

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION**  
No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

**Dated: 19<sup>th</sup> December 2018**

**Present:**

Shri M.K. Shankaralinge Gowda .. Chairman  
Shri H.D. Arun Kumar .. Member

**OP No.92/2016**

**BETWEEN:**

Athani Sugars Limited,  
Vishnuanna Nagar,  
Post Navlihal,  
Taluk – Athani,  
Belagavi -591 234.

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**PETITIONER**

*[Represented by Navayana Law Offices, Advocates]*

**AND:**

- 1) Power Company of Karnataka Limited,  
Room No.501, 5<sup>th</sup> Floor,  
KPTCL Building,  
Cauvery Bhavan,  
Bengaluru – 560 009.
- 2) Bangalore Electricity Supply Company Limited,  
K.R. Circle,  
Bengaluru – 560 001.
- 3) Chamundershwari Electricity Supply Corporation Limited,  
No.29, Kaveri Grameena Bank Road,  
Vijayanagar, 2<sup>nd</sup> Stage, Hinkal,  
Mysuru – 570 019.

- 4) Gulbarga Electricity Supply Company Limited,  
Station Road,  
Kalaburagi – 585 101.
- 5) Hubli Electricity Supply Company Limited,  
P.B. Road, Navanagar,  
Hubballi – 580 025.
- 6) Mangalore Electricity Supply Company Limited,  
MESCOM Bhavana,  
Kavoor Cross Road,  
Bejai,  
Mangaluru – 575 004.

.. **RESPONDENTS**

*[Respondents 1, 2,3 and 5 represented by Just Law, Advocates;  
Respondent 4 represented by Indus Law, Advocates;  
Respondent 6 unrepresented.]*

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### **ORDERS**

- 1) In substance, the Petitioner being aggrieved against the claims made against it for recovery of damages under Articles 6.2.3 and 6.2.5 of the Power Purchase Agreement (PPA) dated 14.10.2015, entered into between the Petitioner and the Distribution licensees in the State of Karnataka, has filed the present Petition, to set aside the said claims.
- 2) The relevant facts for the disposal of the above claims of the Petitioner may be stated, as follows:

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- (a) The Petitioner is a captive Cogeneration Unit, producing electricity using bagasse. It entered into a short-term PPA dated 14.10.2015 (ANNEXURE-P1) with the Distribution Licensees of Karnataka (Respondents 2 to 6), for supply of 20/21 MW contracted capacity, for the period between 01.11.2015 to 31.05.2016, at the tariff of Rs.5.08 per unit, as per the terms and conditions mentioned in the PPA.
- (b) The Petitioner supplied energy from 01.11.2015 to 04.04.2016 and informed, by letter dated 04.04.2016 (ANNEXURE-P7) that there was acute scarcity of water in Krishna river since the last fifteen days, thereby it was forced to shut down the Plant from that date, thereby it was not going to schedule for the export of the energy from 05.04.2016 till 31.05.2016.
- (c) The 1<sup>st</sup> Respondent-PCKL, as the representative of the Respondents 2 to 6 was overseeing the purchase of energy under the short-term purchase, for the relevant period. According to the 1<sup>st</sup> Respondent, as per the terms of Article 6.2.3 of the PPA, the amounts recoverable from the Petitioner towards the shortfall in supply of energy to that of scheduled energy for the period between 01.11.2015 to 31.03.2016, was Rs.55,31,054/- and the same was recovered from the Petitioner, the details of which are, as follows:

Month	Energy Scheduled (in MU)	Energy Supplied (in MU)	Shortfall in Energy (in MU)	Penalties for the shortfall, calculated as per Article 6.2.3 (in Rs.)
November, 2015	12.576	12.405	0.171	2,67,170
December, 2015	11.904	11.400	0.504	11,21,089
January, 2016	11.904	10.898	1.006	26,54,189
February, 2016	11.928	11.553	0.375	11,89,082
March, 2016	13.008	12.880	0.126	2,99,524
	<b>61.320</b>	<b>59.136</b>	<b>2.182</b>	<b>55,31,054</b>

This claim is challenged by the Petitioner and it has requested for the refund of the said amount.

