

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai - 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 9 of 2011

In the matter of

Petition of M/s.JSW Energy Ltd. for adjudication of dispute between JSW Energy Ltd. and Maharashtra State Electricity Distribution Company Ltd.

Shri. V.P. Raja, Chairman
Shri. Vijay L. Sonavane, Member

M/s. JSW Energy Ltd

... Petitioner

Versus

Maharashtra State Electricity Distribution Company Ltd.

... Respondents

ORDER

Dated: November 16, 2011

M/s. JSW Energy Ltd. (“JSWEL”) submitted a Petition on 05.01.2011 seeking adjudication of a dispute under Section 86(1) (f) of the Electricity Act, 2003 (hereinafter referred to as “the EA 2003”) between JSWEL and Maharashtra State Electricity Distribution Company Ltd. (“MSEDCL”).

2. The prayers in the Petition are as follows:

“

- a) *Adjudicate upon the dispute that has arisen between M/s. JSW Energy Ltd. and Maharashtra State Electricity Distribution Company Limited as detailed herein-above or in the alternative refer the disputes for adjudication through Arbitration;*

b) Pass an order directing the Respondent to pay to the Petitioner the costs of the present proceedings.”

3. It has been averred by the Petitioner as under:

- a) JSWEL is a Company incorporated under the provisions of the Companies Act, 1956 and JSWEL has established a generating station – Power Plant of 300 MW (one of the proposed 4 X 300 MW) at Jaigad, Ratnagiri in the Maharashtra State.
- b) In 2007, the Respondent MSEDCL had initiated a Competitive Bidding process for procurement of power from generating companies as per guidelines of Government of India, Ministry of Power. In terms of the process initiated under Section 63 of the EA 2003, the Petitioner was selected as the successful bidder to supply 300 MW of electricity to the Respondent and subsequently the Petitioner and Respondent executed a Power Purchase Agreement dated 23.02.2010 (hereinafter referred to as “PPA”).
- c) Before signing the PPA, the Petitioner had entered into a Long Term coal supply arrangement dated 26.12.2007 with M/s PT Sungai Belati Coal (“SBC”) of Indonesia for supply of coal of specifications required for the said Power Plant. This Fuel Supply Agreement (hereinafter referred to as “FSA”) was a basis for the bid and the fuel arrangement under the PPA. Thus, the Petitioner had duly complied with the conditions subsequent in the PPA in regard to the FSA during the competitive bidding process itself.
- d) On 26.12.2007, the date of entering into the Fuel Supply Agreement, SBC, the supplier of coal, had a valid license for extraction and supply of coal in Indonesia. However, on 28.05.2010, SBC informed the Petitioner, that the Appellate Division of the Supreme Court of Indonesia, by an Order has revoked their license for mining and supply of coal. The Petitioner contended that the said revocation of the license of SBC was a force majeure condition and SBC was not in a position to perform its obligation under the Fuel Supply Agreement (Coal Sale Purchase Agreement) entered into with the Petitioner. Thus, the FSA for the project was frustrated on account of factors beyond the control of the Petitioner and SBC, the supplier of coal.
- e) On 03.06.2010 the Petitioner notified the Respondent of the Force Majeure condition affecting the PPA. In this notification, Petitioner offered to mitigate the effect of the said Force Majeure to generate and supply power to the Respondent by procuring the coal from other sources subject to adjustment in

tariff on account of actual price payable on such procurement from other sources.

