

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

**Date: 1 June, 2017**

**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**)

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**)

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

**Appearance**

Advocate of Lanco:	Adv. Sanjay Sen
Advocate of MSEDCL:	Adv. Harvinder Toor

**Daily Order**

Heard the Advocates of Lanco and MSEDCL.

1. Advocate of Lanco stated the following:

1.1. Vide its submission dated 9 February, 2017, Lanco had submitted the summary and the facts and circumstances leading to the filing of the Petition in Case No. 136 of 2015, and also set out the factual background of submissions of Lanco and the responses of MSEDCL in both the Cases.

- 1.2. Lanco has issued a final notice of termination on 20 September, 2014, and it was not challenged by MSEDCL before any forum till the filing of the present Petition by Lanco (i.e. Case No. 136 of 2015).
- 1.3. After filing of the Petition in Case No. 136 of 2015, MSEDCL admittedly as an afterthought has filed its Petition in Case No. 85 of 2016, in which it has sought power supply or, in the alternative, compensation in the form of damages.
- 1.4. Compilations of the Judgments regarding delay on account of Statutory Approvals and land acquisition allowed by CERC have been submitted in compliance of the last Daily Order dated 22 December, 2016. Among the 7 Judgments in the Compilation, Sr. No. 1 to 4 and 8 have already been quoted in Lanco's submission dated 9 February, 2017, whereas Sr. No. 5 to 7 were not provided previously. In the Cargo Solar Judgment dated 4 February, 2014 in Appeal No. 123 of 2012 and I.A. No. 396 of 2012, APTEL has observed that the legal approval required by Cargo Solar under Bombay Tenancy and Agricultural Lands and action taken by it to obtain such approval and the delay in obtaining the approval for land was beyond the control of Cargo Solar and was thus a Force Majeure Event.
- 1.5. The process of getting the Environmental Clearance (EC) for the Project required initial public hearing, which was followed by High Court Order on the Public Interest Litigation filed by Shri P.V. Deshmukh and others and then again rehearing before the public and finally approval of the EC. High Court passed the Order for rehearing on 18 October, 2011. MPCB carried out fresh Public Hearing 20 June, 2012. MoEF finally issued revalidated EC on 21 August, 2014, Thus, from grant of first EC, which came on 24 February, 2011, the revalidated EC was issued on 21 August, 2014, with a total delay of 42 months. The Commission observed that since there was no stay on the EC by the High Court, Lanco could have proceeded with the project activity. Advocate of Lanco stated that it was a risk for the developer and no banker would have funded the project.
- 1.6. Advocate of Lanco has referred to the following Judgments and legal provisions:
  - a) Supreme Court in its Judgment dated 1 December, 2016 in Appeal No. 5302 of 2006 & others, provided in Compilation at Sr. No. 8, regarding the coal being a monopoly of Central Government.
  - b) CERC in Case No. 73/MP/2014 dated 16 October, 2015, has decided on the issue of whether the delay in grant of Section 164 authorization is covered under the provision of Force Majeure.
  - c) Paras 32, 36 and 40 of the Supreme Court Judgment dated April 11, 2017 in Civil Appeal Nos. 5399-5400 of 2016, which deals with Force Majeure, Sections 32 and 56 of the Indian Contract Act.

