

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 419/MP/2014

Coram:

**Shri Gireesh B. Pradhan, Chairperson
Shri A. K. Singhal, Member
Shri A S Bakshi, Member**

Date of Order: 27.6.2016

In the matter of:

Petition on behalf of Raichur Sholapur Transmission Company Limited under Transmission Service Agreement dated 4.8.2010 read with section 79 (1) (f) of the Electricity Act, 2003.

And

In the matter of:

Raichur Sholapur Transmission Company Limited
Patel Estate Road, Jogeshwari West
Mumbai – 4000102

.....**Petitioner**

Vs



1. Power Grid Corporation of India Limited
B-9 Qutab Institutional Area
Katwaria Sarai New Delhi
2. Gujarat Urja Vikas Nigam Ltd.,
Sardar Patel Vidyut Bhawan,
Race Course Road,
Vadodara - 390 007
Gujrat
3. Madhya Pradesh Power Trading
Company Ltd.,
Shakti Bhawan, Vidhyut Nagar, Rampur
Jabalpur - 482 008
Madhya Pradesh
4. Chhattisgarh State Power Distribution Comp[any Limited,
Energy Info Tech Centre
Daganiya, Raipur
Chhattisgarh - 492 013
5. Goa State Electricity Department,
Electricity Department , Government of Goa,
3rd Floor, Vidyut Bhawan, Tiswadi,
Goa - 403 001
6. Electricity Department, Daman
Plot No. 35 OI DC Complex
Near Fire Station Somnath
Nani Daman - 396 210
7. DNH Power Distribution Corporation Limited
Vidhyut Bhawan
Opp. Secretariat
Silvassa - 396 230
8. Madhya Pradesh Audyogik Kendra Vikas Nigam (Indore) Ltd.,
3/54, Press Complex, Free Press House
Agra – Mumbai Road
Indore
Madhya Pradesh - 452 008
9. Jindal Power Limited
Jindal Centre
12, Bhikaji Cama Place
New Delhi - 110 066

Plant Office

Tamnar 496107; District Raigarh

Chhattisgarh

Order No. Petition No 419/MP//2014

Page 2 of 43



10. Torrent Power Limited, Ahmedabad
Torrent House, Off Ashram Road
Ahmedabad - 380009

The following were present:

Shri G. Sai Kumar, Advocate, RSTCL
Shri Varun Pathak, Advocate, RSTCL
Shri Nitish Gupta, Advocate, RSTCL
Shri Birender Kumar Singh, RSTCL
Shri Kunj Rajgarif, RSTCL
Shri S. Mukherjee, RSTCL
Shri Sandeep Bajaj, Advocate, MSEDCL
Shri Ekank Mehra, Advocate, MSEDCL
Shri Swapnil Verma, PGCIL

ORDER

Raichur-Sholapur 765 kV transmission line is a tariff-based competitive bidding project on Build, Own, Operate and Maintain (BOOM) basis. Raichur Sholapur Transmission Company Limited (RSTCL), the Petitioner, was incorporated on 19.11.2009 by the Bid Process Coordinator i.e. Rural Electrification Corporation Transmission Projects Company Limited (RECTPCL) as its wholly owned subsidiary to initiate work on the Project to build, own, operate and maintain the transmission system for evacuation of power from Krishnapattnam UMPP (4000 MW) and export of power from various IPPs coming in the Southern Region to their target beneficiaries in Western region and Northern Region and for synchronization of Southern Region with the rest of the Indian Grid and subsequently to act as a Transmission Service Provider (TSP) after being acquired by the successful bidder.