- f) The Respondent vide its letter dated 28.06.2010, contended that the revocation of license of SBC to mine and supply coal to customers could not be considered as a Force Majeure event and relief could not be granted.
- g) The Petitioner informed the Respondent on 14.07.2010, that a "Dispute" as contemplated under the PPA had arisen and the same needs to be resolved as per the provisions contained in the PPA. The Respondent reiterated its earlier stand on 11.08.2010, that the provision of Force majeure Clause in the PPA is not attracted in the present situation.
- h) On 12.08.2010, the Petitioner requested the Respondent to hold a joint meeting for resolution of the dispute. The meeting was held on 27.08.2010 but the dispute could not be amicably settled. Hence, the Petitioner filed the present Petition before the Commission for resolution of the dispute.
- i) The Petitioner further stated that the said revocation of SBC License was beyond the control of the Petitioner. There was no scope for the Petitioner to avoid the same by any reasonable care or compliance with Prudent Utility Services. Therefore, the Force Majeure event as per Clause 12 of the PPA arose, and in this condition the Petitioner had no option but to procure the imported fuel from alternate sources at a very high price, for which Petitioner is entitled for differential price from MSEDCL as per Clause 12.7 of the PPA.
- j) The Petitioner prayed for adjudication of dispute or in the alternate, for reference of the dispute to Arbitration.

4. The Commission vide Notice dated January 28, 2011, scheduled a hearing in the matter on February 15, 2011 and directed the Petitioner JSWEL to serve a copy of the Petition along with its accompaniments to the Respondent MSEDCL and authorised Consumer Representatives. The Respondent was directed to file its written comments, if any, with a copy served to the Petitioner and authorised Consumer Representatives.

5. During the hearing the Commission directed the Petitioner to submit the following information:

- a. At what price the coal was to be purchased from SBC Company as per the Coal Sale Purchase Contract and at what price the coal is being procured presently?
- b. What are the notified mines owned by SBC as per the Coal Sale Purchase Contract dated 26.12.2007? Which notified mines are at present being held after revocation of license (by the Supreme Court of Indonesia?)

- c. List of mining properties owned/operated by the SBC Company Worldwide.
- d. Is there any dispute resolution clause in Coal Sale Purchase Contract?
- e. Have JSW used article 14.2 of the Coal Sale Purchase Contract? If not why?
- f. What is ratio of Indonesian coal being imported vis-a-vis total coal import to India? In terms of Indonesian Export of coal, what is the share of India?
- g. What is the normal business practice while dealing with international foreign companies? Whether any provision is there such as bilateral agreement etc. by Government of India with Indonesian Govt.?
- h. Does the Petitioner have any legal remedy against SBC?

6. MSEDCL submitted an application on 28th February 2011 where under it was prayed that the Petitioner should be directed to submit before the Commission with copies served on MSEDCL, the following documents:-

- (i) the agreement between SBC and the Petitioner;
- (ii) complete correspondence between the Petitioner and SBC prior to and after the execution of the agreement between the parties;
- (iii) copy of the pleadings if any, in respect of the order passed by Regent of Sarolangun (“ROS”) in the matter of SBC dated 18.01.2010, including prior orders.

7. On 1st April 2011, the Petitioner filed a copy of the Coal Sales Purchase Contract between the Petitioner and SBC, Judgments passed by the Supreme Court of Indonesia dated 27th October 2008 in Case No. 25/K/TUN/2008 and dated 27th September 2009 in Petition No. 48PK/TUN/2009, Decrees dated 5th January 2010 and 18th January 2010 passed by the ROS, and the Regulation on the Procedure for Setting Mineral and Coal Benchmark Selling Price as issued by the Republic of Indonesia. The Petitioner has submitted that copies of pleadings in the above litigations are not available with the Petitioner. It has also submitted that the Petitioner was not aware of the dispute regarding the coal license of SBC at the time of signing the PPA with MSEDCL. Further, in view of the Coal Sales Purchase Contract with SBC, the Petitioner has not got any linkage for coal supply for its project in Maharashtra.

8. The Petitioner filed an additional Affidavit on 17th June 2011 providing the information sought by the Commission. The Petitioner also submitted the summary of events, and Orders passed by the Appellate Division of the Supreme Court of Indonesia. The Petitioner submitted as follows:-