- 1.7. Advocate of Lanco submitted that whether it has taken reasonable care and has followed prudent Utility practices is to be checked by the considering Commission. The time it took for EC and the consequence of EC delay in regards of the PPA, the PPA may be terminated without any penalty or damages.
- 1.8. APTEL in its Judgment dated 4 February, 2014 in Appeal No. 123 of 2012 has decided that the delay in obtaining approval for land is beyond the control of the Generator and thus would be a Force Majeure event as per Article 8.1 (a) (v) of the PPA. As such the period of such delay is required to be suspended or excused and to that extent of Commercial Operation Date (CoD) is to be extended in terms of the PPA.
- 1.9. In its submission dated 17 February, 2017, Lanco has referred to the provision for termination of the PPA under Article 3.3.3. This Article stipulates that, in case of inability of the Seller to fulfill the conditions specified in Article 3.1.2 due to any Force Majeure event, the period for fulfillment of the Condition Subsequent as mentioned in Article 3.1.2 shall be extended for the period of such Force Majeure event, subject to a maximum extension period of 10 Months, continuous or non-continuous in aggregate. Thereafter, the PPA may be terminated by the Procurer or the Seller by giving a notice of at least 7 days to the other Party. Additionally, under Article 4.5.3 of the PPA, it is provided that, in case of extension occurring due to reasons specified in Article 4.5.1(a), the original Scheduled CoD of any Unit or of the Power Station as a whole would not be extended by more than 2 years or the date on which the Seller elects to terminate the PPA, whichever is earlier.
- 1.10. He referred to para 43 of the Supreme Court Judgment dated 9 January, 2015 in Appeal No. 193 of 2015 in the matter of Kailasnath Associates vs Delhi Development Authority (DDA) & others and stated that, in case a public auction is held, forfeiture of earnest money may take place even before agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In that matter, under the terms and conditions of auction, the highest bid may well have been rejected. In such cases, Section 74 of the Contract Act may not be attracted on its plain language because it applies only “when a contract has been broken”. Under the Law on compensation for breach of contract under Section 74 of the Contract Act, where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive a reasonable compensation of such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In cases where the amount fixed is in the nature of a penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both the cases, the liquidated damages amount stipulated is the upper limit beyond which the Court cannot grant reasonable compensation.
- 1.11. Since Section 74 allows reasonable compensation for damage or loss caused by breach of contract, damage or loss caused is a sine qua non for the applicability of Section 74. If the Force Majeure is accepted, then the Case will close. If it is not accepted as Force

Majeure, then reasonable compensation is to be paid and the claimant has to give proof that the loss or damage arises out of the contract.

- 1.12. The Supreme Court in the matter of Gangotri Enterprises Ltd. vs Union of India has referred to its previous rulings holding that it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. Damages are the compensation which a Court of law gives to a party for the injury which he has sustained. Hence, in this case, no damages can be claimed as certain conditions could not be met due to occurrence of Force Majeure events.
2. Advocate of MSEDCL stated the following:
  - 2.1. Petition in Case No. 136 of 2015 basically deals with two aspects, the termination of PPA and Performance Guarantee invoked by MSEDCL.
  - 2.2. MSEDCL had accepted Lanco's offer for supply of electricity of 680 MW on the terms and conditions contained in the RFP documents. It was expressly stipulated in the PPA that Lanco shall obtain all consents required pursuant to the PPA, execute the project in a timely manner and fulfill all the obligations undertaken under the PPA.
  - 2.3. As per Article 3.1.2 of the PPA, Lanco has agreed and undertaken to duly perform and complete certain activities, such as clearances, Fuel Supply Agreement (FSA), etc., within 18 months from the Effective Date, unless such completion is affected due to any Force Majeure event or if any of the activities is specifically waived in writing by MSEDCL.
  - 2.4. The time limit for meeting conditions subsequent as per Article 3.1.2 of the PPA was extended by 6 months. However, MSEDCL had made it clear that the Scheduled Delivery Date of the project would remain the same. Lanco failed to provide the FSA within the period stipulated in the PPA even after grant of extension of 6 months.
  - 2.5. As per Article 4.1.1 of the PPA, the Seller has to undertake certain responsibilities and risks, and has to fulfill all obligations undertaken by it under the PPA.
  - 2.6. It is important to note Article 4.4.7 of the PPA which provides that, if the COD of the unit is delayed beyond the Scheduled CoD as offered by Lanco in response to the RFP, Lanco shall be liable to pay damages as per the terms of the PPA. To avoid such liquidated damages, Lanco had the option of supplying the contracted power from alternate sources. As per Article 5.2 of the PPA, it would not be relieved from any of its obligations under the PPA or be entitled to any extension of time by reason of unsuitability of the Site for whatever reason.

