

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

Appeal no. 28 of 2013

Dated: 2nd January, 2014

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

In the matter of:

**Chhattisgarh State Power Distribution Co. Ltd.Appellant(s)
Vidyut Seva Bhavan, Danganiya
Raipur, Chhattisgarh – 492 013**

Versus

- 1. Chhattisgarh State Electricity RegulatoryRespondent(s)
Commission
Irrigation Colony, Shanti Nagar
Raipur – 492 001 (Chhattisgarh)**
- 2. Bharat Aluminum Company Limited
Balco Nagar, Korba
Chhattisgarh – 495 678**

Counsel for the Appellant (s):

Ms. Suparna Srivstava

Counsel for the Respondents (s):

**Mr. C.K. Rai
Mr. Prashanto Chandra Sen
Ms. Sara Sundaram
Mr. Shome (Rep.)**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by Chhattisgarh State Power Distribution Co. Ltd. challenging the order dated 30.11.2012 passed by Chhattisgarh State Electricity Regulatory Commission in Petition no. 55 of 2011 whereby the claim of the Bharat Aluminium Company Ltd., Respondent no.2 considering the period of shutdown of generating unit due to annual overhauling and generator/equipment breakdown for the period from 1.4.2009 to 31.3.2010 has been allowed under force majeure condition and consequently the Appellant has been directed to revise the bills accordingly.

2. The Appellant is a distribution licensee. Chhattisgarh State Electricity Regulatory Commission ("State

Commission”) is the Respondent no.1. Bharat Aluminum Company Ltd. ('BALCO') is the Respondent no.2.

3. The brief facts of the case are as under:

(A) BALCO, the Respondent no.2 has set up a Captive Power Plant ('CPP') to meet its Aluminium Plant's power requirements. The CPP comprises 4 units of 67.5 MW each and 4 units of 135 MW each, aggregating to 810 MW. From out of the surplus power available with the Respondent no.2, power is being supplied to the Appellant under Power Purchase Agreements ('PPAs') entered into between the Appellant and the Respondent no.2 from time to time.

(B) The sale of power by the Respondent no.2 to the Appellant was commenced under PPA dated 12.3.2009

whereunder power was agreed to be supplied @ Rs.2.80 per unit at Plant Load Factor ('PLF') of 85% and above. Under the subsequent PPAs entered into between the Appellant and the Respondent no.2 for the period in question, power was agreed to be supplied @ Rs. 2.95 per unit at a PLF of 80% and above. Under the PPA dated 12.3.2009, the rate of purchase of power was to be reduced in proportion to the deviation from contracted supply below a defined permissible limit of load factor. However, the events of overhauling and major generator/equipment breakdown along with certain defined conditions of forced majeure were to be considered for calculation of load factor as per the terms of the PPA.

- (C) The modalities of calculation of load factor in peak and non-peak hours were set out in the PPA. The peak hours agreed to in the PPA were from 18:00 hours to

23:00 hours i.e. 5 hours, and non-peak hours from 00:00 hours to 17:00 hours and 23:00 hours to 24:00 hours i.e. 19 hours. The controversy in the present case is regarding calculation of PLF for the period from 1.4.2009 to 31.3.2010 considering the period of annual overhauling/breakdown of equipment.

(D) The power was supplied during the period under dispute under 3 PPAs as under:

- i) PPA dated 30.9.2009 for the period 1.4.2009 to 30.9.2009.
- ii) PPA dated 5.12.2009 for the period 1.10.2009 to 31.12.2009
- iii) PPA dated 1.2.2010 for the period 1.1.2010 to 31.3.2010.

In each of the above PPAs, the force majeure clause was amended to include only the event of overhauling for the purpose of load factor calculation and the event of generator/equipment breakdown was deleted.

