

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

**Appeal No. 64 of 2012**

**Dated: 18th February, 2013**

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

**In the matter of:**

**Indiabulls CSEB Bhaiyathan Power Limited,**

1 A, Hamilton House, First Floor,  
Connaught Place,  
New Delhi-110 001

... **Appellant**

Versus

1. **Chhattisgarh State Electricity Regulatory Commission,**  
Irrigation Colony, Shanti Nagar,  
Raipur-492 001,  
Chhattisgarh.
2. **Chhattisgarh State Power Holding Co. Ltd.,**  
A Government of Chhattisgarh Undertaking  
2<sup>nd</sup> Floor, Vidyut Sewa Bhawan, Dangania,  
Raipur-492 013.
3. **Chhattisgarh State Power Generation Co. Ltd.,**  
A Government of Chhattisgarh Undertaking,  
Executive Director (Project Generation-I)  
101, Vidyut Sewa Bhawan, Dangania,  
Raipur-492 013.

...**Respondent(s)**

Counsel for the Appellant(s) : Mr. Sanjay Sen,  
Mr. Anurag Sharma, Mr. Hemant Singh  
Ms. Shikha Ohri

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,  
Ms. Swapna Seshdri, Mr. Anand K. Ganesan &  
Ms. Swagatika Sahoo for R-1  
Ms. Suparna Srivastava for R-2 & 3

**JUDGMENT**

**RAKESH NATH, TECHNICAL MEMBER**

This Appeal has been filed by Indiabulls CSEB  
Bhaiyathan Power Ltd. against the order dated

31.12.2011 passed by Chhattisgarh State Electricity Regulatory Commission ('State Commission').

2. The Appellant is a generating company. The State Commission is the first Respondent. Chhattisgarh State Power Holding Co. Ltd. and Chhattisgarh State Power Generation Co. Ltd., the successor entities of the State Electricity Board, are the Respondent nos. 2 and 3 respectively.

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

3.1 On 8.2.2007, the erstwhile Chhattisgarh State Electricity Board issued a notice inviting tenders for a tariff based bidding for 1200-1500 MW Bhaiyathan Thermal Power Project along with development of captive coal block, coal transportation and power evacuation facilities upto Raipur.

3.2 The Appellant participated in the bidding process. Ultimately, the Appellant was selected as a successful bidder and was issued a Letter of Intent on 2.4.2008 for development of the project by the Electricity Board. Under the Letter of Intent, the Appellant was also informed by the Electricity Board about the status of Environment and Forest clearance for the project.

3.3 The Appellant submitted the Performance Bank Guarantee to the Electricity Board aggregating to Rs.100 Cr. as per the terms of the PPA.

3.4 On 13.10.2008, the Appellant executed the Power Purchase Agreement with the Electricity Board for sale of power from the project. The PPA provided for conditions subsequent to be satisfied by the Appellant and the Electricity Board within the stipulated time

frame. Providing the land for the project and necessary approvals for development of captive coal mine was the responsibility of the Electricity Board as per the PPA and the time provided for completion of these activities was six months i.e. by 12.4.2009. The project had to commence supply of electricity by FY 2012-13.

3.5 The PPA had a provision for termination of the agreement in case of non-fulfillment of condition subsequent by the Appellant or the Electricity Board beyond the maximum extension period for reasons directly attributable to the Appellant or the Electricity Board or a Force Majeure event. In case of termination of the agreement, there are provisions for damages to be paid by the defaulting party to the other party.

3.6 The PPA also provided that if any of the conditions subsequent to be carried out by the Appellant is not fulfilled within 3 months after the specified time, then the Appellant was liable to furnish to the Electricity Board additional weekly performance guarantee of Rs. 2 crores for every week of delay, until the Appellant has satisfied all the specified conditions.

3.7 The Electricity Board could not fulfill its obligation of providing the land and clearance from Ministry of Environment & Forest for captive coal mines and fuel transportation system. Consequently, the Appellant also did not carry out its obligations under the PPA.

3.8. On 23.11.2009, the Respondent no. 2 asked the Appellant to deposit the weekly performance bank guarantee of Rs. 2 crores/week until the Appellant fulfilled its obligations under the PPA. The Appellant refused to pay the additional performance guarantee

as according to them it was payable only if the Appellant failed to fulfill its obligation despite the Respondent having fulfilled its obligation.

3.9 On 26.5.2010, the Appellant received a notice from the Respondent no. 2 for payment of additional performance guarantee of Rs. 56 crores. In the meantime the Appellant came to know that the Forest Advisory Committee of the Ministry of Environment & Forest had rejected the proposal of forest clearance for the development of captive coal mine for the project.

3.10 Thereafter, the Appellant approached the State Commission to set aside the notice dated 26.5.2010 issued by the Respondent no. 2 and to direct them to comply with their obligation under the PPA in a timely manner as per the provisions of the PPA.

