BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION, SHIMLA-171002.

M/s Jaiprakash Power Ventures Limited,
Juit Complex, Waknaghat, PO Dumehar Bani,
Kandaghat , Distt. Solan (H.P.). Pin- 173215

….. Petitioner.

V/s

HP State Electricity Board Ltd.,
Kumar House, Shimla-171004
Through its Executive Director (P).

… Respondent.

Petition No. 120 of 2011
Passed on 21.09.2012

CORAM
SUBHASH C NEGI
CHAIRMAN

Counsel:

For the petitioner:	Sh.Pawan Upadhayay, Advocate.
For the respondent:	Sh. Bimal Gupta, Advocate.

ORDER

M/s Jaiparkash Power Ventures Ltd., (hereinafter referred as "the Company" or "JPVL"), has filed this petition dated 14.10.2011 seeking directions of the Commission to the Himachal Pradesh State Electricity Board Ltd. (successor-in-interest of the erstwhile Himachal Pradesh State Electricity Board), (hereinafter referred as "the Board"), to constitute joint committee in terms of Article 17.7 of the Power Purchase Agreement, (hereinafter referred as "the PPA") to verify the extent of cost incurred by the Company on restoration of damaged works caused due to the Force Majeure, (hereinafter referred as "FM"), event so as to include such cost as additional completion cost of 300 MW Hydro Electric BASPA-II located in Kinnaur Distt. HP (hereinafter referred as "the project"), pursuant to the settlement under Good Faith Negotiation, (hereinafter referred as "GFN"), arrived at by the representatives of both the parties under Article 18.1 (b) of the PPA.

2. The facts of the case in brief are as under:-

(a) The Company and the Board executed the PPA on 04.06.1997 for 300 MW Hydro Electric Project on river Baspa a tributary of river Satluj, in District Kinnaur. The project was commissioned in the year 2003.

(b) There was flood in the Baspa river on 5th July, 2005 and the petitioner Company claiming flood event as FM event, issued notice to the Board on 09.07.2005. As per record, due to consequence of flood, operation of project remained suspended from 5th July, 2005 to 10th July, 2005 and the Company claimed through subsequent notice dated 22 .05.2006 that the capital expenditure of Rs. 77.88 crores is required for restoration of damaged works and protection works to avoid such damage to the barrage works in future.

(c) The respondent Board disputed the claim of the Company as per its communication dated 07.08.2006 stating that damages so caused were not as a result/consequence of FM event.

(d) The Company issued notice dated 26.08.2006 to the Board for resolution of dispute under Article 18 of the PPA and constitution of Good Faith Negotiation Committee under Article 18.1 (b) and also nominated its member on the committee.

(e) The Board also nominated its representative for GFN for settlement of dispute under Article 18.1 (b) of PPA.

(f) The GFN Committee submitted its Report dated 24.01.2011.

(g) Since no decision was forthcoming from the Board, the Company preferred petition before this Commission vide M.A. No.98/2011 dated 16.06.2011, seeking directions for expediting the approval to be granted by the Board in respect of the FM claims as per the GFN Committee Report. The Commission issued notice to the Board calling for its response, including reasons for inordinate delay in decision. The Board took decision on the Report of GNF Committee in its meeting held on 23.09.2011, wherein the Report of GFN committee was not accepted/approved by the Board Management.

(h) Aggrieved by this decision of the Board, the Company moved this petition for issuing suitable directions to the Board to constitute a committee in terms of Article 17.7 of the PPA for quantifying damages in respect of FM claims for restoration and protection works carried out by the Company or in the alternative refer the dispute, in exercise of power under section 86(1)(f) of the Electricity Act 2003, to Arbitration for adjudication.

3. The contention of the Company is that the GFN Committee has duly been constituted under Article 18.1 (b) of the PPA in which the Company nominated Sh.R.L.Gupta as its Sr. Executive Officer and the Board nominated its Chief Engineer Sh.P.K.Kohli and subsequently Sh.C.P.Sehgal the Chief Engineer (I&P) on transfer of Mr.Kohli, as its Sr. Executive Officer to attempt in good faith negotiation to resolve the dispute. This joint committee concluded its GFN in January, 2011 to resolve the dispute of FM event. The copy of Report was sent to the Board and also to the nominee of the Company on 24.01.2011. Both the Sr. Executive Officers have resolved the dispute of FM event, the findings of which were recorded in writing and signed by both the parties. As per the Article 18.1 (c) the dispute stands resolved as is evidenced by the settlement being reduced in writing and signed by both the officers. There is no requirement of any other agreement under Article 18.1 (a). For the purpose of quantification of expenditure incurred on restoration and protection works, Article 17.7 provides for a specific provision where-in committee comprising of one representative each from the Board and the Company and one more representative nominated jointly by the parties will decide the claims after examination/verification, which amount will be included in the capital cost of the project for determination of tariff etc.