- I. The price of coal to be procured was fixed at FOB US\$39.40 per ton. At present the coal is being procured on the spot market basis from both Indonesia and South Africa, based on the availability and ruling prices of coal. Coal from Indonesia is imported in the range of about US\$55 to US\$90 per ton on FOB basis and that from South Africa in the range of about US\$85 to US\$ 125 per ton depending upon the quality/calorific value and source of coal.
 - II. As per the agreement dated 26.12.2007, the notified mines covered by the SBC were Kelurahan, Kecamatan, Sarolangun, Jambi-Indonesia mines. These mines are covered by the KP Exploitation No. KW.02KP210801 and have now been revoked by the ROS. Further the SBC does not hold or otherwise have any other mine to supply coal to the Petitioner.
 - III. Clause 14 of the Coal Sales Purchase Contract contains provision for dispute resolution through Arbitration. The Petitioner has not invoked the arbitration clause because it involves considerable cost and expense and is unlikely to result in any favourable decision in regard to supply of coal or compensation in terms of money in view of the clear existence of Force Majeure reasons affecting SBC.
 - IV. As regards the ratio of Indonesian coal being imported into India as against the total coal imported in India for the Year 2010-11, out of a total import of 65.7 million tonnes of coal in India, about 43 million tonnes constituting about 65% was from Indonesia.
 - V. There is no bilateral agreement between the Govt. of India and the Republic of Indonesia for assured coal import into India or for regulating the trade agreements for export of coal out of Indonesia to India.
 - VI. The Amendment to Agreement dated 10.07.2009 was to ensure that the off-take of coal by the Petitioner was consistent with the commercial operation of the plant of the Petitioner. Clauses 2.12 and 2.13 were not applicable to Force Majeure conditions and in such events no compensation was payable by SBC to the Petitioner and therefore had no implications to the matter in issue.
 - VII. The Agreement with the Respondent MSEDCL is to sell 300 MW of electricity from one unit only.
9. The Respondent, MSEDCL filed affidavit-in-reply on 10th May 2011. In its reply MSEDCL submitted that:
- i. SBC was well aware of the subject that its mines were under dispute and claims by PT. Karya Bumi Baratama (“KBB”) and that litigation had ensued. The Supreme Court of Indonesia passed its judgment and decree holding that

the mining concession no. KW.02KP210801 granted by ROS to SBC violated the prevailing laws. The judgment clearly reveals that SBC was aware of the claims raised by KBB from 2006 in respect of the overlapping of mining rights.

- ii. The Coal Sales Purchase Contract was entered into between Petitioner and SBC on 26.12.2007. On this date the litigation concerning the rights of SBC on specific mines was pending. It is presumed that with required due diligence the Petitioner, JSW was aware of these proceedings. Further clause 2.1.2 of the Coal Sales Purchase contract enabled the seller i.e. SBC to provide coal from alternative sources at the agreed price in case of the notified mines being affected by a force majeure event. The agreement also contemplates that Petitioner is entitled to source coal to meet its demand due to inability on the part of SBC to adhere to its supply commitments. The difference in price of coal sourced from any third party by Petitioner is to be borne by the seller, SBC.
- iii. The Petitioner and the SBC on 10.07.2009 amended the Coal Sales Purchase Contract, in which the definition of force majeure was not amended. At the time of amendment both the Petitioner and SBC were aware of the pending litigation. The amendment was made in light of the pending litigation.
- iv. The Petitioner is responsible for the consequence thereof, as the Petitioner waived its right to get reimbursed the difference in price of coal in the event of failure on the part of SBC to supply coal as per the agreement.
- v. The doctrine of frustration of contract has been self-indulged by the Petitioner. The Coal Sales Purchase agreement dated 26.12.2007 permitted the Petitioner as the buyer to obtain coal from alternative sources, in the event of the default on the part of the SBC. However, despite the pending litigation the Petitioner has taken the risk and elected to amend the agreement in July 2009 to its detriment by giving up its claim for the difference in price of coal. Thus, the Petitioner has elected to give up the difference in price.
- vi. The Coal Sales Purchase Contract was never provided by the Petitioner to MSEDCL till the present dispute was raised. This was contrary to the provisions of the PPA. MSEDCL denied that there is a frustration of contract between the Petitioner and SBC. Further there is no provision in the PPA which specifically provides that price of coal is determined on the basis of coal sourced from the notified mines of the coal seller.

