State Commission on 16.6.2011 in Petition No.98 of 2011 praying for a direction to the Electricity Board to expedite its approval over the recommendations of the authorized representative's report dated 24.1.2011. The relevant prayer is as follows:

“6. The Applicant respectfully submits that more than five years have passed since the Applicant had incurred the capital expenditure of Rs.67.88 Crs on restoration and protection works of Barrage. The Board is yet to approve the same in terms of the provisions of the PPA. The Applicant further respectfully submits that it can file an application for approval of the same and determination of tariff thereon with the Hon'ble Commission, only after the approval by the Board. The Applicant therefore, respectfully prays to the Hon'ble Commission to kindly issue suitable directions to HPSEB Ltd., to expedite its approval in the matter in terms of the provisions of PPA in a time bound manner, say within two to three months as the Applicant's servicing

capacity of capital cost incurred is causing liquidity constrain for such a long time.

Prayer

In the facts and circumstances stated above, this Hon'ble Commission may graciously be pleased to:

(a) Issue suitable directions to HPSEB Ltd., to expedite its approval in terms of the provisions of PPA in respect of capital expenditure amounting to Rs.67.88 Crs incurred by the Applicant on restoration and protection works of Barrage on account of Force Majeure Event caused due to Flash Flood in river Baspa on 5.07.2005, in a time bound manner, say within two or three months hereof."

The perusal of the above prayer would show that the Appellant merely asked for the limited prayer i.e. the approval of the Electricity Board over the recommendations contained in the Report.

(b) The **Second Aspect is this:** In view of this limited prayer, the State Commission during the hearing in Petition No.98 of 2011, directed the Electricity Board by the Order dated 3.9.2011 to file the Board's reply within two weeks by explaining the inordinate delay in taking decision on the recommendations of the authorized representatives namely Senior Executive Officers of the parties and to report their decision.

- 43.** These two aspects would indicate that there was no prayer by the Appellant in the said Petition for constituting an Assessment Committee straightway. Only prayer made in the Petition is for mere direction to the Electricity Board to take decision on approval for Recommendation Report.
- 44.** Similarly, in the order passed on 3.9.2011 the State Commission while directing the Electricity Board to explain the delay in taking decision regarding the approval gave adjournment to file the reply and adjourned the matter on 1.10.2011 for deciding the issue. In this order, there was no reference to Article 17.7 of the PPA which deals with the constitution of Assessment Committee.
- 45.** At that stage, on 22.9.2011, the Director (Projects) of the Electricity Board who received the Good Faith Negotiations Report earlier sent by the Representatives of the both parties, analyzed the said report and gave its expert Report on 22.9.2011 to the Management of the Electricity Board stating that the claim of the Force Majeure Event causing loss to the Appellant cannot be accepted.
- 46.** On receipt of the said Report, the whole time Directors of the Electricity Board convened the meeting on 29.9.2011 and examined all the documents such as the Good Faith Negotiations Report, separate expert technical report of the Director (Projects) of the Electricity Board and such other materials and discussed the matter. Finally, the

Management of the Electricity Board took the decision that the Force Majeure Event as claimed by the Appellant was not correct in view of the fact that the damage was not on account of the Force Majeure but due to the factors attributable to the Appellants such as faulty design, etc.,

47. After taking the said decision on 29.9.2011, the Electricity Board filed a reply in Petition No.98 of 2011 before the State Commission reporting about the decision taken by them and praying the State Commission not to accept the claim of the Appellant for Force Majeure Event and to dismiss their Petition.
48. On the basis of this reply, the State Commission by the order dated 1.10.2011, dismissed the Petition No.98 of 2011, as the prayer in the said Petition was limited to the direction for the early decision to be taken by the Electricity Board, the Respondent, on the approval of the Report.
49. The relevant portion of the dismissal order dated 1.10.2011 is as follows:

“The prayer of the Applicant was only to get the decision of the Respondent Board expedited so that the applicant could proceed further. From the facts, as set out in the proceedings paras, it is clear that the Respondent Board has now taken its decision and the purpose of the Application made by the Applicant stands meted out. Now, it is for the respective parties

to the PPA, to seek the relevant remedy in accordance with the dispute resolution mechanism provided in the PPA. The Commission would consider the cost implications, if any, of the event as and when it is settled by the parties in accordance with the provisions of the PPA.”