3.11 The State Commission disposed of the petition filed by the Appellant by the impugned order dated 31.12.2011 quashing the notice dated 26.5.2010 issued by the Respondent no. 2. However, the State Commission also gave some findings regarding the provisions of the PPA relating to conditions subsequent to be fulfilled by the Appellant and the Respondent and also directed them to discuss and review the terms and conditions of the PPA and arrive at amicable conclusion. The State Commission also observed that the failure of Respondent to obtain forest clearance is an event of Force Majeure under the PPA. Aggrieved by these additional findings and directions, the Appellant has filed this Appeal.

4. The Appellant has made the following submissions:

i) The State Commission has erred in rendering the findings that not getting forest and environment clearance of coal mine from the Ministry of Environment & Forest on account of placing of the said allocated land for coal mining under no go area is a situation of force majeure and as such it is beyond the control of the Respondent to complete its obligation. It was not the case of the Appellant that failure of the Respondents to obtain environment & forest clearance is an event of force majeure and even the Respondent did not invoke force majeure or given any notice in this regard. On the other hand, as per the PPA in case of failure to obtain such clearance within the extended time, the Appellant has a right to terminate the PPA. However, by these findings, the State Commission has in effect taken away the vested

right accruing to the Appellant under the provisions of the PPA.

ii) The State Commission has also erred in finding that the obligation of the Appellant under the PPA is not reciprocal to the obligation of the Respondents. The Respondents could not insist on the Appellant to perform the contract without performing their obligations. In other words, the Appellant's obligation would automatically get postponed till the discharge of the Respondents' obligation had been completed. Without the entire project land being provided and environment and forest clearance, the Appellant could not carry out its obligations such as arranging the finances, issue notice to proceed to the EPC contractor or payment of declared price of land on its transfer.

iii) The State Commission also could not have asked for parties to review the terms of the PPA, when the Respondents had followed the competitive bidding route provided under Section 63 of the Electricity Act, 2003. Giving such directions for the project being developed under Section 63 of the Act is beyond its jurisdiction.

5. The Respondent nos. 2 and 3 have submitted as under:

i) The Ministry of Environment & Forest vide letter dated 30.1.2009 has declined the proposal for forest clearance for coal mine submitted by the State Government for the reason that the major part of the proposed mine was forest land. Thus, the fuel linkage for the project, which had earlier been allotted at the time of entering into the PPA has become unavailable. The matter has again been taken up by the

Respondents with the Ministry of Environment and Forest. When no positive response seemed coming from the Ministry of Environment and Forest, the Appellant has ultimately decided to abandon the project vide letter dated 12.12.2011 addressed to the Chief Minister, Govt. of Chhattisgarh. Accordingly, the Appellant requested for direction for refund of the amount invested by it alongwith interest and returning the Performance Bank Guarantee furnished by it. Presently, negotiations between the Appellant and Respondent nos. 2 and 3 on the request of the Appellant for refund are yet to achieve an amicable outcome.

ii) The State Commission's finding that there is no reciprocity of performance of obligations agreed to between the Appellant and the Respondent nos. 2 and 3 is correct as there is no agreed obligation which is to

be performed first in point of time so as to enable performance of the other. Further, the State Commission has also correctly held that the non-performance of contractual obligation by the Respondent nos. 2 and 3 is due to a force majeure event.

iii) The PPA in the present case stands frustrated on account of impossibility to perform the obligation thereunder as per Section 56 of the Contracts Act. The Appellant itself has considered the subject project as “dead” and has proceeded with taking post-termination steps in the form of claiming compensation from Respondent nos. 2 and 3. As a result of aforesaid, the generator-licensee relationship between the Appellant and the Respondent ceases to exist. As such the PPA no longer falls under the jurisdiction of the State Commission.

6. According to learned counsel for the State Commission, the State Commission has only given the option to the parties to renegotiate the terms of PPA and it is wrong to say that the State Commission has given a mandatory direction to renegotiate the PPA. This was done since the parties submitted before the State Commission that they wished to go ahead with the project. The finding about reciprocity of the obligations of the parties and force majeure was also rendered by the State Commission in view of the various claims and counter claims raised by the parties during the proceedings and the same has nothing to do with the quashing of the letter dated 26.5.2011 of the Respondent no. 2. None of the parties had placed before the State Commission the fact that the PPA had been terminated by the Appellant vide letter dated 12.12.2011. In any case,

since both the parties have submitted that the PPA has come to an end, there is no relevance of the above findings now.

7. On the above issues we have heard the learned counsel for the parties.

8. We notice that the State Commission besides quashing the notice dated 26.5.2010 issued by the Respondent no. 2, as sought for by the Appellant, has also given the following findings and directions:

i) The situation of not getting forest and environmental clearance of coal mine from the Ministry of Environment and Forest on account of placing the said allocated coal mine under 'no go area' is a situation of force majeure.

ii) The obligation of the Appellant under clause 3.1.2 of the PPA is not reciprocal to the obligation of the Respondent no. 2 under clause 3.1.2 A of the PPA.

iii) Both the parties are directed to review the terms and conditions of the PPA with open mind under the changed situation to bring the project in reality.