vii. Even before execution of Agreement dated 26.12.2007, the litigation was pending. The Petitioner is expected to take due diligence prior to execution of the contract. Lack of due diligence has to be viewed with reference to the risk allocation. The Petitioner has invoked the force majeure condition to contend frustration of contract between the Petitioner and SBC and therefore claims compensation in terms of the purported force majeure event. An event within the control of the parties and which relates to changes in cost of fuel is excluded from Force Majeure condition. Force Majeure condition on account of litigation in Indonesia, does not arise as in terms of the Coal Sales Purchase agreement dated 26.12.2007 as it was neither an exceptional event nor beyond the control of SBC. Therefore the present Petition is liable to be dismissed with costs.

10. Further hearings were held on 20th April 2011, 12th May 2011, 27th June 2011, and on 20th July 2011. The Petitioner submitted that being a legal dispute the matter is to be referred to arbitration. The Petitioner referred to a citation in the matter of M/s Dhanrajamal Gobindram Vs. M/s Shamji Kalidas & Co. SCR (1961) 1020, based on reference to arbitration. Further the Petitioner submitted that on the date the Petitioner entered into a Fuel Supply Agreement with SBC, SBC was holding a valid and subsisting Coal Mining and Exploration license granted by the Government of Indonesia. Therefore, there was no reason for the Petitioner to believe that the licence of SBC was not legal or invalid. In the PPA the force majeure clause in clause 12 specifically includes the force majeure events affecting the Petitioner's contractors affecting the supply of fuel as a force majeure event. The notified mines referred to in Clause 2.11 of the Coal Sales Purchase Agreement dated 26.12.2007 was those which are covered by the Exploration Mining Concession at Karurahan, Serkam, Kecamatan, Sarolangum and Jambi in Indonesia. No other mine was added to or otherwise owned or controlled by SBC. Thus, this event is a force majeure event which affects the supplier of coal to the project and as per Article 12 of the PPA this is a force majeure event.

11. It was submitted by the Petitioner that the PPA itself recognizes in Article 12 that the Force majeure not only affects the parties to the PPA, but also the supplier's force majeure. It is not open to the MSEDCL now to take the stand that the Petitioner should assume the liability to arrange for fuel outside the fuel supply agreement

entered into with SBC. The effect of the force majeure is that if MSEDCL so decides, it can put an end to the contract and need not accept the mitigation proposal given by the Petitioner. All the contentions of the MSEDCL are misconceived and without any merit. The petitioner has no reason to believe that the mining license of SBC was illegal or otherwise not authorised. At the time of the agreement with the SBC, SBC held a valid license for mining and exploration of coal. Thus all of the acts were beyond the control of the parties and only based on the interpretation of the laws by the highest court in Indonesia. The contention of MSEDCL that as per Clause 2.12 of Coal Sales Purchase Agreement, SBC has to provide alternative coal at the same price in case of non supply from notified mines, is not applicable in view of the amendment agreement dated 10.07.2009, which deleted the part “at the same price” and further the exception of force majeure event is there in the agreement. Thus the contention of MSEDCL that the provision of clause 2.12 is applicable is incorrect.

12. It was further submitted by the Petitioner that MSEDCL’s contention regarding not pursuing any legal remedy against the SBC by the Petitioner was based on commercial decision is not correct. The Petitioner preferred not to initiate any arbitration, as the arbitration with SBC would have required observance of the International Arbitration norms under the Rules of London Court of International Arbitration, which would involve considerable long drawn non-productive and futile efforts and expenses. Therefore, the Petitioner decided to mitigate the effect of the force majeure condition with MSEDCL and procure coal from alternative sources. Further, the communication dated 27.05.2011 received from SBC confirmed that apart from the mines notified in the agreement which was revoked, SBC does not hold or otherwise have any other mine to supply coal to the Petitioner. Thus, if the prayer of the petitioner is not allowed and the Petitioner is not compensated due to Force Majeure event, the Petitioner’s cash flow would be severely affected and the Petitioner would be unable to recover even the variable cost of power generated at 300 MW Unit 1 under the PPA. Hence the Petition be allowed.

The Petitioner submitted written arguments on 20th July 2011 wherein the following additional points were raised:-

- (i) If the provisions of the PPA are interpreted on the basis of an absolute obligation on the part of the Petitioner to procure coal from whatever source

and whatever price and generate and effect supply of power to MSEDCL, then the PPA providing for finalisation of Fuel Supply Agreement as a Condition Precedent, and further, Clause 12 of the PPA recognising the events affecting the supplier's force majeure event, shall be redundant and of no meaning or purpose.

(ii) The contention of MSEDCL that the Petitioner's bid was selected based on the price quoted by the Petitioner at the time of selection of bids, and if a higher price is now required to be paid for power supply the same will not be competitive, is not relevant in the present case. Competitiveness needs to be considered at the time of selection. The vagaries of acts of God, supervening circumstances beyond the control of the parties subsequent to the selection of bids cannot be a ground. As the bid documents provide for acts in the nature of force majeure, there is no merit in the argument that MSEDCL could have selected another bidder in the place of the Petitioner.

(iii) The contention of MSEDCL that the Petitioner is guilty of not asserting its legal rights and is thus not entitled to seek any relief from MSEDCL under the PPA, is totally misconceived. This contention is based on the misconceived premise that the Petitioner should initiate successful legal action against SBC.

(iv) The Petitioner, on legal advice sought, was advised that pursuing any legal remedy under the Coal Supply Agreement with SBC will not result in any benefit to the Petitioner as the revocation of Mining and Exploration License of SBC was clearly a force majeure event in terms of Clause 9 in the said agreement.

13. The Respondent MSEDCL in its argument apart from the submission of its reply opposed the prayer of the Petitioner to refer the matter to Arbitration and further sought the attention of the Commission on the following points:

- a. The proposal of mitigation is not acceptable as no force majeure event has actually happened. Hence, there is no mitigation and the petitioner has to follow the PPA.

- b. The definition of Force Majeure, in Coal Sales Purchase Contract in Article 1(33) does not protect the mining license dispute of SBC. Further, SBC even knowing the fact of pending litigation entered into a contract and failed to perform its duty hence there was no force majeure.
- c. Further as the Petitioner had waived its rights of litigation against the SBC, now the Petitioner cannot pass on the burden on MSEDCL and indirectly on the Consumers. By way of amendment of Coal Sale Purchase agreement, the Petitioner accepted all risks on its shoulder from the SBC, therefore now it cannot be transferred on MSEDCL by taking the shelter of force majeure event.
- d. The Petitioner has accepted the escalable clause regarding the fuel in the PPA as per CERC escalation indexes for imported coal. In view of this, the Petitioner cannot ask to compensate for additional fuel Cost and expenses incurred by the Petitioner on actual basis due to alleged force majeure event.

14. During a further hearing in the matter on 4th August 2011, Shri. S. Srivastava, Counsel for the Petitioner submitted that an oral proposal for settlement has been made to MSEDCL. Shri. Laxman R. Shahapur, Advocate for MSEDCL, and Shri. A.S. Chavan, C.E.(PP)-MSEDCL, submitted that the said oral proposal is being considered by MSEDCL and sought four week's time for the same.

15. Further hearings were conducted on 7th September 2011 and 28th September, 2011. In the said hearings, after considering the submissions of the Petitioner, MSEDCL and authorised consumer representatives, the Commission observed that though sufficient time was provided to mitigate their dispute through an amicable settlement, no settlement took place. The Commission directed MSEDCL to submit full details of all the bidders selected after the RFP, and the internal evaluation report along with the escalable and non escalable bid details of all bidders, before the signing of the PPA. The Petitioner was directed to submit the consequences of the PPA, if its contentions on Force majeure event should be accepted. Further, the parties were further directed to make submissions in writing on the role of the Commission on the present dispute.

16. On 14th September, 2011, Prayas Energy Group, a consumer representative filed its submissions as follows:

- a. The prayer of the Petitioner to refer the matter to the arbitration should not be allowed. As Arbitration can only be considered only between two commercial parties who are parties to contract and the consumers of MSEDCL may not have any say in arbitration process. Whereas, the Commission has the legal mandate for being the custodian of consumer interest and hence the Commission may decide upon such matters and ensure that public interest is protected.
- b. The case of the Petitioner does not qualify as an event of force majeure. In terms of the PPA for an event to be termed as force majeure, it should have been either unknown or unavoidable, in spite of taking reasonable care to avoid the same. The force majeure requirements as per the definition are not met in this case. Also, the Petitioner must have been aware of the litigations contesting the ownership claims of the SBC with which the Petitioner entered into a Coal Supply Agreement (CSA). Further, the Petitioner elected to amend the CSA and diluted the clauses which would have mandated the SBC to supply coal to the Petitioner at agreed price in case the notified mines get affected by a force majeure event. The Petitioner is hence responsible for the consequences of his deliberate decisions and the risks it entailed and could have avoided the same, if he had undertaken reasonable care and prudent utility practices. Also the fuel supply related issues are not part of force majeure definition under current PPA. Under which clause of the PPA the petitioner is seeking relief is not clear, the Clause 12.4 of the PPA which deals with force majeure, excludes fuel from the definition of force majeure. Also the revocation of the coal supplier's license by Indonesian Court of law cannot be construed as unlawful, unreasonable or discriminatory revocation. Further Clause 12.7 of the PPA has granted no relief for energy charge related compensation, if any. Hence under the present PPA the Petitioner is not entitled for the reliefs sought.
- c. Beyond the provisions of bidding framework no pass through of variable costs shall be allowed. The Petitioner has quoted a variable energy charge indexed to CERC declared escalation index for imported coal. Therefore, increase in price of imported coal to the extent passed on by the petitioner is already a part of the tariff structure under the present PPA. At the time

of the bidding the Petitioner was free to pass on complete risk of fuel variation if he opted for the same.

17. On 17th September 2011, MSEDCL submitted the financial bid evaluation report for case 1 stage 1, and adopted the arguments as submitted in its reply. On 27th September 2011, the Petitioner filed written submissions in terms of the direction of the Commission and raised the following contentions:

- a. The consequences of force majeure event is provided for in Article 12.7, namely, release of the obligation of the parties to perform under the PPA. As the force majeure event affecting the above Supplier of Coal is of a continuous and sustained nature, the Petitioner is entitled to claim release of its obligation to supply power to the Respondent MSEDCL.
- b. Article 12.6 of the PPA provides for a duty to mitigate. To mitigate the effect arising out of the force majeure event, the extra cost and expenses incurred by the Petitioner in undertaking such mitigation need to be compensated by the MSEDCL. In other words the Respondent MSEDCL has two options, either to accept the Force majeure event and terminate the PPA, which will release of the obligation to both the parties without any claim or counter claim. In the alternative, MSEDCL may accept the mitigation proposal of the Petitioner and adjust the Coal price appropriately to enable supply of power from the Petitioner.
- c. If the force majeure event is accepted, the consequences will be 1) to direct MSEDCL to decide whether it would avail the mitigation pleaded by the Petitioner, or would like the PPA to be terminated on account of the existence of the force majeure event. 2) If mitigation proposal is accepted, the supply of electricity during the pendency of the proceedings to be decided by paying the additional cost and expenses incurred by the Petitioner on such fuel procurement. 3) If the mitigation proposal is not accepted and the Commission arrives at the conclusion that MSEDCL need not be directed to purchase power from the Petitioner under the mitigation proposal, the supply during the pendency of the Petition to be treated under as quantum merit and MSEDCL be directed to bear the additional fuel Cost and expenses incurred by the Petitioner on actual basis.
- d. Regarding the role of the Commission to decide the case, the Commission has full adjudicatory powers under Section 86 (1) (f) of the Act. This provision empowers the Commission to refer the dispute and difference between the parties to arbitration. Regarding the participation of consumer representatives, the Commission may direct that the arbitrator shall allow participation of the

consumer representative along with the Respondent. Alternately, as the bidding documents including the RFP and the draft PPA were placed before the Commission in accordance with the Competitive bidding guidelines issued by Central Government and were approved by the Commission, the rights and obligations of the parties were crystallized as per the bidding documents and approved by the Commission. In this case the Commission has powers to adjudicate on the rights and obligations of the respective parties only in terms of the provisions of the PPA. The Commission cannot adjudicate on the basis of any regulatory role of the Commission or otherwise. The approved PPA contains an exit provision in the form of Force Majeure affecting the Suppliers of Coal. Thus all the regulatory aspects including the interest of consumers, the larger public interest, fair play etc. were all considered and approved both by the Central Government and by the Commission while providing for the Force majeure event. As regards the participation of the consumer representatives, the dispute if referred to arbitration should be *lis* between parties to contract. However, the Commission may direct that the arbitrator shall allow participation of consumer representatives, including their rights to file pleadings and make submissions.

18. In light of the submissions and averments made by both parties in the present matter, the Commission has following points for consideration:

- a. The dispute between the Petitioner and the Respondent is based on the occurrence of Force Majeure event and the issue before the Commission is to decide whether it has occurred or not. The Petitioner argued that the revocation of the licence of the SBC Company was a Force Majeure event. The Respondent MSEDCL denied it on the grounds that the Petitioner and the SBC both were aware of the fact that the title or the mining licence of the SBC was in dispute and that the matter was pending in the Courts of Indonesia. The Commission has considered the PPA dated 23.02.2010 entered into between the Petitioner and the Respondent to ascertain the provisions of the Force Majeure contained as per Clause No. 12.3 of the PPA, which reads as follows:

“ A Force majeure means any event or circumstances or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the

reasonable control, directly or indirectly, of the Affected party and could not have been avoided if the Affected party had taken reasonable care or complied with prudent utility Practices:

i. Natural Force Majeure Events: .

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

ii. Non natural Force Majeure Events :

I Direct Non- Natural Force Majeure Events:

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

*b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, **any Consent** required by the Seller or any of the Sellers contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant **any other consent** required for the development/ operation of the project.*

Provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

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

II Indirect Non- Natural Force Majeure Events:

- a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- b) Radio active contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the site by the Affected Party or those employed or engaged by the Affected Party.
- c) Industry wide strikes and labour disturbances having a nationwide impact in India.

12.4 Force Majeure Exclusions:

Force majeure shall not include (i) **any event or circumstances which is within the reasonable control of the parties and**

(ii) the following conditions, except to the extent that they are consequences of an event of Force majeure:

- a) **Unavailability**, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, **Fuel or consumables for the Project**;
- b) Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;
- c) Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- d) Strikes or labour disturbance at the facilities of the Affected party;
- e) Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- f) Non-performance caused by, or connected with, the Affected Party's:
 - i) Negligent or intentional acts, errors or omissions;
 - ii) Failure to comply with an Indian Law; or

iii) *Breach of, or default under this Agreement or any Project Documents.*” (**emphasis added**)

It can be seen that Direct Non- Natural Force Majeure Events covers only those actions by an **Indian Governmental Instrumentality** qua (i) Nationalization or compulsory acquisition of any material assets or rights of the Seller or the Seller’s contractors; and (ii) any other unlawful, unreasonable or discriminatory action which is directed against the Project.

The PPA defines “Indian Governmental Instrumentality” as follows:-

“Indian Governmental Instrumentality” means the GOI, Government of Maharashtra and any ministry or, department of or board, agency or other regulatory or quasi-judicial authority controlled by GOI or Government of States where the Procurer and Project are located and includes the CERC and MERC;

The action on the part of the Appellate Division of the Supreme Court of Indonesia to revoke the license of the fuel supplier for mining and supply of coal is not an action by an **Indian Governmental Instrumentality** as the Appellate Division of the Supreme Court of Indonesia is not an Indian Governmental Instrumentality. **Hence, the Petitioner cannot claim Force Majeure event under Article 12.3 ii I (a) or (c).**

As regards, Article 12.3 ii I (b) the same covers “*b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, **any Consent** required by the Seller or any of the Sellers contractors to perform their obligations under the Project Documents or any unlawful, unreasonable or discriminatory refusal to grant **any other consent** required for the development/ operation of the project.*”