2. The instant petition has been filed invoking the adjudicatory jurisdiction



of this Commission claiming that RSTCL is not liable for the delay in completion of the project and as such liquidated damages are not payable by the Petitioner to the LTTCs. Accordingly, the Petitioner has prayed for the following reliefs:

(a) The Commission may direct the beneficiaries of the project, i.e. Raichur-Sholapur 765 kV Single Circuit Line-1, to release the performance bank guarantees dated 29.12.2010, issued on behalf of the consortium members by Patel Engineering Limited, and hold that RSTCL is not liable for the delays which occurred in the execution of the project; and/or

(b) In case the Commission comes to the conclusion that the petitioner is not liable for the delays, the Commission may be pleased to change the scheduled COD to 4.6.2014 instead of 7.1.2014.

3. Briefly the background of the case as submitted by the Petitioner is that RPF bids for the above project were opened on 26.10.2010 in the presence of Bid Evaluation Committee and the representatives of the bidders. Based on the evaluated levelised transmission charges, the Bid Evaluation Committee recommended M/s Patel Engineering Limited in consortium with Simplex Infrastructure Limited and BS Transcomm Limited (Consortium) as the successful bidder with lowest levelised transmission charges of Rs. 2,939.569 lakh per annum for the Project. The letter of intent was issued to the Consortium on 16.12.2010 and subsequently the Consortium acquired



RSTCL on 7.1.2011 after execution of the Share Purchase Agreement and completing all procedural requirements specified in the bid documents.

4. TSA was entered between the various LTTCs and RSTCL on 4.8.2010. RSTCL filed Petition No. 5/2011 and Petition No. 6/2011 before this Commission for grant of transmission license and for adoption of transmission charges in respect of the transmission system. The Commission granted transmission license and adopted transmission charges vide orders dated 24.8.2011 and 12.8.2011 respectively.

5. The petitioner has made the following submission in support of its contention:

(a) The Scheduled COD of the Project was 7.1.2014. However, the actual COD of the Project, as per the certificate issued by POSOCO, is 4.7.2014. Under the TSA, the Transmission Charges become payable from the financial year 2013-2014, i.e. for the period January 7.1.2014 to 31.3.2014. Since the COD of the Project in accordance with Article 6.2 of the TSA is 4.7.2014, the Transmission charges become payable from 1.4.2014 in accordance with Article 10 read with Schedule 5 and 6 of the TSA.

(b) The Petitioner has timely completed the Project in terms of the TSA. During execution of the Project, the Petitioner encountered various difficulties in the nature of blockades such as concerned farmers were reluctant to allow the officials to enter their fields, right of way issues,



adverse climatic conditions, incessant untimely rain fall, cyclone and presence of black cotton soil preventing access to many tower locations.

(c) In accordance with clause 2.1 of the TSA, the effective date was 6.1.2011. As per schedule 3 of the TSA, the Project was scheduled to be completed within a period of 36 months. Under the TSA, the time period was divided in a manner wherein 6 months were earmarked for the purposes of obtaining transmission licensee, adoption of tariff under section 63 of the Act and for achieving financial closure. Therefore, within 6 months of the effective date under the TSA i.e. by 7.6.2011 the transmission licence and adoption of tariff should have been granted to the Petitioner in order to enable it to proceed with the construction of the transmission line.

(d) The Petitioner had filed the petitions for grant of transmission licence and adoption of transmission tariff before this Commission on 10.1.2011 and 14.1.2011 respectively. However, the transmission licence was granted by this Commission only on 24.8.2011 and the said order was intimated to the Petitioner vide letter dated 13.9.2011. Therefore, due to delay of approximately three months in grant of transmission licensee, the Petitioner could not begin the work within the time contemplated under the TSA.

(e) The petitioner, vide letter dated 10.1.2011, applied to Ministry of Power, Govt. of India for permission under Section 164 of Electricity



Act,2003 for starting the constructional activity. However, permission dated 08.11.2011 under Section 164 of the Act was sent to the petitioner by Ministry of Power vide its letter dated 24.11.2011. The Appellate Tribunal for Electricity in its judgment dated 2.12.2013 in Appeal No. 139 of 2012 has held that power of Telegraph Authority under Section 164 of the Act is essential for laying transmission line both from point of view of prior consent of land owner as well as conveyance of telephonic or telegraph message. Hence, the delay in obtaining the Central Government's approval in conferring power of the Telegraph Authority is to be construed to be a case of Force Majeure.