4. On the contrary the contention of the Board is that the Report of the GFN Committee is not conclusive unless a written settlement agreement is arrived at between the two Parties as laid down under Article 18.1 (a).

5. After hearing arguments of both Parties, the Commission decided, vide its order dated 30.03.2012, to seek advice/assistance of an expert and requested Hon'ble Mr. Justice D.P.Sood, retired Judge of the High Court of Himachal Pradesh for interpretation of

relevant provisions of the PPA dated 04.06.1997 on the following points: -

(i) Whether settlement arrived at and reduced in writing by the Senior Executive Officers of the parties, nominated as members of the Committee, constituted under clause 18(1)(b), "is final and binding on the parties"?

(ii) Whether the managing body of any of the party to the agreement can refuse to accept the report/findings made, under clause 18(1)(b), and despite the findings of the said Committee the party (ies) may refer the dispute to the Committee of the Chief Executive Officers of the parties under clue 18(1)(d)?

(iii) Whether the reference to the Dispute Resolution Board under clause 18(2) of the PPA is necessary before initiating the arbitration proceedings?

(iv) Whether the request of the JPV Ltd. for constitution of the Assessment Committee under clause 17.7 of the PPA is premature?

6. These points were answered as under:-

(a) Settlement arrived at and reduced in writing by the Senior Executive Officers of the parties, nominated as members of the committee, constituted under clause 18(1)(b), is not final and binding on the parties. Rather it is pre-condition to the stage at which the parties are required to execute a written settlement agreement as required under Article 18.1(a);

(b) No. The managing Body of any of the party to the agreement cannot refuse to accept the report/findings made under clause 18.1(b) irrespective of the fact whether the dispute is resolved or not resolved as evidenced by the terms of the settlement being reduced in writing and signed by the Senior Executive Officers of both the parties within the stipulated time or where the settlement period is mutually extended within that extended time. In fact after this stage/conclusion arrived at jointly by the representatives of the parties pursuant to Good Faith Negotiations, the parties to the PPA are required to execute a written settlement agreement in accordance with the conclusion, so arrived at of the said representatives of the parties.

(c) Yes. In view of Article 18.1(a) read with Article 18.2 reference to the Dispute Resolution Board under Article 18(2) of the PPA is necessary before initiating the arbitration proceedings; and

(d) Yes. The request of the JPPVL, for constitution of the Assessment Committee under Article 17.7 of the PPA is not only premature but, in fact, the applicability of the said Article cannot be invoked."

7. This Commission, on receipt of the expert advice so sought, forwarded its copies to both the parties inviting their views/ objections thereto and both have put in their objections. As per the objections raised by the respondent Board, the opinion of Hon'ble Justice D.P. Sood (Retd.) on points (i) and (ii) is self destructive and contradictory to each other and the report is opined to be not binding on the parties, as such it requires

ratification from its Board of Directors. The Company has also submitted their objections/views relying upon the legal opinion sought by it from Hon'ble Justice V.N. Khare, the former Chief Justice of India, who has opined that the report dated 24th January, 2011, prepared by the Senior Executive Officers was in conformity with the provisions of Article 18.1 of the PPA and the settlement was reduced to writing and duly signed by them as provided under Article 18.1 (c) as evidenced from the resolution of the dispute. There is no need of entering into a further written settlement/agreement as per Articles 18.1 (a) of the PPA and the only course available now is to constitute a Committee in terms of Article 17.7 of the PPA. The Company asserts that the Report is the outcome of Good Faith Negotiations arrived at between the parties and is, therefore, final and binding on the parties and no ratification, therefore, is required from either party to the instant lis in as much as the such requirement is neither provided in the PPA nor such a condition is contained in the Report. That Article 18(1)(b) is only procedural and it does not require the parties to prepare a Report. Per theme Article 18 1(a), being not independent, is to be read with Article 18.1 (c). Thus a document which is reduced to writing and signed by the Sr. Executive Officers of both the parties is a written settlement Agreement as per Article 18.1(a).

8. Based on the contentions raised and arguments advanced, expert advice tendered and comments of the both the parties thereon and the provisions of Articles 17 and 18 of the PPA, the following issues are framed for consideration:-

(1) Whether the dispute shall be resolved in accordance with the provisions of the PPA or such dispute can be resolved under any other relevant law?