- (d) As already noted, during the month of April, 2016, the Petitioner has supplied power upto 04.04.2016 only and thereafter, did not supply any energy, as per the intimation (ANNEXURE-P7). The 1<sup>st</sup> Respondent assessed the damages, as per Article 6.2.5 of the PPA and taken into consideration, the energy supplied under the PPA, from 01.04.2016 to 04.04.2016, as per the Schedule and also the excess energy of 2,26,500 units, supplied in excess of the energy scheduled and the claim towards the compensation amount receivable by the Petitioner, as per Article 6.2.5 of the PPA, and found that a sum of Rs.7,51,332/- is still payable by the Petitioner to the Distribution Licensees. The Petitioner has prayed that the demand of Rs.7,51,332/- be set aside and the amount of Rs.99,28,860/- towards the supply of energy during the said period, be paid to it. It may be noted that, the excess energy of 2,26,500 units, supplied in excess of the energy scheduled, for the period from 01.04.2016 to

04.04.2016, is considered as the energy supplied under Section 11 of the Electricity Act, 2003, as during that period, the Section 11 Order was in force and the rate payable was Rs.5.08 per unit, for such supply. The calculations of the claim for the month of April, 2016 are as follows:

<b>Particulars</b>	<b>Bill amount (in Rs.)</b>
Total Bill amount for energy supplied of 1.728 MUs.	87,78,240
Compensation amount for less than 85% capacity declared during the month (as per Article 6.2.5 of the PPA)	-1,06,80,192
Net amount receivable by ESCOMs	-19,01,952
Energy supplied under Section 11 at Rs.5.08 per unit (226500 units X Rs.5.08)	11,50,620
<b>Net amount receivable by ESCOMs</b>	<b>-7,51,332</b>

- (e) During the month of May, 2016, the energy was not supplied under any schedule as per the terms of the PPA (ANNEXUTRE-P1). However, there was a supply of 34,500 units of energy during the month of May, 2016. Giving a credit to this quantum of energy, at the rate applicable for the supply of energy under Section 11, the compensation amount under Article 6.2.5 of the PPA was claimed and the balance amount payable by the Petitioner to the Distribution Licensees, was found to be Rs.1,26,75,108/-.

The calculations pertaining to claim for the month of May, 2016 are as follows:

<b>Particulars</b>	<b>Bill amount (in Rs.)</b>
Total Bill amount for energy supplied (0) MUs.	0
Compensation amount for less than 85% capacity declared during the month (as per Article 6.2.5 of the PPA)	1,28,50,368
Net amount receivable by ESCOMs	-1,28,50,368
Energy supplied under Section 11 (35600 kWh)	1,75,260
<b>Net amount receivable by ESCOMs</b>	<b>-1,26,75,108</b>

The Petitioner has prayed that the demand of Rs.1,26,75,108/-, be set aside and the amount of Rs.1,75,260/- towards the supply of energy, during this month be paid to it.

- (f) The Petitioner has contended that, the scarcity of water was existing from January, 2016 itself, by spending its money, it managed to buy water from outside and from April, 2016, the availability of water had become increasingly scarce and more expensive. The Petitioner has contended that, this situation amounted to a *Force Majeure* Event, as defined in Article 7.1 (ii) of the PPA, which reads, thus:

**“7.1 Force Majeure**

- (i) *Any restriction imposed by RLDC / SLDC in scheduling of power due to breakdown of Transmission / Grid constraint shall be treated as Force Majeure without any liability on either side.*

- (ii) Any of the events or circumstances, or combination of events and circumstance such as act of God, exceptionally adverse weather conditions, lightning, flood, cyclone, earthquake, volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system.
- (iii) The contracted power will be treated as deemed reduced for the period of Transmission Constraint. The non / part availability of transmission corridor should be certified by concerned RLDC / SLDC.

*The Affected Party shall give intimation to the other Party of any event of Force Majeure immediately by not later than 24 hours."*

It may also be noted here itself that, Article 7.2 of the PPA reads, thus:

**"7.2 Duty to Mitigate**

*To the extent not prevented by a Force Majeure event, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable."*

- (g) In support of the plea of *Force Majeure*, the Petitioner has stated that the Karnataka Neeravari Nigam Limited has given advertisement, to bring to the notice of general public that water from the barrage should not be pumped for industrial purpose, as the same was reserved for drinking purpose. A copy of the newspaper publication dated 22.12.2015 is produced as ANNEXURE-P3 to the Petition. Further, the said Nigam, after coming to know