9. The question that arises before us is whether the above findings are relevant to the context of the issue raised before the State Commission in the Petition filed by the Appellant and whether the State Commission has exceeded its jurisdiction in directing the parties to review the terms and conditions of the PPA when the project was awarded to the Appellant under the tariff based competitive bidding process undertaken on behalf of the distribution licensees.

10. We find that the main issue before the State Commission was whether Respondent no. 2 could raise demand for additional performance guarantee from the Appellant for not fulfilling its obligation under the PPA when the Respondent no. 2 itself had not fulfilled its own obligation under the PPA under 'conditions subsequent'.

11. We feel that for answering this question it was not necessary for the State Commission to go into other issues relating to reciprocity of obligations of the parties and force majeure as the State Commission has itself held as under:

*“We are also convinced about the reasons for not fulfilling the obligations by the petitioner on account of uncertain situation of fuel arrangement and thus not achieving financial closure”.*

*“We also feel that since there is also deficiency on the part of the respondent in completion of its own*

*obligation, it should not have taken action to issue a notice for additional supplementary bank guarantee unilaterally”.*

12. Clause 3.1.2 of the PPA specifying the obligations of the Appellant clearly states that the activities have to be undertaken by the seller within the stipulated time unless such completion is affected due to procurers’ failure to comply with their obligations under the PPA or force majeure. The relevant paragraph of the PPA is reproduced below:

*“ 3.1.2 The seller agrees and undertakes to duly perform and complete the following activities within (i) ten (10) months from the Effective Date or (ii) twelve (12) Months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to Procurers’ failure to comply with their obligations under Article 3.1.2 A of this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by Procurer:”*

13. The State Commission having decided that the completion of activities under the obligation of the Appellant has been affected by deficiency in completion of activities under the obligation of the Respondent no. 2 and quashing the letter of demand dated 26.5.2010 for additional performance guarantee, has gone into other issues which were not relevant to the issue which was legality of demand letter dated 26.5.2010 by the Respondent no. 2. The State Commission in its written submission has also admitted that the State Commission had gone into other issues due to various claims and counter claims made by the parties and the same has nothing to do with quashing of the letter dated 26.5.2011 issued by the Respondent no. 2.

14. As regards the directions of the State Commission regarding review of the terms and conditions of the

PPA, the project was awarded to the Appellant under tariff based competitive bidding process. The State Commission under Section 63 of the Act has to only ensure that the process followed in the competitive bidding is as per law. The State Commission has to adopt the tariff discovered in the competitive bidding process. The State Commission could not give directions to the parties renegotiate the terms of the PPA.

15. Learned counsel for the State Commission has argued that the State Commission has only given an option to the parties to renegotiate the terms and conditions of the PPA and it was not a binding direction. However, she has referred to the judgment of this Tribunal dated 6.5.2010 in Appeal no. 44 of 2010 in the matter of MP Power Trading Company Limited vs. Madhya Pradesh Electricity Regulatory

Commission and Ors. reported as 2010 ELR (APTEL) 0634 to press the point that negotiation is inherent in the process of competitive bidding.

16. We feel that the above judgment is not relevant to the present case. In the matter referred to in the above judgment, the procurer had entered into negotiation with the lowest bidder with a view to bring down the quoted price before entering into the PPA. In the present case the Appellant has been selected as the successful bidder and the price has been accepted by the Respondent no. 2 and PPA has been entered into between the parties. Thus, the State Commission should not have directed the parties to renegotiate the terms and conditions of the PPA. Further, if the Environment and Forest clearance has been denied by the Ministry of Environment and Forest, there is no further scope for development of the project.

17. In view of above, we set aside the findings and direction of the State Commission as enumerated in the paragraph 8 (i) to (iii) above.

18. However, we must make it clear that we are not inclined to go into the merits of the submissions made by the Appellant and Respondent nos. 2 & 3 regarding reciprocity of their obligations and force majeure condition as these may have to be decided in the proceedings for termination and settling of claims of the parties for compensation. As such, we do not propose to give any finding on these issues as the termination of the PPA is not an issue before us.

**19. Summary of our findings:**

**i) The issue to be decided by the State Commission in this case was whether the Respondent no. 2 could raise the demand for**

**additional performance guarantee from the Appellant for not fulfilling its obligations under conditions subsequent when the Respondent no. 2 itself had not fulfilled its own obligations under the PPA.**

**ii) The State Commission after setting aside the letter of the Respondent no. 2 dated 26.5.2010 has also gone into giving findings on the reciprocity of obligations of the parties under the PPA and force majeure event and also gave directions to the parties to renegotiate the terms of the PPA even though the PPA was entered into following the process of tariff based competitive bidding under Section 63.**

**iii) The above findings on the provisions of the PPA and directions to renegotiate the term of PPA were not relevant to the issue before the State**

**Commission regarding legality of demand notice by the Respondent no. 2 for additional performance guarantee. We accordingly set aside the above findings and direction of the State Commission.**

20. With above directions, the Appeal is disposed of.  
No order as to costs.

21. Pronounced in the open court on this  
**18th day of February, 2013.**

**( Rakesh Nath)  
Technical Member**

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

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**REPORTABLE/NON-REPORTABLE**

vs