(2) Whether the dispute arising under Article 17 of the PPA required to be settled/resolved under Article 18 can be settled in its entirety and finality under Article 18 only or it can be settled partly under Article 18 and partly under Article 17?

(3) Whether the outcome of good faith negotiation (GFN) as attempted by authorised representatives of the parties, the terms of the settlement of which is reduced to writing and signed by such representative under Article 18 (1) (b), is enforceable or Parties are required to execute written settlement agreement under Article 18(1) (a)?

(4) Whether parties can decline to execute written settlement agreement in accordance with the Article 18 (1) (c) where the representatives of parties

have resolved the dispute under 18 (1) (b) read with Article 18 (1) (c) and if so what are the consequential steps to be taken?

Issue No.1:

9. The PPA for the project provides for appropriate mechanism for resolution of dispute and in this specific case, Articles 17 and 18 provide for resolution of dispute. The Hon'ble APTEL in the case of **HP State Electricity Board Ltd. V/s M/s JPVL in Appeal No. 43 of 2011 decided on the 6th February, 2012** have held that the regulations of the State Commission duly recognised the terms and conditions of the concluded PPA and stipulates that terms and conditions as per the PPA would prevail. Therefore, relationship between the parties is governed by the terms and conditions enshrined in the Power Purchase Agreement. Accordingly, the Commission holds that, at this stage, for dispute resolution provisions of Articles 17 and 18 of the PPA shall be followed instead of the provisions of section 86 (1) (f) of the Electricity Act, 2003.

Issue No.2:

10. To consider this issue in the right perspective, the relevant provisions of Articles 17 and 18 of the PPA are required to be analysed in the context of the present case. The claimed FM is a non-political event (flood), such claimed F.M. event occurred during operation of the project after its completion and the effect of F.M., in terms of execution of restoration and protection works, continued for more than 365 days and hence only the provisions under Articles 17 and 18 in the factual context need discussion. Relevant portions of Article 17 are as under:

Article 17: FORCE MAJEURE

17.1 DEFINITION OF FORCE MAJEURE:

> Force Majeure shall mean any event or circumstances or combination of events or circumstances referred to in this Clause 17.1 that wholly or partly prevents or unavoidably delays any Party in the performance of its obligations under this Agreement, but only if and to the extent that such events and circumstances are not within the reasonable control, directly or indirectly, of the affected Party and could not have been avoided even if the affected party had taken reasonable care. Force Majeure includes the following events and circumstances to the extent they, or their consequences, satisfy the above requirements:

17.3 NOTIFICATON OBLIGATIONS

(a) The party claiming Force Majeure shall give notice in writing to the other Party of the occurrence of the Force Majeure event …..…… Such notice shall include full particulars of the event of Force Majeure, of its effects on the Party claiming relief and the remedial measures proposed;……

(b) If the Party in receipt of Force Majeure Notice disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be settled as per Article 18.

(c) xxx xxx xxx xxx xxx xxx xxx xxx xxx

17.5.1 FAILURE OR DELAY CAUSED BY FORCE MAJEURE – GENERAL CONSEQUENCES

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(c) The parties shall co-operate, negotiate in good faith and develop and implement a plan of remedial and reasonable alternative measures to remove/remedy Force Majeure Event to enable the performance of the affected party.

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(f) Notwithstanding anything contained in this Agreement during any Non-political Force Majeure and indirect Political Force Majeure Event as per section 17.1 (a) and 17.1 (b) (i) to (iv), if the Company cannot operate the station at all or cannot operate the station at declared capacity, the Board shall pay to the Company the capacity charges calculated on the basis ……. from the date of commencement of Force Majeure Event, till the effect of Force Majeure Event is completely over.

17.6 OTHER CONSEQUENCES OF FORCE MAJEURE CONDITONS UDNER SECTION 17.1 (b)

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(c) After the COD of the Project, if the operation of the project is seriously and adversely affected for a continuous period of ……365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (i to iv), the Company may, for so long such any of the Political Force Majeure Event is continuing, deliver a notice to the Board informing the Board in reasonable detail of the nature, duration, and impact on the Company of the Force Majeure Event.

(d) After the COD of the Project, if operation of the Project is seriously and adversely affected …… for a continuous period of 365 days or greater due to the occurrence of other Force Majeure events under Section 17.1 (a) or 17.1 (b) (I to iv), the Board may, for so long as such Force Majeure is continuing, deliver a notice to the Company informing the Company in reasonable detail of the Board's understanding of the nature, duration, and impact on the Board of the Force Majeure Event.

(e) Any notice delivered in accordance with Section 17.6 (a), 17.6 (b), 17.6 (c) or 17.6 (d) shall be referred to as a Force Majeure (FM) Notice".

(f) If the Party in receipt of the FM Notice, within thirty (30) Days of its receipt, disputes the degree to which the Force Majeure Event has affected the construction or operation of the Project, as the case may be, such dispute shall be dealt as per provisions of Article 18.

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(h) In case of Force Majeure Event after the completion of any unit(s)/project, the parties shall take actions as per sub-para (d) above and in such a situation the additional capital cost required for remedial and alternative measures to remove/remedy the Force Majeure Event shall be added to the project completion cost for all purposes including, but, not limited to tariff calculation for subsequent period of operation. Additional capital cost shall be worked out after deducting receivables from insurance proceeds from the total cost of additional works, subject to provisions of section 17.7.

17.7 PROCEDURE TO SETTLE FORCE MAJEURE CLAIMS

17.7.1 Neither party shall raise any claim on account of Force Majeure for value of less than Rupees ten lacs at any instance, during construction period. Any claim exceeding Rupees ten lacs shall be referred to a committee comprising one representative each from the Board and the Company and one more representative nominated jointly by the parties.

17.7.2 The aforesaid committee shall verify/examine and decide such claims and its decision/award shall be final and binding on both the parties.

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17.7.4 During operation of the project, each individual claim above only Rupees one crore after adjustment of receivables from insurance at a time shall be referred to the committee and any excess expenditure by the Company over Rupees one crore to overcome the Force Majeure event and as agreed by the Committee shall be added to the capital cost of the project for the subsequent period of operation for the purpose of computation of tariff and other purposes of this Agreement.

11. As per the provisions of Article 17.3 the Company issued notice to the Board on 09.07.2005 informing that due to the flood on 05.07.2005 power house was closed and lot of damages to the project have occurred and detailed assessment of damages is being done and shall be intimated to the Board along with the proposed measures to be taken in due course of time.

12. At this stage it is pertinent to observe that the opportunity/privilege provided under Article 17.3 (b) for disputing the notice issued by the Company was available only to the Board i.e. Party in receipt of FM notice, to invoke the provisions of Article 18 for dispute resolution. In this case the Board did not dispute this notice of the Company dated 09.07.2005.

13. Notice under Article 17.3 issued by the Company is informatory. The subsequent communication of the Company dated 22.05.2006 to the Board contained details of works already undertaken and proposed to be undertaken along with the details of proposed restoration works and their estimated cost worked out to Rs.67.50 crores, and sought early approval of the cost of restoration works. This communication of the Company to the Board is the communication that can be treated as Notice under Article 17.6 (c) and as per the provisions of Article 17.6 (e) this communication is to be referred as FM Notice.

14. It is prudent to have a combined reading of definition of FM under Article 17.1, essential contents of Notice required under Article 17.6 (c) and 17.6 (d), which constitutes FM Notice. By definition FM means any event or circumstances or combination of events or circumstances and that it includes events and circumstances or their consequences. The contents of Notice under Article 17.6 (c) by the Company should have information in reasonable detail of the nature, duration and the impact on the Company of the FM event. The communication of Company dated 22.5.2006, which refers to earlier communications of the Company on the matter, amply reveal that it contains the nature and scope of remedial measures executed and proposed to be executed and the cost incurred and proposed to be incurred. Notice of the Board to the Company under 17.6 (d) should contain the Board's understanding on the Notice of the Company under 17.6 (c) and its impact on Board. Therefore, these provisions indicate that such notices shall contain, and

has contained in this case, the nature of FM event, its consequences, approximate duration and its impact in terms of cost implication.

15. The Board disputed the above Notice through its letter dated 07.08.2006 stating that the damages caused to the structures down stream side of barrage were not the result/consequence of any eventualities covered under Force Majeure event. This communication is the communication under Article 17.6 (d) which is FM Notice as per the Article 17.6(e).

16. The Company disputed this Notice of the Board and issued letter to the Board disputing the communication and proposing that the matter be resolved as per the Article 18 of the PPA relating to Resolution of Disputes and this communication be also treated as Notice from the Company in terms of Article 18.1 (b) of the PPA. The Company also nominated Sh.R.L.Gupta as its Senior Executive Officer, on the G.F.N. Committee.

17. At this stage it is pertinent to examine sequential provisions subsequent to Article 17.6 (d) and followed by Article 17.7 of the PPA. Article 17.6 (h) provides that parties shall take action as per the Article 17.6 (d) and in such a situation additional capital cost required for remedial/alternative measures shall be added to project completion cost subject to the provisions of Article 17.7. It implies that parties have agreed to each other's understanding of F.M. event and its consequences and only the verification and scrutiny part of the cost claims on the scope already agreed will be worked out in accordance with the Art. 17.7 by the Committee so constituted by the parties.

18. The conjoint reading of Article 17.6 suggests that once party in receipt of FM Notice, i.e. in this case the Company, has disputed such notice and sought recourse to Article 18, the subsequent provisions of Article 17.6 ceases to operate i.e. provisions of Articles 17.6 (h) and 17.7 shall not be applicable. Article 17.7 applies where parties have arrived at good faith negotiation under Article 17.6 (c) and 17.6 (d) and 17.6 (h) read with Article 17.5 (c) and settled the dispute.

19. To co-relate and further substantiate the issue, relevant provisions of Article 18, as reproduced below, needs analysis:-

ARTICLE 18: RESOLUTION OF DISPUTES

18.1 GOOD FAITH NEGOTIATIONS

In the event of dispute, disagreement or difference (a "Dispute") arising out of or relating to this Agreement between the Parties, in respect of which a procedure for the resolution of the Dispute is not otherwise provided for in this Agreement, the following provisions shall apply :-

(a) the dispute shall not be subject to the provisions of Section 18.2 dealing with resolution of disputes through Dispute Resolution Board or to any litigation unless and until the provisions of Section 18.1(b) are fulfilled and the Parties have failed to execute a written settlement agreement in accordance with Section 18.1(c) and 18.1 (d);

(b) either Party shall give to the other a written notice setting out the material particulars of the Dispute and requiring an authorised senior executive officer each from both the Board and the Company to meet personally at Shimla, Himachal Pradesh, India or at any other mutually agreed place within ten (10) working days of the date of receipt of such notice by the relevant Party to attempt in good faith negotiation, and using their best endeavours at all times, to resolve the Dispute; and

(c) if the Dispute is not resolved as evidenced by the terms of the settlement being reduced to writing and signed by the senior executive officers of both the parties within 20 (Twenty) working Days (settlement period) after the date of receipt of the notice described in Section 18.1(b), then the provisions of Section 18.1 (d) shall apply (unless the settlement period is mutually extended).

(d) The Chief Executive Officers of both the parties shall meet at Shimla or at any other mutually agreed place within ten (10) working days after the expiry of the 20 days (Twenty) period as mentioned in 18.1 (c) to attempt in good faith negotiation and using their best endeavour at all times to resolve the dispute within a further period of 20 (twenty) days and if the dispute is still not resolved as evidenced by the terms of the settlement being reduced to writing and signed by both the Chief Executive Officers, then the provisions of Section 18.2 shall apply unless the settlement period is mutually extended.

18.2 DISPUTE RESOLUTIN BOARD

(a) All disputes relating to the Agreement which cannot be settled as per Section 18.1 shall be referred to the Dispute Resolution Board hereinafter referred to as DRB.

(b) DRB shall consist of one nominee each of the Board and the Company. Nominees shall agree to one umpire who will preside over DRB.

(c) DRB shall use settlement/mediation/conciliation/other procedure for fast settlement of the dispute.

(d) The decision of DRB shall be final and binding on both the parties in respect of disputes having total financial implication of up to Rs. Five (5) Crores.

For disputes involving financial implication of more than Rs. Five (5) Crores, parties may mutually agree to the award. In case of non-agreement, matter shall be referred to Arbitration as per Section 18.3.

(e)-(g) xxx xxx xxx xxx xxx xxx xxx xxx xxx

20. While invoking the provisions of Article 18.1 (b), it requires either party to give to the other a written notice and such notice will set out material particulars of the dispute. The conjoint reading of the Articles 18.1 (b), 17.1,17.6(c), 17.6(d) and 17.6 (h) suggests that dispute constitutes all the components including nature, scope, consequences, remedial measures, cost implication etc. and, therefore, entire dispute is referred for resolution under Article 18 and not any part thereof. The good faith negotiations committee under Article 18.1 (b) or Dispute Resolution Board under Article 18.2 and arbitration mechanism under Article 18.3 shall consider the force majeure event and its consequences and the relief sought by the parties in its totality while resolving the dispute. The Article 17.6 (h), provides for Article 17.7 to be followed where-ever relevant. The provisions of Articles 17 and 18 no-where provide that certain components of dispute can be dealt with under Article 18.1 (b) read with Article 18.1(c) and (d) but the component of verification/examination of FM claims exceeding Rs. 1.00 core shall be referred back for decision under Article 17.7. In fact it is explicit that Article 17.7 has limited purpose and it essentially flows from Article 17.6 (h) and, therefore, it cannot be applied independently. The Commission, therefore, is of the view that the dispute referred under Article 18 for resolution shall be the dispute in totality comprising of all its aspects/components and such dispute shall be dealt with only under Article 18.

21. Article 18 of the PPA, providing for dispute resolution, is self contained Code providing for various stages and institutional mechanism. The first step is resolution of dispute by way of good faith negotiation between the parties. If a good faith negotiation fails dispute will be referred to DRB and the award of DRB up to Rs.5 crores is binding on the parties but if implications are of more than the Rs. 5 crores then again dispute has to be resolved by way of good faith negotiation because it is for the parties to mutually agree to such award. If this also fails the dispute shall be referred to Arbitration. The arbitration proceedings are as per law and it assumes finality. Therefore, it is amply clear that Article 18 provides for various stages, mechanisms and institutions and is a complete Code in itself to consider and resolve the dispute in its totality and finality.

22. Based on above discussion on Issue No.2, the Commission decides that dispute once referred for resolution under Article 18 shall have to be resolved under Article 18 only, which is a self-contained Code providing for resolution of any dispute and to its totality and finality. As has been opined by Hon'ble Mr. Justice V.N. Khare, part disputes not settled as per Article 18.1 (b)/18.1(c), can be settled by GFN by the parties under 18.1 (a). On the same lines parties have all the rights and responsibility to settle the entire F.M. dispute by GFN under Article 17 also anytime.

ISSUE No.3:

23. The Board contends that the report of outcome of the attempt made by the joint committee for settling the dispute recorded in writing, is not binding upon the parties because the parties to the agreement are still open to accept or refuse such settlement arrived at between the Senior Executive Officers of the parties and once such power is there under the PPA, it cannot be concluded that the Managing Body or signatories to the PPA have no option but to accept the aforesaid report. The Board further contends that interest of justice requires that the provisions of the PPA are interpreted in consonance with each other and not in derogation with each other. The Hon'ble Justice D.P. Sood has rightly opined that the settlement arrived at by the committee is not final and binding on the parties and it is only a precondition to the stage at which the parties are required to execute written settlement agreement.

24. The Company has vehemently opposed the contention of the Board and has also relied upon the opinion rendered by the Hon'ble Mr Justice V.N.Khare former Chief Justice of India. The stand of the Company is that the dispute having been settled in terms of Article 18(1)(b) and the said settlement having been recorded in writing, in so far as the existence of Force Majeure condition is concerned, the same stood resolved and further no separate written settlement agreement is required to be executed. There is a settlement on the existence of the Force Majeure condition. It is, therefore, for the parties to decide whether there can be an amicable solution with regard to the quantum or amount of compensation or tariff adjustment to be done consequent to the existence of the Force Majeure condition. The written settlement referred to Article 18(1) (a) is nothing but the settled agreement duly signed by the Senior Executive Officers under Article 18(1)(b), read with Article 18(1)(c). The Senior Executive Officer represents the party being duly authorized and that action of settlement should be taken as a settlement by the Parties.

25. At this stage it would be pertinent to note that there are settled principles for interpreting the provisions of the Statutes and therefore Articles 17 and 18 of the PPA are required to be interpreted accordingly. While interpreting the provisions of the Statute, the principles laid down by the Appex Court in catena of cases are required to be followed. In **RMD Chamarbaugwala V/s UoI AIR 1957 SC 628; and in Kanailal Sur V/s Paramnidhi Sadhukhan AIR 1957 SC 907**; it is concluded that a Statute is to be construed according to the intent of the Legislature. Intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said or also what has not been said. "The first and primary rule of construction", says Hon'ble Mr. Justice Gajendragadkar, J. "is that the intention of the Legislature must be found in the words used by the Legislature itself". In **Poppatlal Shah V/s State of Madras AIR 1953 SC 274** "each word, phrase or sentence", observed Hon'ble Mr. Justice Mukherjee J,. "is to be construed in the light of general purpose of the Act itself". The golden rule of interpretation is that unless literal meaning given to a document leads to anomaly or absurdity, the principles of literal interpretation should be adhered to. The intention of the legislature must be found by reading the Statute as a whole. Thus it is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the Statute has to be gathered from the text, the nature of the subject matter and the purpose and intention of the Statute. It is cardinal principle of construction of a Statute that effort should be made in construing

its provisions by avoiding the conflict and adopting a harmonious constructions. The Statute or rules made there under should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduce one of the provisions to a "dead letter" is not harmonious construction".

26 To understand the meaning and intent of the provisions of Article 18.1, it is important to consider each word, appreciate and interpret it and as well as read it in conjunction with the related provisions of Articles 17 and 18. Article 18.1(b) states that:-

> "either Party shall give to the other a written notice setting out the material particulars of the Dispute and requiring an authorised Senior Executive Officer each---- to attempt in good faith negotiation, and using their best endeavourers at all times, to resolve the Dispute";

27. Substantive word relevant for interpretation to the context of the Issue No.3 is "Party". The word "Party" here is expressly worded with capital "P" and therefore it here means the party to the PPA. Such party to the PPA means the authority who exercises full power, which is ordinarily the management of the Board/Company unless expressly provided in the PPA by delegation/ empowerment to any other person/institution.

Plain reading of Article 18.1(b) implies that -

(a) the parties to the PPA will nominate their representatives ,

(b) such nominee is authorized by the PPA to make attempt in good faith negotiation (G.F.N),

(c) such G.F.N is for resolving the dispute.

28. The above analyses clearly show that the Party to the PPA i.e. management of the Board/Company has authorised its nominee (Sr. Executive Officer) to make attempt in GFN to resolve the Dispute. After fulfillment of the above step, process under Article 18.1(c) will be followed, which states that:-

> "if the dispute is not resolved as evidenced by the terms of the settlement being reduced to writing and signed by the senior executive officers of both parties ------- then the provisions of 18.1 (d) will apply".

This provision implies that the senior executive officers will record in writing the outcome of their attempt to resolve the Dispute by way of GFN and sign it. Such written record will contain the terms of settlement of the Dispute.

29. The attempt of the nominees in GFN will have one of the two possible outcomes, of which one of the outcomes is that the Dispute is not resolved. In such a situation, the next step that shall automatically follow is GFN attempt by the Chief Executives of the parties. In this petition, record of outcome indicates that the nominees have made their best attempt and resolved the dispute with respect to FN Event. If dispute is not resolved by the nominees, the next step is under Article 18.1(d) which is automatic, mandatory and binding upon parties. However, as per the understanding of the senior executive officers, if the Dispute is resolved there is no provision under Article 18.1(c) as to what is the consequential action or result of their attempt. There is also no provision of its finality and enforceability.

30. Conjoint reading of various provisions under Articles 17 and 18 amply demonstrate that each provision in the PPA provides for implementability and enforceability of the actions some of which are listed as under:-

(a) Article 17.5(f):- provides that Board shall pay deemed generation/capacity charges if hydel power station cannot be operated.

(b) Article 17.6(h) provides that if parties to PPA agree to claims and counter claims of F.M, its extent and consequences, additional cost required for remedial measures shall be added to capital cost for completion of project. Therefore, decision of parties is final.

(c) For verification of claim of additional cost, a committee is constituted by the parties and the delegation to the committee is for taking decision and such delegation is complete and final.

(d) Under Article 18.2, PPA mandates the DRB to take decision to resolve the Dispute but even after such mandate, its decision up to Rs. 5.00 Crores is enforceable and any decision having implication of more than Rs. 5.00 Crores are subject to mutual agreement of the parties, which again is a GFN.

(e) Arbitral proceedings assume finality and is enforceable as per provision of the Arbitration Law.

31. Articles 17 and 18, relevant to the present petition, contain specific provisions for enforceability in the same sub Article or any other Article related to it. In this case Article 18.1 (b) and 18.1 (c) do not provide, in itself, for enforceability of the resolution of dispute attempted by Senior Executive Officers. We have to refer to Article 18.1 (a) to address the issue, which reads as under:-

> "18.1(a): The dispute shall not be subject to the provisions of section 18.2 ----- unless and until the provisions of section 18.1 (b) are fulfilled and parties have failed to execute written settlement agreement in accordance with section 18.1 (c) and 18.1 (d)".

This article 18.1 is meant for only settlement of Dispute by GFN before proceeding to next stages. The entire provision under Article 17 is for GFN and only when it fails, Article 18 is invoked. Since Article 18 is meant for all Disputes under the PPA, the drill of GFN in F.M. case is also required to be repeated to meet the procedural requirement. The Commission accordingly concludes that for enforcement of the outcome of attempt of GFN by Senior Executive Officers, the recourse to Article 18.1(a) has to be taken and the decision under Article 18.1(a) is to be taken by the parties to the PPA. The Commission, therefore, holds that resolution of dispute by way of GFN by the Senior Executive Officers is not enforceable.

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32. Implications of Article 18.1(a) are that before moving to Article 18.2 i.e. DRB for resolution of disputes, conditions precedent are:-

(a) that Article 18.1(b) is required to be fulfilled, which in this case has been fulfilled.

(b) that the Parties have failed to execute a written settlement agreement.

(c) that such written settlement agreement has to be in accordance with Article 18.1(c).