- (E) When first PPA dated 30.9.2009 was to be executed with the modified force majeure clause, the Respondent no.2 requested the Appellant to consider the same force majeure clause in the PPA as existed earlier in the PPA dated 12.3.2009 to include the period of both annual overhauling and major breakdown for calculation of load factor. However, the Appellant clarified that the definition of force majeure would include only the incident of annual overhauling. The Appellant further informed the Respondent no.2 that for annual overhauling the generating station had to earmark a particular unit/units having capacity to match the quantum of contracted power to be supplied to the

Appellant so that in case of overhauling of earmarked generators, consideration for load factor calculation could be taken care of. However, the Respondent no. 2 vide letter dated 30.9.2009 informed the Appellant that it was executing the PPA under protest with a request to reconsider the force majeure clause for including the event of generator outage for load factor calculation. As regards earmarking the units of matching quantum, the Respondent no. 2 indicated its inability to earmark units for supply to the Appellant. As the Respondent no. 2 did not earmark the units for supply of power to the Appellant, the Appellant denied the relief of force majeure to the Respondent no.2 for the period from 1.4.2009 to 31.12.2009.

(F) Aggrieved by the action of the Appellant of denying the relief for outage of units for calculation of PLF, the

Respondent no. 2 filed a petition being no. 4 of 2010 before the State Commission.

- (G) In the meantime, the State Commission in suo motu petition no. 5 of 2010 had been considering the terms and conditions and pricing of power to be purchased by the Appellant in short term from Captive Power Plants (CPPs) and Independent Power Projects (IPPs) in the State from the FY 2010-11, i.e. for the period subsequent to the period agitated between the Appellant and the Respondent no.2. The State Commission in Petition no. 5 of 2010 by order dated 30.4.2010 gave definition of forced outage and planned outage and decided that the forced and planned outage condition would be considered for calculation of Plant Load Factor for short supply of power by CPPs/IPPs.

(H) The State Commission while deciding the claim of the Respondent no. 2 vide order dated 22.6.2010 decided that the definition of force majeure clause would be as per the Grid Code, 2007; the overhauling of generating unit was not covered under force majeure condition and the Respondent no. 2 had to earmark the generating unit/units and approach the Appellant for getting the benefit of force majeure condition.

(I) On 9.8.2010, the Respondent no. 2 wrote to the Appellant for payment of outstanding dues relying on the order dated 22.6.2010 of the State Commission for the month of July 2009, August, 2009 and December, 2009 when three of its units were under shutdown due to annual overhauling or breakdown and identified the said units for claiming benefit of force majeure for the purpose of load factor calculation. This claim for outstanding amount was not agreed to by the Appellant.

(J) Aggrieved by the non-acceptance of its claim by the Appellant, the Respondent no.2 filed a petition being no. 55 of 2011. By the impugned order dated 30.11.2012, the State Commission disposed of the petition of the Respondent no. 2 which according to the Appellant was in variance with that decided earlier by order dated 22.6.2010.

(K) Aggrieved by the order dated 30.11.2012 passed by the State Commission, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

(A) The State Commission in the impugned order dated 30.11.2012 has completely contradicted its findings made in earlier order dated 22.6.2010 and applying the dispensation laid down in its order dated 30.4.2010 in

case of the Respondent no.2 which was for an antecedent period, thereby incorrectly allowing the benefit of annual overhauling and equipment/generator breakdown as force majeure condition for consideration of load factor calculation.

(B) Despite clearly acknowledging that order dated 30.4.2010 was not retrospective in its operation, yet the State Commission permitted the benefit of annual overhauling for the antecedent period by relying on that very force majeure clause in PPA which it had found in order dated 22.6.2010 as non-applicable since the same was not in accordance with the force majeure provision provided in the State Grid Code.

(C) The State Commission ought to have rejected the claim of the Respondent no. 2 as it had earlier refused to identify the units from which it had to supply power to

the Appellant but subsequently earmarked the units to its advantage.