(f) Further, as per clause 3.2 of the TSA, LTTCs were under an obligation to provide within 6 months from the Effective Date an irrevocable letter to the lenders, which was only done on 18.9.2012 by MSEDCL, which delay also resulted in delay in financial closure. The Petitioner is not liable for the delay caused in achieving COD and as such the bank guarantees issued to the long term beneficiaries should be returned and no liquidated damages are payable at all on account of delay in the completion of the Project.

(g) In addition to the above factors, the Petitioner has also adverted to the delay in machine mobilization due its non-availability in the market, lack of police protection from local administration due to Lok Sabha election during April to May, 2014 and unforeseen situations like inclined rock base under the river bed beneath the pile foundation as causes which also



contributed to the delays. The Petitioner has contended that it had put in additional resources and compensated for the delays. According to the Petitioner, the net delay of 6 months was completely attributable to delay in grant of transmission licence and issuance of permission under section 164 of the Act. There were also other impediments also in the nature of force majeure.

6. The Petitioner has submitted that on 17.10.2014, M/s. Patel Engineering Ltd received a letter dated 13.10.2014 from Respondent No.3 which urged the lead procurer i.e. MSEDCL to invoke BG issued by the Consortium members. Similar letters were issued by some other beneficiaries as well. According to the Petitioner, it is not liable for delay, and therefore, no liquidated damage should be imposed on the consortium members/ RSTCL and the performance guarantees should be released.

7. During the hearing on 31.10.2014, the representative of GUVNL submitted that GUVNL vide its letter dated 25.9.2014 requested the lead procurer, MSEDCL to intimate the total amount of liquidated damages to be recovered from the petitioner and also call upon the petitioner to deposit the same in terms of Article 6.4.3 of the TSA. In case the petitioner does not make the payment within 10 days, GUVNL requested to MSEDCL to convey the amount recoverable by GUVNL towards liquidated damages in terms of Article 6.4.1 so as to enable GUVNL to recover the same by en-cashing the existing bank guarantee which was due to expire on 31.10.2014. The representative of GUVNL requested the Commission to direct the petitioner to



send the copy of the letter extending BG to GUVNL. He further submitted that GUVNL has not received copy of the petition.

8. After hearing the learned counsel for the petitioner and representative of GUVNL, the Commission directed the petitioner to submit the letter extending BG by 1500 hrs with copy to the respondents failing which the respondents would be at liberty to en-cash the BG. In the event of extension of the BG, the respondents were directed not to take any coercive measure with regard to encashment of BG till further order.

9. During the hearing on 11.11.2014, the learned counsel for the petitioner submitted that the performance BG has already been extended and status report in this regard has been filed on 11.11.2014. Learned counsels for GUVNL and MSEDCL requested for two weeks time to file reply to the petition, which was allowed.

10. Respondent No. 23, viz. MSEDCL vide its affidavit dated 28.11.2014 has submitted as under:

(a) In accordance with the TSA, the said transmission line was to be completed before 6.1.2014 but was declared under commercial operation on 4.7.2014 resulting in a delay of 179 days.

(b) In accordance with Article 6.4.1 of TSA, if Transmission System Provider (TSP) fails to achieve COD of any element of the project, it was liable to pay to LTTC a sum equivalent to 3.33% of Monthly



Transmission Charges (MTC) applicable for each day of delay upto 60 days of delay and beyond that time limit, at the rate of 5% as Liquidated Damages (LD). Accordingly, in view of the delay of 179 days, MSEDCL, being a Lead Customer as per Article 18.1.1 of TSA, has raised a LD of Rs. 23.31 crore vide letter dated 18.10.2014 and has instructed the petitioner to pay the same in 10 days, failing which the BG furnished by the petitioner shall be encashed.