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that the Petitioner was using the water from the barrage to its Sugar Mill, for generation of electricity, issued a Notice dated 21.01.2016, directing the Petitioner to stop taking water from the barrage, for any industrial and commercial purpose. A copy of the Notice is produced at ANNEXURE-P4 to the Petition. The Petitioner has stated that, though the availability of water was getting severe in the region, with a view to fulfilling the obligations under the PPA, sourced the water from private commercial suppliers, to generate and supply the contracted capacity. Further that, the Petitioner, with great hardship, managed to generate and supply electricity for the period from January, 2016 to March, 2016 and in the month of April, 2016, the availability of water had become increasingly scarce and very expensive, therefore, the Petitioner could not source water for generating electricity and thereby issued a Notice dated 04.04.2016 to the Respondent-1, as per Annexure P-7, informing that the plant would be shut down from 05.04.2016. The Petitioner has claimed that, for the non-supply of energy for the months of April, 2016 and May, 2016, it was made to pay damages, as per Article 6.2.5 of the PPA, and the same was illegal. Therefore, the Petitioner has filed this Petition on 24.10.2016. It is contended that, the contract for supply of power was frustrated and it had become impossible to perform, due to the acute scarcity of water. Further, that, the ABT Order dated 20.06.2006 would apply to the biomass and bagasse based Co-generation Plants of 25 MW capacity and above only, and since the Petitioner's Plant was only of 21 MW capacity,



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the Petitioner was not required to schedule the energy, therefore it could not violate Articles 6.2.3 and 6.2.5 of the PPA.

- (h) The Respondents have contended that, the grounds urged in support of the *Force Majeure* Events, do not establish the *Force Majeure* Events, in terms of Article 7.1(ii) of the PPA.
  - (j) The Respondents have contended that the Petitioner has no impediment to purchase water and continue production of electricity and that the scarcity of water was not a sufficient cause to shut down the Bagasse-based Power Plant.
  - (k) The Respondents have further contended that, the imposition of damages as per Article 6.2.3, as well as Article 6.2.5 of the PPA, is valid and legal. Therefore, the Respondents have prayed for dismissal of the Petition.
- 3) We have heard the learned Counsel for the parties. In addition to the contentions taken in their pleadings, the learned counsel for the Petitioner submitted that, the proof of actual damage is a pre-condition for recovery of the damages under Article 6.2.3 and Article 6.2.5 of the PPA and that the Respondents have not led any evidence to establish such loss or damage. On the other hand, the learned counsel for the Respondents submitted that, the loss or damage, in the present case, was self-explanatory. He pointed

out that, during that period, the Distribution Licensees had to purchase power on short-term basis and also the Government of Karnataka was forced to impose Section 11, in order to meet with the scarcity of power situation in the State. Further, he refuted the other contentions of the Petitioner.

- 4) From the rival contentions of the parties, the following issues would arise, for our consideration:
  - (1) Whether the Petitioner has made out a case of *Force Majeure* Event, for non-supply of power, for the months of April, 2016 and May, 2016?
  - (2) If Issue No.(1) is answered in the affirmative, to what relief the Petitioner is entitled to?
  - (3) Whether the Respondents are entitled to Liquidated Damages under Article 6.2.5 of the PPA?
  - (4) What Order?
- 5) After considering the submissions of the parties and the pleadings and records, our findings on the above Issues are, as follows:
- 6) **ISSUE No.(1):** *Whether the Petitioner has made out a case of Force Majeure Event, for non-supply of power, for the months of April, 2016 and May, 2016?*

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- (a) The *Force Majeure* Event and its consequences, as noted in Article 7.1 of the PPA, would clearly show that, any restriction imposed by the RLDC / SLDC in scheduling of power due to breakdown of transmission / grid constraint and further any of the events or circumstances, or combination of events and circumstances, such as act of God, exceptionally adverse weather conditions, flood, cyclone, earthquake or volcanic eruption, fire or landslide or acts of terrorism causing disruption of the system, should be treated as *Force Majeure* Events, to consider the rights or liabilities on either side. In such event, the contracted power would be treated as deemed to have been reduced for the period of transmission constraint. Therefore, it is clear from the *Force Majeure* clause in the PPA that, the breakdown due to transmission line or grid constraint or any of the events or circumstances stated in Article 7.1 (ii) of the PPA, which causes disruption of the system i.e., transmission line or grid system, alone, are to be considered and any other difficulties of the Seller has no relevance. The defense stated by the Petitioner that, due to acute shortage of water, he was forced to shut down his Plant, cannot be treated as a valid defense, to bring its case under the *Force Majeure* Events, stated in Article 7.1 of the PPA.
- (b) The learned counsel for the Respondents have relied upon the decision rendered by the Hon'ble Supreme Court in the case reported in (2017) 14 SCC 80, to contend that an unexpected rise in price of coal was held to be not a ground to absolve the Generating Company from performing its part

of the contract and that, when a contract contains a *Force Majeure* clause Section 56 of the Contract Act can have no application. In view of the above principles, one has to hold that the acute shortage of water cannot be held to be a valid defense and the Petitioner cannot take the defense of frustration of the contract or the impossibility to perform the contract, due to scarcity of water.