5. The Respondent no. 2 in its reply has supported the findings of the State Commission in the impugned order. The Respondent no.2 has emphasized that the cause of action in Petition no. 4 of 2010 was entirely different from the cause of action in Petition no.55 of 2011. According to the Respondent no. 2, in Petition no.4 of 2010 the cause of action was the wording by which force majeure should be defined while in Petition no. 55 of 2011 the cause of action was the implementation of order dated 22.6.2010.

6. According to the Respondent no. 2, there was no clause in the agreement dated 30.9.2009 to identify generators at the inception of the transaction as the power was supplied by the Respondent no. 2 from the

pool of surplus power which is available after it has consumed power for its own use. There is nothing which prevents the units to be identified even after the period of power purchase is over. In fact the PPA for supply of power for the period 1.4.2009 to 30.9.2009 was executed on the last date namely on 30.9.2009. The objection and contention of the Respondent no.2 of signing PPA under protest regarding force majeure clause was duly considered by the State Commission in its order dated 22.6.2010 which has attained finality. Thereafter, the plea of not earmarking the units in advance in subsequent petition no. 55 of 2011 was not available of the Appellant.

7. On the above issues we have heard Ms. Suparna Srivastava, Learned Counsel for the Appellant, Shri C K Rai, Learned Counsel for the State Commission and

Shri P.C. Sen, Learned Counsel for the Respondent no.2. They have also filed written submissions.

8. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:
 - i) Whether the State Commission in the impugned order has re-examined and re-adjudicated the issue as between the Appellant and the Respondent no. 2 which it had already decided vide its order dated 22.6.2010, thus acting in contravention of the principle of res judicata?
 - ii) Whether the State Commission has erred by applying the dispensation laid down in its order dated 30.4.2010 to the case of the Respondent no.2 for an antecedent period in allowing the claim of the benefit of annual overhauling and equipment/generator breakdown as

- force majeure condition for consideration of Plant Load Factor calculation?
- iii) Whether the State Commission was correct in allowing the benefit of annual overhauling and equipment/generator breakdown as force majeure condition without the earmarking of units by the Respondent no. 2 for supply of power to the Appellant in advance?
9. Since all the issues are interwoven, we shall be taking them up together.
10. We find that 2nd Respondent had entered into a Power Purchase Agreement on 12.3.2009 with the Appellant for sale of power for the period 20.9.2008 to 31.03.2009. The PPA contained the following force majeure clause.

“(7) FORCE-MAJEURE:- This agreement is subject to force-majeure such as rebellion, mutiny, civil unrest, riot, strike, lockout, fire explosion, flood, cyclone, lightening, earthquake, war or other forces or Act of God or Act of Law or other similar causes beyond control. Neither party shall be entitled for claiming compensation for damages in the event of force majeure. The Annual overhauling and major generator/equipment of breakdown would also be considered as event of force majeure. However, such events would be subject to verification and authentication by CSPDCL/Licensee officers. Force majeure period shall be considered for calculation of load factor.”

Thus the PPA provided for annual overhauling and major generator/equipment breakdown to be considered as an event of force majeure which was to be considered for calculation of load factor.

11. Thereafter, another PPA was signed on 30.9.2009 between the Appellant and Respondent no.2 for sale of surplus power for the period 1.4.2009 to 30.9.2009. The majeure clause as existed in the earlier PPA was modified in this PPA to the extent that the force majeure

clause in this PPA excluded generator/equipment breakdown for the purpose of load factor calculation. Thereafter the PPA executed on 5.12.2009 for the period 1.10.2009 to 31.12.2009 and on 1.2.2010 for the period 1.1.2010 to 31.3.2010 also had the same force majeure clause as in the PPA dated 30.9.2009, i.e., excluding the generator/equipment breakdown for the purpose of load factor calculation.

12. Aggrieved by the exclusion of generator/equipment breakdown for the purpose of load factor calculation the Respondent no.2 filed a petition being bearing no.4 of 2010 before the State Commission praying for declaration that the definition of force majeure as outlined in the PPA dated 12.3.2009 should remain the same in the subsequent PPA for power purchase from 1.4.2009 to 30.9.2009. State Commission passed the order in this Petition on 22.6.2010.

13. Let us now examine the order dated 22.6.2010 of the State Commission. The observations and findings of the State Commission in this order are as under:

i) There appears to be no substance in the claim of BALCO (R-2 herein) that they have signed the PPA under protest despite knowing the views of the distribution licensee regarding force majeure clause.

ii) The force majeure clause as defined in the Chhattisgarh State Electricity Grid Code 2007 with subsequent amendment dated 9.8.2008 is as under:

“Force Majeure: Any event which is beyond the control of the agencies involved which they could not foresee or with reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either agency such as but not limited to:

- (a) *Acts of God, natural phenomena, including but not limited to floods, droughts, earthquakes and epidemics;*
 - (b) *Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;*
 - (c) *Riot or civil commotion;*
 - (d) *Grid's failure not attributable to agencies involved."*
- iii) The change/addition or alteration by the distribution company in the definition of force majeure from that specified in the Grid Code in the PPA was unwarranted and therefore definition of force majeure as recorded in the PPA for procurement of power signed on 30.9.2009 is not correct. Hence the definition of force majeure as defined in the Grid Code, 2007 shall have to be applicable.

- iv) As the force majeure condition by definition is such happening which cannot be anticipated and which is beyond the control, the annual overhauling of generating plant which is a statutory requirement already known to the generator cannot be considered to be covered under force majeure.

- v) It has not been possible to identify all types of conditions/situation which can be covered in force majeure conditions and the party claiming the benefit of the force majeure shall have to prove that it has taken all the necessary precaution and measures but occurrence of such situation could not be prevented.

- vi) Considering the force majeure conditions of all units in a financial year to give relief in load factor is not justified. The State Commission is in agreement with the contention of the distribution licensee that unless

the generating unit matching its capacity with the contracted power is identified it will be difficult for the distribution company to consider the case related to force majeure as it may cause the dispute. Therefore, to avail benefit of force majeure clause it is necessary that the Petitioner shall earmark the generator matching its capacity with contracted power with the distribution licensee. During the course of public hearing in the matter of terms and conditions and pricing of power to be purchase in short term from captive generating plant and IPPs by the distribution licensee for the FY 2010-11, the generators have raised the points related to statutory requirement of annual overhauling of the power plant and unavoidable minor breakdowns of the power plant and requested to consider this aspect at the time of calculation for monthly load factor for power supply by them to the distribution licensee. The State Commission in its order dated 30.4.2010 has

considered these points and have made necessary provisions in the order for maximum 15 days period for overhauling and 240 hours for minor breakdown in a year which will be considered for the purpose of calculation of monthly load factor. Regarding the incidences related to force majeure conditions, the Commission ordered that this will be looked into by the distribution licensee on case to case basis.

vii) Finally, the State Commission directed as under:

“(I) the definition of force majeure clause shall be as mentioned in Chhattisgarh State Electricity Grid Code, 2007 and its subsequent amendment; (ii) the overhauling of a generating unit is not covered under force majeure condition; and (iii) M/s BALCO, the petitioner has to earmark the generating unit/units making its capacity matching with the contracted power with CSPDCL and approach to CSPDCL for getting benefit of force majeure condition, if in their opinion the incidence of the breakdown and the damage in their generating plant/equipment was beyond their control and shall submit the necessary proof to the CSPDCL to process the case accordingly.”

14. The findings of the State Commission in the order dated 22.6.2010 are summarized as under:
- i) The definition of force majeure in the PPA shall be as per the Grid Code.
 - ii) Annual overhauling cannot be considered to be covered under force majeure.
 - iii) The party claiming the benefit of force majeure shall have to prove that it had taken the necessary precaution and measures but occurrence of such situation could not be prevented.
 - iv) The generating company shall earmark the generator matching its capacity with contracted power to avail the benefits of force majeure.
 - v) The BALCO (Respondent no.2) has to earmark generating capacity matching with contracted power with the distribution licensee for getting the benefit of force majeure condition with necessary proof that the

breakdown and damage in their generating plant was beyond their control.