(c) It was obligatory on the part of the petitioner to first raise the dispute under article 16.2 (for amicable settlement) instead of directly filing the petition under article 16.3 as has been done in the present case bypassing the remedy provided under article 16.2. Therefore the present petition is not maintainable.

(d) BG is an independent and a separate contract and is absolute in nature. The existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of BG.

(e) As per the law laid down by the Supreme Court in catena of judgements, the invocation can be restrained only in following three conditions:

- (i) Invocation not in terms of the Bank Guarantee
- (ii) Fraud
- (iii) Irretrievable injury or extraordinary special equities



(f) To seek an injunction in respect of BG, the petitioner is not only required to plead but to prove the above mentioned grounds. However in the present case, this is not even the case of the petitioner that it falls under any of the above stated categories. No such ground has been raised by the petitioner.

(g) It is settled principle of law that extra financial loss/balance of convenience/grave prejudice are not even the grounds for restraining the BG. No other ground has even been raised by the petitioner. Therefore, the petitioner is not entitled to relief as sought by it under the interim application.

(h) The BG in the present case is unequivocal, unconditional and irrevocable and can be invoked merely on demand.

(i) Force Majeure: The Natural Force Majeure as defined under Article 11.3(a) of the TSA does not include the adverse weather condition. It includes such exceptionally adverse weather conditions which are in excess of the statistical measures for last hundred years. Similarly, even direct/indirect non natural force majeure are those which have specifically been defined in the said clause and not otherwise. It is settled law that a force majeure clause should be construed in each case with a close attention to the words which precede or follow it, and with regard to the nature and general terms of



the contract.

(j) No Notice of Force Majeure: Assuming that the reasons submitted by the petitioner are covered under the definition of Force Majeure, it was mandatory for the petitioner to send a written notice to the respondents within a period of 7 days about the commencement of Force Majeure. In the absence of any such written notice as mandated under Article 11.5, the Petitioner cannot claim any relief of Force Majeure.

(k) Default on the part of the Petitioner: The progress of the line as desired at the site was not taking place and RSTCL has always overlooked CEA remedial suggestions provided from time to time, which have resulted in missing of target date. The TSA signed by the Petitioner, in Article 5.1, clearly specifies that it agreed for the commissioning of the project on time and acknowledged that it shall not be relieved from any obligation or ask for extension due to the reason such as unsuitability of site or transmission routes for whatever reason.

(l) Delay in grant of Licence: As per TSA, it is the responsibility of the Petitioner to obtain licenses from the Commission within 6 months from the effective date. The petitioner cannot claim any benefit of delay in obtaining the same. As regards the Petitioner's contention that the delay of around 3 months in granting permission under section 164 of the Electricity Act by the Ministry of Power is liable to be excluded



while calculating the period of 36 months for the completion of the project as the same is the Force Majeure event, the reliance of the petitioner on the judgment of the Appellate Tribunal for Electricity in Appeal No.139 of 2013 is totally wrong and the said contention is liable to be rejected.

(m) Access to the Site: As regards the plea of obstruction to access the site as a cause of delay in COD, it was the responsibility of the Petitioner to seek access to the site and other places where the Project was being executed.

(n) Extension of Time: Even in the case of delay under Force Majeure, the COD shall be extended on day to day basis in terms of Article 4.4.2 of the TSA. It is not even the case of the petitioner that COD was ever extended. Even otherwise, it was the duty of the petitioner to explain the delay on day to day basis and such explanation has been provided.

(o) No condonation of delay in COD by the Commission: The Petitioner's submission that the Commission vide its order dated 15.10.2014 while disposing of the Petition No. 331/SM/2014 had accepted the contentions of RSTCL and in its supervisory and regulatory capacity did not pass any adverse order for delay in completion of the project from Schedule CoD is incorrect.

(p) Liquidated Damages: The delay in COD is attributable to the



sole conduct of the petitioner and it is liable to pay for the liquidated damages as provided under TSA.

11. GUVNL, Respondent No. 2, vide its affidavit dated 28.11.2014, has submitted as under:

(a) In terms of Article 3 of the TSA, the conditions subsequent provided for are to be satisfied by the Petitioner. These include the obligation to obtain the transmission licence required under Sections 12 and 14 of the Electricity Act, 2003 from the Appropriate Commission and also to obtain the order for adoption of transmission charges by the Appropriate Commission as per the provisions of Section 63 of the Electricity Act, 2003. It is, therefore, for the Petitioner to pursue diligently and arrange for the above two. The period of 36 months was stipulated in the Bidding Documents for the Scheduled COD after having provided for various conditions subsequent as specified in Article 3. The bidders for the Petitioner's project ought to be assumed to have accepted the time line of 36 months fully knowing that the time taken for obtaining license or the approval for adoption of tariff is included in the period of 36 months. It is for the selected bidder to arrange the affairs in such a manner as to obtain license and for adoption of tariff.

(b) Similarly, the time which would be required for applying for and obtaining permission under section 164 of the Electricity Act, 2003 for



being declared as a Telegraph Authority is also included in the period of 36 months.

(c) The Petitioner having participated in the Tariff Based Competitive Bidding Process with stipulation of Scheduled COD being 36 months from the Effective Date ought to have known that the matters relating to obtaining of license, adoption of tariff, obtaining permission under section 164 of the Electricity Act, 2003 are included in the period of 36 months and further these activities are the scope of obligations of the selected bidder. These are neither Force Majeure events nor events of default on the part of the LTCCs as provided for in Article 4.4 of the TSA.

(d) To qualify as Force Majeure Event as defined and provided for in Article 11 of the TSA, an event or circumstance should be of the nature that it partly or wholly prevents or unavoidably delays the performance of the obligations under the TSA as provided for in Article 11.3. Further, it should not come under the exclusion provided for in Article 11.4.

(e) In terms of Article 11.5 of the TSA, the Petitioner was required to give notices of the Force Majeure Event within a period of 7 days from the date of commencement of the event, which is a pre-condition for claiming implications or consequences of Force Majeure. In the present case, the Petitioner did not give the requisite notice and accordingly



cannot claim any consequences of the alleged Force Majeure. In any event, the allegation of Force Majeure affecting the project awarded to the Petitioner is vague and without any merit.

(f) The reference made by the Petitioner to the decision of the Appellate Tribunal dated 2.12.2013 in Appeal No. 139 of 2012 regarding section 164 is misplaced. In the present case, the Petitioner has been granted the requisite approval under section 164 of the Electricity Act, 2003 on 8.11.2011.

(g) The Petitioner ought to have known that there would be a requirement for taking various approvals and the time required is included in the period of 36 months provided for the Scheduled COD.

(h) It is wrong and denied that the time taken by the lead beneficiary for giving the Letter of Lenders has in any manner affected the implementation of the project as alleged or otherwise.

12. The Petitioner in its rejoinder had made the following submissions:

(a) Submission of MSEDCL that the present Petition is premature as the process contemplated under Article 16.2 has not been followed by the Petitioner is erroneous and misconceived. Hon'ble Supreme Court of India in the landmark judgment of *Gujarat UrjaVikas Nigam Ltd. v. Essar Power Ltd., 2008 (4) SCC 755* has held that it is the prerogative of the respective ERCs, whether to refer the matter to



arbitration or to decide the matter on its own. Hon'ble Supreme Court has laid down that all disputes between licensees are to be adjudicated by the ERCs. Further, the discretion to refer the matter to arbitration or not, even if there is an existence of an arbitration clause, is the sole prerogative of the ERCs and that discretion can be exercised by the ERCs alone. Therefore, under the Act itself, this Commission will have jurisdiction.

