

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 136 of 2015 and Case No. 85 of 2016

Date: 22 December, 2016

**CORAM: Shri. Azeez M. Khan, Member
Shri. Deepak Lad, Member**

In the matter of Petition filed by Lanco Vidarbha Thermal Power Ltd. under Sections 86(1)(f), 86 (1)(k) and other applicable provisions of the Electricity Act, 2003 in connection with the disputes and differences arising under the Power Purchase Agreement dated 25.09.2008 entered between it and MSEDCL. (**Case No. 136 of 2015**)

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| Lanco Vidarbha Thermal Power Ltd. ('Lanco') |Petitioner |
| V/s | |
| Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) | ...Respondent |

And

Petition filed by Maharashtra State Electricity Distribution Company Limited under inter-alia Section 86(1)(f), of the EA,2003, for adjudication of the disputes and claims arising under the PPA dated 25.09.2008 executed between Lanco and MSEDCL. (**Case No. 85 of 2016**)

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| Maharashtra State Electricity Distribution Company Ltd. |Petitioner |
| V/s | |
| Lanco Vidarbha Thermal Power Ltd. | ...Respondent |

Appearance

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| Advocate of Lanco: | Adv. Sanjay Sen |
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| Advocate of MSEDCL: | Adv. Harvinder Toor |
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Daily Order

Heard the Advocates of Lanco and MSEDCL.

Advocate of Lanco stated that it had demonstrated the occurrence of Force Majeure which allowed it to terminate the PPA without costs and has relied on Judgments of the Appellate Tribunal for Electricity (ATE) and other authorities, but MSEDCL has denied any Force

Majeure occurrence. MSEDCL had encashed the Bank Guarantee and also asked for additional Bank Guarantee. Under the PPA, the Bank Guarantee can be encashed only if there is delay in Project commissioning or termination of the PPA. Hence, by encashing it, MSEDCL has accepted the termination. The present inquiry can only be with regard to the ground for the termination, i.e. whether it is for breach of the PPA or because of Force Majeure.

He stated further that the Liquidated Damages (LD) provision is in the nature of a ceiling. The exact quantum of damages incurred, if any, due to termination has to be established, within that ceiling. The PPA can be terminated at different stages. For instance,, if conditions subsequent are not satisfied, MSEDCL can terminate the PPA (Art. 3.2). MSEDCL did not do so. Instead, Lanco terminated it under another provision. Having failed to exercise its right to terminate, MSEDCL cannot now claim LD after Lanco has terminated the PPA, and would produce Judgments in support.

The Commission asked whether the claim of Force Majeure relates to Environmental Clearance (EC) or the change relating to the Fuel Supply Agreement (FSA) under the New Coal Distribution Policy (NCDP). The Commission also observed that it had held in some earlier matters that the amendment to the NCDP did not constitute either Change in Law or Force Majeure.

Advocate of Lanco submitted that both the issues of EC and FSA constitute Force Majeure. Till the Presidential Directives were issued, no FSA was signed by Coal India Ltd. (CIL), which amounts to Force Majeure under Art. 12. The NCDP was admittedly revised after the initial period for FSA signing. Hence, Lanco applied for extension of time. The EC issue was also a Force Majeure. On 18.10.2011, the High Court directed the District Collector to conduct a fresh Public Hearing. It was held on 20.6.2012, but the EC was not issued. Lanco approached the High Court again, and a revalidated EC was issued only in 2014.

Advocate of MSEDCL drew attention to the definitions in the PPA, particularly those of the Effective Date, Expiry Date, India Governmental Instrumentality and SCOD. In this background, she referred to Art. 2.3 (survival of rights and obligations) read with Schedule I regarding initial consents to be obtained; Art. 3.3 regarding consequences and additional Performance Guarantee, maximum extension period, etc.; and Art. 4.4 relating to Seller's obligations. To a query of the Commission, she stated that Art. 4.4.7 provided an option of supply from alternative sources in case of delay. She also referred to Art. 4.5.1 (b) and (d) and 4.5.3. Art. 5.1 to 5.7 are regarding construction responsibilities and site. She stated that all the issues regarding the original site (in Chhattisgarh) were or ought to have been known to Lanco. Art. 5.4 and 5.7 deal with responsibility for consents and for supply at the Delivery Point. Under Art. 12, Force Majeure should be beyond the reasonable control and could not have been avoided by the affected party.