- 50.** As mentioned earlier, the above facts would clearly indicate that the Appellant had never prayed before the State Commission to constitute an Assessing Committee straightway on the basis of the Good Faith Negotiations Report on the ground that no further approval is necessary by the Board of Directors of the recommendations of the Good Faith Negotiations Report.
- 51.** In other words, the short prayer made by the Appellant in Petition No.98 of 2011 is to direct the Electricity Board to expedite the decision to be taken by the Electricity Board on the Report of Recommendations without any further delay.
- 52.** As mentioned above, the State Commission was constrained to dismiss the said Petition on the ground that the prayer made by the Appellant would not survive in view of the decision already taken by the Electricity Board to reject the Recommendation Report during the pendency of the said Petition No.98 of 2011.
- 53.** In the said order, a specific direction was given by the State Commission to the parties to seek for appropriate remedy in

accordance with the Dispute Resolution mechanism provided in the PPA as referred to in Article 18.2.

- 54.** The Appellant, instead of invoking Article 18.2 as directed by the State Commission has filed another Petition in Petition No.120 of 2011 seeking for the direction to the Electricity Board to constitute Assessment Committee in terms of Clause 17.7 of the PPA for assessing the damages after cancelling the decision dated 29.9.2011 by the Electricity Board rejecting the report of the Good Faith Negotiations or in the alternative refer the dispute to the Arbitration for adjudication.
- 55.** The contents of the second Petition in Petition No.120 of 2011 and the prayer made therein, would not disclose any reason as to why the Appellant has not sought for directions to the Electricity Board to constitute Assessment Committee in terms of Article 17.7 of the PPA in the 1st Petition in Petition No. 98/2011 which has been sought for in the present Petition in 120/2011.
- 56.** Similarly, there is no reason as to why the Appellant, instead of complying with the orders passed by the State Commission in Petition No.98 of 2011 directing the parties including the Appellant to seek the remedy in accordance with the Dispute Resolution Mechanism namely Article 18.2 provided in the PPA, has resorted to file this Petition to direct the Board to constitute the Assessment Committee.

- 57.** As mentioned earlier, the Appellant having sent a letter on 7.4.2011 to the Electricity Board to constitute an Assessment Committee under Article 17.7 of the PPA has not made such a prayer in the Petition No.98 of 2011 filed on 16.6.2011.
- 58.** Admittedly, as indicated above, the main prayer in the Petition was only for a direction for expediting the approval of the decision taken on the recommendation of the Good Faith Negotiations.
- 59.** This would indicate that the Appellant was conscious of the fact that the final decision was to be taken by the Electricity Board with regard to the recommendation and only subject to the said decision; the issue relating to the constitution of the Assessing Committee would arise.
- 60.** In the light of the above factors, we shall now consider the submissions made by the Appellants in this Appeal.
- 61.** The main contention of the Appellant is that the whole time Directors of the Electricity Board and the Management of the Electricity Board is bound to accept the Good Faith Negotiations report signed by both the parties and as such, the decision of the Board of Directors rejecting the Report has got to be ignored.
- 62.** In short, the contention of the Appellant is that the Electricity Board has no authority to take a decision either to accept or

not to accept the recommendations made by the Good Faith Negotiations report.

- 63.** If this is the stand of the Appellant in this Appeal, we are not able to understand as to why the same stand has not been taken by the Appellant before the State Commission in their 1st Petition in Petition No.98 of 2011.
- 64.** On the other hand, as stated above, the prayer of the Appellant to issue directions to the Electricity Board was only to expedite the decision to be taken by the Electricity Board over the recommendation report with regard to the acceptance of the report but not with reference to the constitution of Assessment Committee.
- 65.** Even when the time was granted by the State Commission to the Electricity Board to file a reply with regard to their decision regarding approval, the Appellant had not raised the point that the Management of the Board is bound by the Report of Recommendation and it has no authority to reject the Report.
- 66.** Similarly, even after filing the reply by the Electricity Board that the decision was taken by the Electricity Board to reject the recommendation report, the Appellant did not choose to question the authority of the Electricity Board to reject the report and never prayed that the Electricity Board be

directed to constitute the Assessment Committee straightaway.

67. Having not raised this issue in the earlier Petition, the Appellant strangely raised this point only in the second Petition No.120 of 2011 filed on 14.10.2011.

68. Without going into the above aspect any further, let us now discuss the question as to whether the contention urged by the Appellant that the Board of Directors is bound to accept the Good Faith Negotiations as the Management of the Board had no authority to interfere in the conclusion arrived at in the Good Faith Negotiations report is correct or not.

69. On this point, the learned Counsel for the Electricity Board, the Respondent, has made the following submissions:

(a) The powers of the Board of Directors of the Company cannot be restricted to contend that the Board of Directors has no authority to reject the proposal of conclusion arrived at the Good Faith Negotiations Committee Report.

(b) In the present case, the Electricity Board managed by the Board of Directors alone has got the authority either to accept the amicable resolution of Good Faith Negotiations or reject the same. The Board of Directors has not authorized any person to settle the dispute in a binding manner with the Appellant. On the

other hand, the representative of the Electricity Board who was nominated to make an attempt of amicable resolution was not authorized to take a final decision.

(c) It is for this reason, the said authorized representative of the Electricity Board after preparing the report forwarded the same to the Director (Projects) by the communication dated 24.11.2011 for taking necessary action and decision.

(d) The communication dated 24.11.2011 was an internal communication by the authorized representative of the Electricity Board to the Chief Engineer (P&M) to forward the report prepared. Further, the communication was marked to the Director (Projects) of the Electricity Board for the future action to be taken.

(e) The ultimate authority to manage the Electricity Board and to take final decision is the Board of Directors. The Board of Directors is not bound by the views or recommendations of their subordinates through the report prepared in the present case.

70. To substantiate these arguments he has cited the following decisions:

(a) Air India Ltd Vs Cochin International Airport Ltd.,
(2000) 2 SCC 617;

(b) Shubh Shanti Services Pvt Ltd.,Vs Manjula S Agarwalla & Others (23005) 5 SCC 30;

(c) Suburban Bank Private Limited Vs Thariath Order of Kerala High Court dated 3.7.1967;

71. In these decisions, it has been held by the Hon'ble Supreme Court that the decision of the High Level Committee cannot be said to be a final decision and therefore, their decision is not binding on the Board of Directors who were the final authority to take a decision.

72. In the present case, as pointed out by the Respondent, we are only concerned with the question as to whether the Board of Directors of the Electricity Board has got the authority either to accept the report or not to accept the recommendations report sent by its authorized representatives.

73. Since we find force in the submission made by the learned Counsel for the Respondent Board, we are not inclined to hold that the decision by the Board of Directors not to accept the recommendation is without authority. At the same time, we must make it clear that we are not inclined to go into the validity of the final decision taken by the Board of Directors not to accept the recommendation as we are not concerned with the merits of the matter at this stage.

- 74.** The reading of the Article 17 and 18 would clearly indicate that when a dispute is not settled under Article 18 (1) after observing the procedure under Article 17, the matter is to be referred to the Dispute Resolution Mechanism as per Article 18.2.
- 75.** As contended by the learned Counsel for the Electricity Board, the Senior Executive Officer, the Representative of the Board, has the limited financial powers and ultimately the report submitted by the Representative to the Board has to be necessarily ratified and approved by the Management of the Electricity Board since the same involves the decision over the financial matters. That was the reason as to why the authorized representative of the Electricity Board has sent the report to the Electricity Board as well as to the officials concerned for taking further action. If the said report has to be construed to be the binding report, this need not be sent on 24.1.2011 to the Electricity Board for further action or approval.
- 76.** In fact, as pointed out by the learned Counsel for the Electricity Board, the Director (Projects) of the Electricity Board after getting the Report of Recommendation, analyzed the various factual situation and sent his expert report to the Electricity Board on 22.9.2011 giving his opinion that the claim of the Appellant for the Majeure Event

causing damage to the Appellant cannot be accepted for the reasons contained in his Report.

- 77.** Thereupon, the whole time Directors of the Electricity Board went into the materials available such as Report of the fact finding Committee, Good Faith Negotiations Report as well as Technical Report of the Director(Projects) and such other materials and then took a conscious decision to the effect that the Force Majeure Event as claimed by the Appellant were not correct since damage was not caused on account of the consequences of Force Majeure Event but due to the factors attributable to the Appellant such as faulty design, etc. Accordingly, this decision was intimated to the State Commission through its reply.
- 78.** On the basis of this reply filed by the Electricity Board intimating the decision taken by the whole time Directors, the State Commission dismissed the said Petition No.98 of 2011 on the ground that the prayer which was limited to the decision to be taken by the Electricity Board over the recommendation of Good Faith Negotiations had become infructuous.
- 79.** In the said Order in Petition No.98 of 2011, the State Commission by the Order dated 1.10.2011 directed the parties to workout the remedies for adjudication of the disputes through the Dispute Resolution Mechanism under Article 18.2 of the PPA.

- 80.** As we have already mentioned, we are not going into the correctness of the final decision taken by the Electricity Board over the Recommendation Report. We are only of the view that the Report submitted by the authorized Representatives of the parties cannot be said to be final in the absence of the ratification by the Electricity Board Management and in the absence of the final written agreement signed by the parties.
- 81.** The learned Counsel for the Appellant has strenuously argued that the present issue had already been decided in favour of the Appellant in the earlier judgment rendered by this Tribunal in Appeal No.43 of 2011 dated 6.2.2011.
- 82.** We are unable to accept this contention, as we are of the view that the said judgment would not apply to the present facts of the case.
- 83.** In that case, the dispute was on a different issue and the report of the Good Faith Negotiations Committee was fully accepted by the Members of the Electricity Board and acted upon and at the later point of time, they attempted to change their views which was not endorsed by this Tribunal. Thus, the findings were given in that judgment in the light of the above facts.

84. The relevant findings given in the said judgment rendered by this Tribunal in Appeal No.43 of 2011 in the facts and circumstances, are given below:

“(k) On 16.6.2008, the above finding given in the Report submitted by the said Committee was accepted by the Electricity Board, the Respondent, (Appellant) as recorded in the minutes of the 360th Meeting of the Whole Time Members of the erstwhile Electricity Board, the Respondent,.

(l) In pursuance of the acceptance of the said finding, on 22.7.2008, the Appellant Board in accordance with Article 17.7.1 of the PPA, constituted a three member Committee (Aggarwal Committee) having one Representative each from the Appellant Electricity Board, the Respondent, and the Jai Prakash Power (R-1) and an External Expert, to assess the quantum of the damage for finalizing the settlement of the claim of the R-1.

(m)

(n) On 16.10.2009, the Electricity Board, the Respondent, (the Appellant) accepted the said report also. Accordingly, on 2.12.2009, the Electricity Board, the Respondent,, the Appellant informed Jai Prakash Power (R-1) about its acceptance of the cost of Rs.96.75 Crores towards the Protection Work as a consequence to the Force Majeure Event to be added to the capital cost for the computation and operation and maintenance of expenses and other related components of tariff. Besides this, the Appellant informed about their decision to State Commission also through the letter dated 19.12.2009”.

85. So, in the judgment referred to above, the facts are completely different from that of the present case. The differences are:

(a) The Committee under Article 17.7 for assessing the damages had already been constituted after accepting the 1st Committee's Report.

(b) The report of the Assessment Committee also was accepted and communicated to the Generators;

(c) The decision of the acceptance of the report of the Assessing Committee was also communicated to the State Commission.

86. In the above circumstances, this Tribunal held that the parties fully accepted the decision and also communicated to the State Commission and therefore, it should not be desirable to take any subsequent decision to review the earlier decision taken.

87. In the present case, as pointed out by the learned Counsel for the Electricity Board, there has been no such decision taken by the Board of Directors earlier.

88. Therefore, the reliance by the Appellant on the above judgment will be of no use.

89. In view of the above, we are of the opinion that the State Commission has rightly come to the conclusion that Recommendation of the Report on the occurrence of the Force Majeure Event is not binding on the Board.

- 90.** The effect of the Impugned Order is that the claim of the Appellant as disputed by the Electricity Board needs to be adjudicated on merits by the Court of competent jurisdiction i.e. the State Commission in the present case.
- 91.** As pointed out by the learned Counsel for the Electricity Board, the Appellant itself has made an alternative prayer in the Petition before the State Commission for adjudication of the above dispute by referring to the Arbitration. As rightly pointed out by the learned Counsel for the Respondent No.1, after coming into force of the Electricity Act,2003, the disputes between the Appellant and the Respondent are within the exclusive jurisdiction of the State Commission.
- 92.** The learned Counsel for the Electricity Board has categorically stated in the written submission that there is no objection for the Electricity Board either for referring the dispute to the Arbitration or to decide the dispute by adjudication by the State Commission itself.
- 93.** In view of the above stand taken by the Electricity Board, we direct the Appellant to approach the State Commission to adjudicate upon the dispute by itself or to refer it for arbitration.
- 94. Summary of Our Findings**
- i) The outcome of the Good Faith Negotiations by the authorised representatives of the Electricity**

Board and the generating Company which has been reduced in writing and signed by both the representatives of the parties is not binding on the parties in the absence of ratification by the Board of the Electricity Board and the final written agreement by both the parties on the basis of such ratification.

- ii) The Appellant is directed to approach the State Commission to adjudicate upon the dispute under Section 86(1) (f) of the Electricity Act,2003. The State Commission may either adjudicate upon the dispute itself or refer it for arbitration.**

95. With these observations, the Appeal is dismissed with certain directions regarding adjudication of the dispute.

96. However, there is no order as to costs.

**(Rakesh Nath)
Technical Member**

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

Dated:05th Feb, 2014

√REPORTABLE/~~NON-REPORTABLE~~