15. Let us now examine the impugned order dated 30.11.2012. The findings in the impugned order are as under:

- i) The Commission recognizes force majeure, annual overhaul and force outages as three different conditions of plant outages. Annual overhaul should not be clubbed into force majeure clause.
- ii) In the PPAs, though the dispensation of force majeure is not as per the State Grid Code, but annual overhauling (not the forced outages) has been specified for consideration of calculation of load factor in force majeure clause of the agreements, which was duly

executed between the generator and the distribution licensee and is binding on them.

- iii) The Commission underlines as under:
 - (a) Though the PPAs for the year 2009-10 are in three parts, but these were executed for entire year of FY 2009-10.
 - (b) BALCO (R-2) had not earmarked units prior to execution of PPA but the same units are supplying power for the entire FY 2009-10.
 - (c) The planned outages claimed by BALCO (R-2) fall into force majeure provisions of the agreements executed between the Appellant and the Respondent no.2.

- iv) In the order dated 30.4.2010 for short term power purchase rate for FY 2010-11, the Commission had

considered the following for load factor calculation for short term supply by IPPs/CPPs in the State.

- a) Planned outage to the maximum of 15 days for overhauling.
- b) Maximum 240 hours for minor breakdowns in a year.
- c) To avail this facility the CPP/generators are required to execute PPA with distribution licensee for one year period.

These factors will be considered for the purpose of calculating monthly load factor.

- v) Although the order dated 30.4.2010 does not have retrospective effect but since the PPAs between BALCO (R-2) and the distribution licensee (Appellant) state that the annual overhauling would be considered

- as force majeure, this is binding on both parties for entire duration of PPA.
- vi) With the same analogy as pronounced in order dated 30.4.2010 and order dated 22.6.2010 and the force majeure clause of the PPA executed between the parties, the Commission allows maximum of 15 days annual overhauling subject to verification by the distribution licensee for consideration in load factor calculation for unit 3 and unit 4 both having capacity matching with the contracted power.
 - vii) The breakdown of unit no.3 due to fire in APH, will be covered in the force majeure under the definition of force majeure in Grid Code as per the PPAs for calculation of load factor, subject to limitation of 240 hours.

viii) The outage of unit 1 due to generator rotor failure will not be considered since unit no 3 and 4 are having capacity to match with quantum of power for which PPA was executed for FY 2009-10.

16. As indicated earlier, in the order dated 22.6.2010, the State Commission had clearly decided and given a direction that the definition of force majeure in the PPA shall be as per the Grid Code and annual overhauling could not be considered to be covered under force majeure. The Respondent no.2 was directed to earmark the generating unit/units with capacity matching with the contracted power and approach the distribution licensee (Appellant) for getting the benefit of force majeure condition, if in their opinion the incidence of breakdown and the damage in their generating plant/equipment was beyond their control, along with necessary proof. It is very clear that while annual

overhauling was not allowed to be included in the force majeure, the breakdown and damage to generating plant/equipment beyond the control of the generator was to be considered for calculation of Plant Load Factor. The order dated 22.6.2010 was not challenged and as such it has attained finality.

17. We find that in the impugned order dated 30.11.2012, the State Commission has decided that the annual overhauling subject to maximum of 15 days in term of the order dated 30.4.2010 applicable for FY 2010-11 will also be applicable to the present case which pertains to FY 2009-10. This in our view is in contravention of the findings of the State Commission in the order dated 22.6.2010 which had already attained finality. Thus, the State Commission has re-examined and readjudicated the issue regarding covering of annual overhauling in force majeure condition for calculation of load factor in the impugned order dated

- 30.11.2012 which was already decided vide its order dated 22.6.2010, thus acting in contravention of the principle of res judicata. We also agree with the findings of the State Commission in order dated 22.6.2010 that annual overhauling would not be covered under force majeure as the period of annual overhauling was to be planned in advance and the CPP was expected to agree for contracted quantum of supply to distribution licensee taking into account the overhauling of its units during the period of supply during the FY 2009-10.
18. As regards earmarking of generating unit/units in advance, we are not in agreement with the contention of the Appellant that the units had to be earmarked in advance for the following reasons:
- i) The PPA for the period 30.9.2009 for the period 1.4.2009 to 30.9.2009 was entered into on the last day of the duration of the PPA. Similarly, the PPA for the period 1.10.2009 to 31.12.2009 was also entered into

- only on 5.12.2009. The PPAs also did not provide for advance declaration of units.
- ii) The Captive Power Plant of the Respondent no.2 was set up primarily for meeting demand of its own Aluminum Plant and the surplus power available from time to time was to be supplied to the distribution licensee (Appellant). The CPP had to estimate its surplus power taking into account the planned outage/ annual overhaul of its units during the period of supply and accordingly commit the contracted supply to the Appellant. However, forced outage of any of its units would affect the actual supply of power to the Appellant. The first charge on the CPP would be meeting the requirement of its own Aluminium Plant and the supply after meeting its captive demand would only be supplied to the Appellant. However, the surplus quantum would be affected by forced outage of units/conditions of force majeure in any of the units

which could not be anticipated in advance. The State Commission in its order dated 22.6.2010 directed for declaration of units matching with contracted power to facilitate calculation of load factor taking into account the force majeure, if any. Such declaration could be made by the CPP after the completion of the period of supply.

- iii) The State Commission in the order dated 22.6.2010 had clearly directed the BALCO (Respondent no.2) to declare unit/units with capacity matching with the contracted power for claiming benefit of force majeure for breakdown and damage in the generating plant for the period under dispute. This direction could not be for advance declaration as the period under dispute was already over when the order dated 22.6.2010 was passed as the State Commission was adjudicating on the dispute for the past period.

19. In the impugned order dated 30.11.2012, the State Commission has readjudicated the matter in terms of the order dated 30.4.2010 regarding short term power purchase by the distribution licensee from IPPs/CPPs for the FY 2010-11 and where PPA is entered for at least one year. This order could not be applied retrospectively for the earlier PPAs for FY 2009-10.

20. The final result of our findings is that the outage of unit no.3 of 135 MW capacity for the period from 24.7.2009 to 05.8.2009 due to fire in APH would only qualify for force majeure and outage of units 3 and 4 due to annual overhauling would not qualify for force majeure in terms of the order of the State Commission dated 22.6.2010. The Appellant is accordingly directed to calculate the load factor and make payment due to the Respondent no. 2 at the earliest.

21. Summary of our findings:

- i) The State Commission has re-examined and readjudicated the issue regarding covering of annual overhauling in force majeure condition in the impugned order dated 30.11.2012 which was already decided vide its order dated 22.6.2010 thus acting in contravention of the principle of res judicata.**
- ii) We are not in agreement with the contention of the Appellant that units for supply to the distribution licensee had to be earmarked in advance.**
- iii) The dispensation allowed in the order dated 30.4.2010 for the period 2010-11 for PPAs entered into for a period of one year could not be applied in the present case.**
- iv) The result of our findings in terms of the order dated 22.6.2010 of the State Commission is that outage of unit 3 of 135 MW capacity for the period**

24.7.2009 to 05.8.2009 due to fire in APH would qualify for force majeure for calculation of load factor and outage of units 3 and 4 due to annual overhauling would not qualify for force majeure. The Appellant is accordingly directed to calculate the load factor and make payment due to the Respondent no.2 at the earliest.

22. In view of our above findings the Appeal is partly allowed to the extent indicated above and the impugned order is set aside. No order as to costs.

23. Pronounced in the open court on this 2nd day of
January, 2014.

(Rakesh Nath)
Technical Member

√

REPORTABLE/NON-REPORTABLE

mk

(Justice M. Karpaga Vinayagam)
Chairperson