

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal no. 154 of 2012

Dated : 1st August, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of

**Raj West Power Limited
308-311 Geetanjali Towers
Ajmer Road,
Jaipur - 302 006**

... Appellant (s)

Versus

**1. Rajasthan Electricity Regulatory
Commission
Vidyut Viniyamak Bhawan
New State Motor Garage
Sahakar Marg, Jaipur – 302 005**

...Respondent(s)

**2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur – 302 005**

**3. Ajmer Vidyut Vitran Nigam Limited
Old Power House, Hathi Bhata
Ajmer – 305 001, Rajasthan**

4. **Jodhpur Vidyut Vitran Nigam Limited**
New Power House, Industrial Estate
Jodhpur – 342 003, Rajasthan
5. **Secretary (Energy)**
Government of Rajasthan
Secretariat, Jaipur – 302 005
Rajasthan
6. **Rajasthan State Mines and Minerals Limited**
4, Meera Marg, Udaipur – 303 001
Rajasthan
7. **Rajasthan Rajya Vidyut Utpadan Nigam**
Jyoti Nagar, Vidyut Bhawan
Jaipur – 302 005
Rajasthan

Counsel for the Appellant(s): **Mr. M.G. Ramachandran**
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo
Ms. Poorva Saigal
Ms. Anushree Bardan
Mr. Avinash Menon

Counsel for the Respondent(s): **Mr. R.K. Mehta**
Mr. R.R. Pathak
Mr. Antaryami Upadhyay
Ms. Ishita C. Dasgupta
Mr. Elangbam
Mr. P.N. Bhandari

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Raj West Power Ltd. against the order dated 08.06.2012 passed by the Rajasthan Electricity Regulatory Commission (“State Commission”) approving the Power Purchase Agreement for purchase of power from the Appellant’s power project by the Distribution Companies with certain directions.

2. Raj West Power Ltd. the Appellant, is a generating company which is in the process of establishing and commissioning a lignite based generating station with the aggregate capacity of 1080 MW (8 units of 135 MW each). The State Commission is the first Respondent. The Distribution Companies who are beneficiaries of power from the Appellant’s power project are the Respondent nos. 2 to 4.

Secretary (Energy), Government of Rajasthan is the fifth Respondent.

3. The following three issues were raised in the Appeal:
 - a) Matters relating to the implementation agreement, particularly holding that the nomination for mining activities is not to be allowed.
 - b) First year applicable tariff.
 - c) Modification of Force Majeure Clause – Clause 12.1(x) of the PPA.

4. It has been submitted by the Learned Counsel for the parties that the first issue regarding Nomination Clause stands concluded against the Appellant by judgment dated 08.04.2013 in Appeal no. 76 of 2012 passed by this Tribunal.

The Appellant has filed an Appeal against this judgment before the Hon'ble Supreme Court which is pending. Further, the second issue is decided in favour of the Appellant by judgment dated 29.10.2013 in Appeal no. 236 of 2012 passed by this Tribunal.

5. Thus, only the third issue remains to be decided in the present Appeal.

6. The Force Majeure Clause under Article 12.1 of the PPA included "any disturbance caused by the Government of Rajasthan" as a Force Majeure event. In the proceedings before the State Commission for approval of the PPA the Distribution Companies submitted that a legislation/directive cannot be included under Force Majeure conditions and, therefore, "any disturbance caused by the GOR" should be removed for being too vague. The State Commission held in the impugned order that the same should be deleted as it

was not appropriate to use such terms for the State Government, more so when the State Government has agreed to support the project.

7. According to the Appellant, the State Commission ought not have directed the deletion of Article 12.1(x) which provides for one of the grounds of Force Majeure as any disturbance caused by the Government of Rajasthan.
8. We have heard Learned Counsel for the parties on the above issue.
9. Shri M G Ramachandran, Learned Counsel for the Appellant suggested substitution of Article 12.1(x) by “Any unlawful, unreasonable or discriminatory action on the part of Government of Rajasthan.”

10. Shri R.K. Mehta, Learned Counsel for the State Commission has submitted that the definition of “Force Majeure” in Clause 12.1 of the PPA is “inclusive” and not “exhaustive” and even in the absence of Sub-Clause (x), action of State Government may be covered by other sub clauses of Clause 12.1.

11. Mr. R.K. Mehta, Learned Counsel for the State Commission has raised an objection to the definition suggested by Mr. Ramachandran as he felt that there is always a presumption that Government action is reasonable and in public interest and if Government action is unlawful, arbitrary or discriminatory, it may be struck down by the courts. He has given examples of some Force Majeure clauses in other agreements where “Government sanction”, “restraint of Government and governmental acts”, “requisition or compulsory acquisition by any governmental or competent authority” have been used.

12. In view of the rival contentions of the parties, the only issue that is required to be decided by us is:

Whether the State Commission was correct in ordering deletion of Clause 12.1(x) indicating “any disturbance caused by the GOR” in the PPA?

13. Let us first examine the Force Majeure Clause proposed in the PPA. The relevant clause is reproduced below:

“12.1 “Force Majeure” means any events or circumstance if such event or circumstance is beyond the reasonable direct or indirect control and without the fault or negligence of the Party claiming Force Majeure and which results in such Party’s inability (partially or fully), notwithstanding its reasonable best efforts, to perform its obligations in whole or in part including:

- i. strike or other industrial dispute or disturbance other than lock outs by either Party;*
- ii. act of foreign enemy, war (whether declared or undeclared), revolution, coup d’etat, terrorist act, blockade, war embargo, insurrection, arson, disturbance of public order, sabotage and act of vandalism;*

- iii. Ionizing radiation or contamination by radioactivity from nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive, toxic explosive or any other hazardous properties of any explosive nuclear assembly or nuclear component thereof;*
- iv. environmental pollution, resulting from any event described in (ii) or (iii) above;*
- v. acts of God such as lightening, storm, cyclone, hurricane, typhoon, flood, tidal wave, earthquake, landslide, epidemic or similar cataclysmic event, quarantine, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years;*
- vi. explosion or fire (which is not due to the Company's negligence or fault or to its failure to comply with the standards of a prudent utility operator) accident or chemical contamination;*
- vii. any legislation, law, directive, regulation, rule, decree, order, restraint or other action (including expropriation or compulsory acquisition of the Project or part thereof) by a Public Sector Entity or other government and all supra-national, national or local agencies, authorities, departments, ministries and officials;*
- viii. non availability of water from IGNP for more than thirty (30) consecutive days causing inability to generate;*
- ix. the expropriation or compulsory acquisition by Government of India of any assets forming part of, relating to or directly derived from the Project which materially effects the operation of the Project;*

- x. *any disturbance caused by the GOR;*
- xi. *failure or inability by the Company or by any other party to perform its obligations in whole or in part under any other project agreement in so far as caused by the above mentioned events of Force Majeure.”*

14. We find that the definition of Force Majeure is inclusive and not exhaustive. Clause 12.1(vii) already covers the legislation, law, directive, regulation, rule, decree, order, restraint or other action by Government and other authorities. Government also includes Government of Rajasthan. Any act of the State Government which results in inability of a party to perform its obligation under the agreement has to be through a legislation, law, directive, regulation, rule or order of the State Government or a Government authority/agency department which is adequately covered under Clause 12.1(vii). Therefore, Clause 12.1(x) is redundant. This Clause is also not worded appropriately. Thus, we do not find any fault with the

observation and direction of the State Commission for deletion of Clause 12.1(x) from the PPA.

15. In view of above the Appeal is dismissed as devoid of any merit. No order as to costs.

16. Pronounced in the open court on this *1st day of August, 2014.*

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~
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