- 2.7. Under the PPA, Lanco is responsible for establishing interconnection facilities for evacuation of power from the Generating Station to the delivery point, and also for obtaining all the clearances/ approvals wherever required from any Government and statutory bodies, which includes both the EC as well as FSA.
- 2.8. Lanco has previously not approached MSEDCL claiming Force Majeure under Non Natural Force Majeure events as stipulated under Article 12.3.(ii) b of the PPA.
- 2.9. It is also the duty of Lanco, which is also an affected party, to perform its obligations pursuant to the PPA. It is required to make its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.
- 2.10. EC is one of the conditions to be fulfilled as prescribed in Schedule 1 of the PPA, and Article 3.1.2 refers to various clearances and consents from Government and authorities.
- 2.11. Lanco wrongly interpreted the Order dated 18 October, 2011 of the High Court. The Order clearly stipulated that there was no stay on the implementation of the project. Lanco on its own stopped the construction activity of the project.
- 2.12. Lanco asked the EPC contractor to go slow on the construction activities at the site and minimize further supplies of equipment and materials due to uncertainty relating to the validity of the EC, which was a conscious decision of Lanco.
- 2.13. Vide Letter dated 13 July, 2012, Lanco updated MSEDCL regarding occurrence of Force Majeure event.
- 2.14. Due to poor progress of the Lanco project, MSEDCL had no option but to inform IDBI Bank through its letter dated 11 March, 2013 for encashment of the Bank Guarantee of Rs. 51 Crore provided by Lanco. Vide its letter dated 12 March, 2013, Lanco requested MSEDCL to withdraw its demand for encashment of the Performance Guarantee of Rs. 51 Crore, and thereafter immediately filed an Arbitration Petition No.393 of 2013 (against MSEDCL and IDBI Bank) before Bombay High Court seeking interim injunction from invoking the Bank Guarantee. The High Court rejected any relief looking to the merits of the case. On 18 March, 2013, Lanco withdrew the Arbitration Petition and sought liberty to apply under Section 17 of the Arbitration and Conciliation Act, 1996. Thereafter MSEDCL had encashed the Bank Guarantee.
- 2.15. On 28 May, 2013, Lanco sent the purported termination notice of the PPA allegedly under Article 3.3.3 to MSEDCL referring to the claimed Force Majeure events which have delayed the project.
- 2.16. Vide letter dated 7 March, 2014, Lanco withdrew its purported termination notice dated 28 May, 2013 on the ground that MOEF had delayed revalidation of EC by almost 26 months, during which the contractor was unable to proceed with the construction work

and it had to be stopped . The letter further states that the project has become completely unviable and it had become impossible for the Company to perform its obligations under the PPA.

2.17. In the meantime, the MoEF issued the revalidated EC based on EAC recommendation on 21 August, 2014.

2.18. Lanco once again issued a notice of termination of PPA on 20 September, 2014 on the alleged grounds that the EC was revalidated after a delay of more than four years from the date prescribed under the PPA for fulfillment of the conditions subsequent under Article 3.1.2., and the cost of the project had also increased, and it had become impossible to complete the project.

2.19. He referred to the Supreme Court Judgment dated 11 April, 2017 in which it has been held that

- i. Force Majeure is governed by the Indian Contract Act, 1872. In so far as a Force Majeure event occurs de hors the contract, it is dealt with by the rule of positive law under Section 56 of the Contract Act. In the present matter, Lanco and MSEDCL have not entered into a PPA which has to be dealt with under Section 56 of the Contract Act.
- ii. An unexpected rise in the price of coal will not absolve the Generating Companies from performing their part of the contract for the reason that, when they submitted their bids, this was a risk they knowingly took.
- iii. Clauses 12.3 and 12.7(a) are a part of the same scheme of Force Majeure under the contract. The expression “hindered” in clause 12.7 (a) goes with the expression “partly prevents” in clause 12.3, and there must be something which partly prevents the performance of the obligation under the agreement. However, in the Lanco case, there was no hindrance for Lanco to perform its obligations under the PPA.

2.20. In terms of Article 4.6.4 of the PPA, the formula for calculation of liquidated damages payable by the Seller as specified in Article 4.6.1 is a genuine and accurate pre-estimation of the actual loss that will be suffered by MSEDCL in the event of Seller’s delay in achieving COD.

3. Advocate of Lanco responded as follows :

3.1. It is not difficult to recognize the actual damages. However, the same is not mentioned in the Petition or submissions.

3.2. Liquidated Damages are always a pre-estimate of damages

3.3. According to Section 73 of the Contract Act, when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him, which naturally arose

in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.

- 3.4. Under Article 12.3 (ii) of the PPA, the unreasonable action on the part of the Indian Government Instrumentality which is directed against the Project is a Non Natural Force Majeure event.
- 3.5. Post the High Court Order, Lanco estimated the details of the losses and viability of the project. It came before the Commission after this delay due to the High Court Order and 33 months taken by MoEF for re-validation of the previously accorded EC.
- 3.6. Lanco continued the EPC work, being the part of the contract and as the equity was being invested in the absence of other loan funding, it was not possible for Lanco to stop the work mid way and terminate the contract.
- 3.7. In its submission dated 9 February, 2017, Lanco has submitted the detailed reasoning for the non-execution of FSA, grounds of termination and delay in fulfilling PPA conditions on account of Force Majeure.

**The Case is reserved for Order.**

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

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