- (c) For the above reasons, we answer Issue No.(1), in the negative.
- 7) **ISSUE No.(2):** *If Issue No.(1) is answered in the affirmative, to what relief the Petitioner is entitled to?*
- (a) If Issue No.(1) were to be held in the affirmative, the Petitioner could have been granted relief from imposing any Liquidated Damages under Article 6.2.5 of the PPA. However, it could not have been given any relief for the liability from paying damages under Article 6.2.3 of the PPA, because this liability has no relevance with the *Force Majeure* Events.
- (b) As noted above, Issue No.(1) is held in the negative. Therefore, the Petitioner is not entitled to claim any relief.
- 8) **ISSUE No.(3):** *Whether the Respondents are entitled to Liquidated Damages under Article 6.2.5 of the PPA?*

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- (a) The learned counsel for the Petitioner submitted that, in case of a breach of contract, the party complaining of the breach, would be entitled to receive a reasonable compensation, on proof of the same, but not otherwise. The learned counsel for the Respondents submitted that, the facts of the case would establish that, the non-supply of energy to the Respondents would establish the loss, even in the absence of any evidence and the burden is on the Petitioner, to prove that no loss had been caused to the Respondents. He has relied upon the decision of the Hon'ble Supreme Court, in the case of *Construction and Design Services –Vs- Delhi Development Authority*, reported in (2015) 14 SCC 263. In this decision, it is held that, "even if there is no specific evidence of loss suffered by the Respondents / Plaintiff, the observations in the Order of the Division Bench of the High Court that the Project being a Public Utility Project, the delay, itself, can be taken to have resulted in loss, in the form of environmental degradation and loss of interest on capital, are not without any basis." Therefore, it is clear that, where it is possible to prove the actual damage or loss, such proof is not dispensed with. But, it is only in cases, where damage or loss is difficult or impossible to prove, the Liquidate amount in the contract, if it is a genuine pre-estimate of the damage or loss, can be awarded.
- (b) As contended by the Respondents, there was shortage of power, thereby the Respondents resorted to purchase of short term power and the State Government had also imposed Section 11 of the Electricity Act, 2003, to

procure the energy. This fact would make it sufficient that, even in the absence of actual proof of loss, the Respondents are entitled to Liquidated Damages.

- (c) It may be noted that, the terms of the PPA were stipulated in line with the 'Guidelines for short Term Procurement of Power by the Distribution Licensees through Tariff-based Bidding Process', 2012, issued by the Ministry of Power, Government of India, under Section 63 of the Electricity Act, 2003. In the said Guidelines, the quantum of Liquidated Damages for failure to supply the instructed capacity, is stipulated and the same stipulation is brought in Article 6.2.5 of the PPA. Therefore, the claim of the Respondents is in the nature of a claim under a statutory contract, wherein, a presumption could be drawn that, the Liquidated Damages stipulated are genuine pre-estimate of the loss or damage.

- (d) For the above reasons, we answer Issue No.(3), in the affirmative.

9) **ISSUE No.(4)**: *What Order?*

- (a) The other contention of the Petitioner is that, its Co-generation Plant is not liable for scheduling the energy, as the ABT Order dated 20.06.2006 is not applicable to it. The said Order stipulates that, the Biomass and Co-generation Plants with installed capacity of 25 MW and above are governed

by this Order. It may be noted that, the Petitioner failed to prove that its Co-Generation Plant had installed capacity of less than 25 MW. In this PPA, the Petitioner has entered into contracted capacity of 20 MW for certain months and 21 MW for certain other months, from November, 2015 to May, 2016, which was Sugarcane Crushing season. Therefore, the installed capacity of the Co-Generation Plant of the Petitioner, which was admittedly a captive unit, must have been considerably higher than the contracted capacity. Even otherwise, when the Petitioner entered into the PPA, as per the terms mentioned in it, now it cannot be allowed to contend that, it was not liable to schedule the energy under the ABT Order dated 20.06.2006. It can also be noted that the said ABT Order has not been fully implemented in the State of Karnataka.

- (b) For the foregoing reasons, we pass the following:

**ORDER**

The Petition is dismissed. The Petitioner is not entitled to any of the reliefs, claimed in the Petition.

Sd/-

(M.K. SHANKARALINGE GOWDA)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER