

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 315/MP/2013

Subject : Petition for adjudication of disputes arising out of the open access approval granted to the petitioner for evacuation of electricity and the terms and conditions of the bulk power transmission agreement dated 24.12.2010.

Date of hearing : 17.6.2014

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member

Petitioner : PEL Power Limited

Respondent : Power Grid Corporation of India Limited

Parties present : Shri Sanjay Sen, Senior Advocate, PEL Power
Shri Anand K. Ganesan, Advocate, PEL Power
Shri S.M. Malik, PEL Power
Shri Jagam Mohan Rao, PEL Power
Shri S.B.Upadhya, Senior advocate, PGCIL
Shri A.M. Pavgi, PGCIL
Shri A. Bhargava, PGCIL

Record of Proceedings

Learned senior counsel for the petitioner submitted as under:

- (a) In the year, 2007, the petitioner had proposed to establish 3X350 MW Thermal generating station in the Nagapattinam District in the State of Tamil Nadu.
- (b) The petitioner applied for long term open access to PGCIL on 20.10.2008 for a capacity of 987 MW which was granted on 10.12.2010. On 24.12.2010, Bulk Power Purchase Agreement (BPTA) was executed between the petitioner and PGCIL. The petitioner also provided a bank guarantee of ₹49.35 crore to the respondent effective from 11.3.2011 and presently valid and subsisting till 30.4.2015.

- (c) The petitioner has obtained all clearances including CRZ clearance and coal linkage, etc. However, due to non-availability of Consent for Establishment (CFE) from Tamil Nadu Pollution Board, the petitioner is prevented from proceeding with the generating station as envisaged, even though the petitioner has already incurred an expenditure of about ₹350 crore on the project.
- (d) Non-availability of CFE was informed to PGCIL in the 3rd Joint Co-ordination Committee meeting held on 1.4.2011 which was further reiterated in the subsequent meetings held on 9.9.2011 and 2.12.2011.
- (e) On 16.12.2011, the petitioner informed PGCIL that due to force majeure event, it is not in a position to establish the generating station and the petitioner also expressed its inability to sign the Transmission Service Agreement. The petitioner also sent several communications in this regard to PGCIL.
- (f) PGCIL in its letter dated 17.1.2012 informed the petitioner that the transmission corridor cannot be put on hold on account of uncertainty of the generating station. PGCIL has been threatening to encash the bank guarantee.
- (g) As per Article 9 of the BPTA, no party shall be liable for any claim for any loss or damage arising out of the failure to carry out the terms of the agreement if such failure is due to force majeure events such as war, rebellion etc. including the causes beyond the control of the defaulting party. The petitioner has informed PGCIL about the force majeure event in December, 2011 when PGCIL had not incurred any financial liability on the project.
- (h) Vide letter dated 2.9.2013, the petitioner requested PGCIL to return the bank guarantee of ₹49.35 crore. PGCIL in its affidavit dated 3.4.2014 has submitted that the construction work of the project was in full swing. PGCIL should indicate that when the work on the project started.

2. Learned senior counsel for the respondent submitted as under:

- (a) The clearance of MoEF vide its letter dated 19.5.2011 was subject to obtaining "Consent for the Establishment" (CFE) which has to be obtained from the Tamil Nadu Pollution Control Board under the Air and Water Act.
- (b) The Govt. Order dated 8.5.1998 of the State of Tamil Nadu provided for maintenance of 5 km distance from Cavery for establishment of any project. The petitioner was aware of the requirement and should have planned the project accordingly.

- (c) Tamil Nadu Pollution Control Board made a reference to Govt. of Tamil Nadu for relaxation of G.O. dated 8.5.1998 two years back. The petitioner has not indicated what action has been taken by the petitioner to expedite the matter.
- (d) The petitioner should have approached the High Court against Tamil Nadu Govt./Tamil Nadu Pollution Control Board seeking a direction to take decision on its application. It is inaction on the part of the petitioner in not properly and effectively following the matter to obtain the clearance which has resulted in the present state of affairs.
- (e) The frustration is self induced. It is not frustration of contract as claimed by the petitioner. Self induced frustration cannot be a ground for force majeure.
- (f) Learned counsel relied on the judgment in J.C Shah V Ramaswami (AIR 1969 Supreme Court 110) and U.P. State Sugar Corporation Vs. Sumac International Limited [(1997) 1 SCC 568] in support of his contention.

3. In response, learned counsel for the petitioner submitted as under:

- (a) The judgments relied upon by the learned counsel for PGCIL are not relevant to this case.
- (b) The petitioner was not ignorant about the Government order dated 8.5.1998 relating to maintenance of distance of 5 km from Cavery. The said order pertains to tannery and textile industries and does not apply to the petitioner who is developing a generation project.
- (c) Even assuming that the petitioner was in breach of contract in December, 2011 and force majeure events have not taken place, PGCIL would only be entitled for recovery of loss suffered as on that date. The judgment in the case of Fateh Chand Vs. Balkishan Dass [(1994) 1scr 515} (para 15)] was relied upon by learned counsel in support of the contention.
- (d) As on December, 2011 PGCIL had not incurred any expenditure and therefore, PGCIL could not have incurred any loss on account of the petitioner.

4. The Commission directed the parties to file written submissions by 8.8.2014. The Commission directed that the due date of filling written submissions should be strictly complied with.

5. Subject to the above, the Commission reserved order in the petition.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Law)**