The plain reading of the above indicates that if the Parties execute a written settlement agreement in accordance with Article 18.1(c), the Dispute stands settled fully, in all respects and there is no need to go to Article 18.2 or any other provision of the PPA or the Law.

33. The petitioner Company has contended that the terms of settlement recorded in writing and signed by the Senior Executive Officers is written settlement agreement and no separate agreement is required. From this perspective, let us examine each substantive word of Article 18.1 (a) as under:-

(a) As already discussed in the preceding paras, the reference to Party in this Article is to the Parties to the PPA and not the nominees for attempting GFN.

(b) Written settlement agreement between the Parties is different from the record of terms of settlement signed by the Senior Executive Officers under Article 18.1 (c). Word specified in Article 18.1 (a) is settlement agreement. Meaning of agreement in Oxford dictionary is "a negotiated and typically legally finding arrangement". Legally binding arrangement can be between the Parties competent to enter into such agreement. Here the Senior Executive Officers have been authorised only to attempt in GFN to resolve the dispute but there is no authority to them to sign the agreement. This authority to sign agreement is inherent with the party to the PPA i.e. the management of the Board/Company.

(c) Article 18.1 (a) also explicitly implies that the party to the PPA can sign agreement in accordance with section 18.1(c).

Meaning in Oxford dictionary of "in accordance with" is "in a manner conforming with". Therefore Commission is of the opinion that the party i.e. management of the Board in this case, can execute written settlement agreement to settle/resolve the issue fully without resorting to Article 18.2 but such agreement has to be in a manner conforming with written record of settlement arrived at by the Senior Executive Officers.

(d) However Article 18.1 (a) expressly provides that only in the situation of failure to sign agreement by management as per settlement being reduced to writing and signed by the Senior Executive Officers, Article 18.2 will apply.

(e) At this stage, it is pertinent to mention here that expert advice of Hon'ble Justice Mr. D.P.Sood also suggests that the report of the GFN committee is not final and binding on the Parties to the PPA but if the parties to the PPA agree with such report, then such report is binding to be part of written settlement agreement to be signed by the Parties to the PPA. Therefore, Commission does not find any contradiction in his opinion.

34. Keeping in view the above discussions, the Commission is of the view that the parties to the PPA, under their power for GFN under this sub-clause, can sign a written settlement agreement to settle the dispute and such written settlement agreement has to be in conformity with the terms of settlement agreed to by the Senior Executive Officers to the extent the Dispute resolution attempted have been resolved. Since it is a GFN fully within its domain and mandate, they can settle other components of the dispute not settled by the Senior Executive Officers and execute the agreement. However, the parties to the PPA may not agree with the attempted resolution of dispute by the Senior Executive Officers. In such a situation the entire Dispute is to be referred to DRB under Article 18.2. In the instant case the process under Article 18.1 (b) and (c) have been concluded and the Senior Executive Officers in their GFN attempt outcome have recorded that dispute is resolved, hence the next course is under Article 18.2. Therefore, the Commission decides

that parties shall proceed under the provisions of Article 18.2 and the Board will be the lead partner to initiate the process and facilitate timely completion of DRB proceedings and the follow up action pursuant to conclusion of such proceedings.

SUMMARY OF FINDINGS

35. In conclusion, the gist of the Commission's decision is that :-

(1) the disputes under the PPA shall be settled under the provisions of the PPA, as has also been held by Hon'ble APTEL in a similar case;

(2) the Article 18 is a self-contained Code and all the disputes falling in the purview of the said Article shall be dealt in its entirety and finality under Article 18 only, in absence of any specific provisions to the contrary. Article 17.7 (4) is not an independent provision. It flows from Article 17.6 (h) and is essentially a supplementary to Article 17.6 (h) only;

(3) the Senior Executive Officers of the parties are authorised only to attempt GFN in resolution of the dispute;

(4) If the dispute is not resolved by the Senior Executive Officers as per their record of proceedings, it will be automatically referred to next level of the Chief Executive Officers for GFN;

(5) if the dispute is resolved as per outcome of GFN recorded by the Senior Executive Officers, it shall stand legally resolved only if the parties to the PPA i.e. management, execute a written settlement agreement in a manner conforming with settlement arrived at between the Senior Executive Officers;

(6) if the parties i.e. management do not sign such written settlement agreement, the dispute shall be referred under Article 18.2 for resolution by the DRB.

36. In view of the above findings, this Commission is of the firm view that the petition No. 120/2011 in question seeking for directions to the Board to set up the committee in accordance with Article 17.7 of PPA is not tenable and is liable to be dismissed and is therefore dismissed.

Ordered accordingly.

(Subhash C Negi)
Chairman