Advocate for Lanco submitted that it was not claiming relief under Art. 12.3.1 (b) or (c), to which the MSEDCL Advocate questioned under which provision the claimed Force Majeure

would be covered, and that Lanco's submission would amount to its claim not falling within the ambit of Art. 12 at all. Advocate for MSEDCL set out further the provisions of Art. 12, including the duty to perform and mitigate in case of Force Majeure. Seller defaults are covered in Art. 14.1. Art. 17.3.1 covers dispute resolution, and raises the issue of whether Lanco can come before the Commission (though MSEDCL itself has done so in Case No. 85 of 2016).

She also referred to the correspondence, which shows that the Project was not carefully conceived and ran into difficulties thereafter. MSEDCL had agreed (p. 282) to Lanco's initial request for extension, but stipulated that there would be no change in SCOD or tariff and the conditions subsequent to be met within 18 months, as per the PPA. MSEDCL issued a notice for additional Performance Guarantee (p. 371) because of non-fulfilment of conditions. Lanco asked for 10 months' extension (p. 378). MSEDCL allowed 6 months, with the SDD remaining the same, and liability for additional Performance Guarantee beyond that extension. MSEDCL also wrote several reminders regarding the conditions subsequent, and asked for additional Performance Guarantee because these were not fulfilled within the extended period. In response, Lanco stated that the FSA would be signed after Plant commissioning as per CEA guidelines, and asking MSEDCL to deem the conditions subsequent to have been completed.

Advocate for MSEDCL also stated that the initial EC dated 24.2.2011 refers to the Environmental Impact Assessment Notification of 2006, which was well known at the time of entering into the PPA. Thus, Lanco was aware of the gravity of the situation. On 17.3.11, Lanco asked MSEDCL to confirm, for its lenders, that it had completed the conditions subsequent and started construction. Thus, financial difficulties were now being raised, and blame was sought to be cast on others. This correspondence continued, with MSEDCL seeking increased Performance Guarantee first.

As regards Lanco's Advocate's earlier statement to the contrary, she referred to its letter at p. 420 in which Lanco had claimed that the delay of 15 months was on account of Non-Natural Force Majeure as provided in the PPA. However, the High Court Order records that Lanco had no objection to holding a Public Hearing for the EC again. Moreover, the High Court did not stay the operation of the original EC, though it was sought. Lanco had also itself stated to the High Court that commissioning would not take place before 2014. Moreover, on 10.5.2012 (p. 431), Lanco told its contractor that appeals had been filed against the High Court Order, leading to more uncertainty about the EC and that, therefore, he should go slow with the construction and minimize supplies. In fact, the Supreme Court did not stay the High Court Order in April, 2013 or give other reliefs to the appellants.

She submitted further that, in July, 2012 (p. 445), Lanco reversed its earlier stand and wrote to MSEDCL stating that the issues regarding the FSA constituted Force Majeure beyond its control and that, therefore, it was withdrawing its earlier requests for treating the conditions subsequent as having been satisfied. She contended that this was in order to avoid penalty. A fallacious statement was made to MSEDCL that the Supreme Court had admitted the Appeal

and that, if the situation persists, its contractors would demobilize. From reliance on the FSA issue, the Force Majeure claim shifted to the High Court Order. Lanco had also made unilateral and wrong interpretations (p. 448) that the SCOD had been extended by 15 months. Thus, Lanco has kept changing its stand, has been picking and choosing its fora and deliberately misrepresenting facts. It had cited Art. 17.3.2 in the High Court, which pertains to disputes outside the purview of the Commission.

Subsequently, MSEDCL had again asked Lanco for additional Performance Guarantee, and asked it to mitigate by providing power from alternative sources, and for Liquidated Damages. Finally, MSEDCL wrote to the IDBI Bank regarding the Guarantee, whereupon Lanco approached the High Court for an interim injunction, stating that it intended to invoke the arbitration clause under the PPA. No interim relief was given. However, as soon as the Bank Guarantee was invoked, Lanco withdrew from the High Court. In May, 2013, Lanco issued the first Termination Notice, but thereafter approached the High Court for the pending EC. Subsequently, the EC was issued, recording that the coal linkage had been obtained. MSEDCL disputed the Notice, and a Final Notice was issued on 20.9.14.

The Commission directed the parties to submit precedents and case law, if any, regarding the treatment of delays in EC, etc. as Force Majeure in the power or other infrastructure sectors in similar contracts within 15 days. At the next hearing, Lanco would briefly complete its submissions, to which MSEDCL would respond.

The next date of hearing in both Cases will be communicated to the parties by the Secretariat of the Commission.

**Sd/-
(Deepak Lad)
Member**

**Sd/-
(Azeez M. Khan)
Member**