The question as to whether the action on the part of the Appellate Division of the Supreme Court of Indonesia to revoke the license of the fuel supplier for mining and supply of coal are covered under “***non natural force majeure events***” defined in clause 12.3ii I (b) of the PPA necessarily will need to be answered keeping in view Article 5.5 below:-

“5.5. Consents

*The Seller shall be responsible for obtaining all **Consents** (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) **required for developing, financing, constructing, operating and maintenance of the Project** and maintaining/ renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Lead Procurer (or Procurer, as applicable) promptly with copies of each application that it submits, and copy/ies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for maintaining/renewing the Initial Consents and for fulfilling all conditions specified therein.”*

The action on the part of the Appellate Division of the Supreme Court of Indonesia to revoke the license of the fuel supplier for mining and supply of coal are not within the meaning of “Consents” “**required for developing, financing, constructing, operating and maintenance of the Project**”. Hence, Article 12.3ii I (b) is not applicable as it deals with “Consents”.

Furthermore, there is no case for any “Indirect Non- Natural Force Majeure Events” as defined in Article 12.3 II of the PPA.

On the other hand, Article 12.4 provides as follows:-

*“Force majeure shall not include (i) **any event or circumstances which is within the reasonable control of the parties and***

(ii) the following conditions, except to the extent that they are consequences of an event of Force majeure:

- a **Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Project;***
- b Delay in the performance of any contractor, sub-contractors or their agents excluding the conditions as mentioned in Article 12.2;*
- c Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;*
- d Strikes or labour disturbance at the facilities of the Affected party;*
- e Insufficiency of finances or funds or the agreement becoming onerous to perform; and*

- f Non-performance caused by, or connected with, the Affected Party's:*
- i) Negligent or intentional acts, errors or omissions;*
 - ii) Failure to comply with an Indian Law; or*
 - iii) Breach of, or default under this Agreement or any Project Documents.” (emphasis added)*

Thus, Article 12.4 **Force Majeure Exclusions**, specifically excludes the unavailability *or changes in cost of* Fuel from Force Majeure unless the same are consequences of an event of Force majeure. Furthermore, it is clear from the above findings that there is no event of Force majeure under Article 12.3 I and II.

19. From an analysis of the clauses governing force majeure events in the PPA, the Commission is of the view that the petitioner does not have a case to claim relief under force majeure. As regards the contention of the petitioner that the PPA is frustrated and hence can be avoided, the Commission is on the view that the question whether the PPA could be avoided could arise only if the PPA is a contingent contract. A “Contingent Contract” u/s 31 of the Indian Contract Act, 1872 is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. In the present case, the PPA was not contingent upon the supply of fuel at the specified price from the fuel supplier of Indonesia. In a case where it could be gathered that the PPA itself contains impliedly or expressly a term, according to which it would stand discharged on the failure of supply of fuel by the fuel supplier, the dissolution of the PPA would take place under the terms of the PPA itself. However, no such term has been placed before the Commission. As has already been seen from the analysis of Article 12 of the PPA, there is an express exclusion of unavailability or change of price of fuel from force majeure. In the circumstances, the doctrine of discharge by frustration cannot be available. The commercial difficulty faced by the Petitioner on account of unavailability of fuel from its fuel supplier cannot be a ground for not performing the PPA. If a person enters into a contract on the basis that the raw material available to the person on the date of the contract is Rs. x such a person cannot rescind the contract on the basis that the raw material on the date of performance of the contract or during the performance of the contract has increased from Rs. x. The risk, therefore, has to be entirely borne by the party who has so contracted. The only exceptions are force majeure events. It has already been seen from the above that revocation of licence of the fuel supplier by

Indonesian authorities is not within the scope and ambit of force majeure under Article 12 of the PPA.

Hence, the claim of the Petitioner is not sustainable. The petition is accordingly dismissed.

-Sd-
(Vijay L. Sonavane)
Member

-Sd-
(V. P. Raja)
Chairman