(b) In the facts of the present case, MSEDCL, even during the monitoring of the Project by this Commission had submitted that liquidated damages were payable. Therefore, when MSEDCL had itself taken an acrimonious stand on its own, then the question of amicable settlement becomes an empty formality.

(c) The entire submission of MSEDCL on the issue of interim relief on invocation of BG is misplaced and erroneous. TSA is a statutory agreement and has been approved by this Commission vide its order dated 29.4.2011. The contract performance guarantee has been issued by the Petitioner in terms of the TSA. In fact the calculation of liquidated damages and the demand thereto by MSEDCL has been in terms of the TSA. In fact, the threat of invocation has also been made by MSEDCL in terms of the TSA.

(d) Even though the Contract BG may be a different contract, the same has been issued in terms of the TSA. Therefore it does not lie in



the mouth of MSEDCL to plead before this Commission that the Petitioner is not entitled to seek relief in terms of the TSA.

(e) Definition of force majeure under the TSA is inclusive and not exhaustive in nature. Therefore, the events not specifically covered under the definition would also be included under the definition of force majeure. Even otherwise, the Petitioner would be entitled to relief under Section 56 of the Indian Contract Act, 1872 as for the period where difficulties were being faced by the Petitioner it was impossible to execute and continue with the performance of the tasks necessary for the completion of the Project.

(f) All the issues raised with respect to force majeure were brought to the notice of this Commission by the Petitioner during the hearings held on 7.1.2014, 13.2.2014, 13.3.2014, 15.4.2014, 22.5.2014 and 11.7.2014. MSEDCL which was put on notice by this Commission, filed its response in the matter in Petition No. 331/SM/2013 and chose not to appear. There was no further requirement of a notice for force majeure under the TSA. Even otherwise, the difficulties faced by the Petitioner during the pendency of Petition No. 331/SM/2013 were in the nature of force majeure provided for under section 56 of the Indian Contract Act, 1872 and therefore, no separate notice is necessary.

(g) As regards the reply by GUVNL, the petitioner has contended that it is entitled to a relief of 3 months straight under clause 3.3.4. As



per clause 3.2 of the TSA, LTTCs were under an obligation to provide within 6 months from the Effective Date, an irrevocable letter to the lenders, which was only done on 18.9.2012 by MSEDCL which resulted in delay in financial closure. This delay was completely attributable to LTTCs and this also contributed and resulted in the delay in completion of the Project as per the scheduled COD. Therefore, in terms of Article 3.3.4 of the TSA, the Petitioner is entitled to relief of 3 months. The period is not required to be calculated on a day wise basis.

13. During the hearing on 15.1.2015 learned counsel for the petitioner submitted as under:

(a) The Scheduled COD of the project was 7.1.2014. However, the petitioner in Petition No. 331/SM/2013 informed the Commission that the COD of the project as per the certificate issued by POSOCO is 4.7.2014.

(b) As per Article 2.1 of the TSA, the effective date was 6.1.2011. However, as per schedule 3 of the TSA, the project was contemplated to be completed within a period of 36 months. Under the TSA, the time period was divided in a manner wherein 6 months were earmarked for the purposes of obtaining transmission licensee, adoption of tariff under Section 63 of the Act and for achieving financial closure and 30 months were earmarked for the purpose of construction. Article 3 of the



TSA clearly provides that the conditions subsequent shall be fulfilled by the petitioner (TSP). Therefore, within 6 months of the effective date, the transmission license should have been granted to the petitioner in order to enable it to proceed with the construction of the line.

(c) The application for grant of inter-State transmission license was filed before the Commission on 10.1.2011. However, the license was granted by the Commission on 24.8.2011 with delay of approximately three months.

(d) There was a three months delay in obtaining approval under Section 164 of the Act and Appellate Tribunal for Electricity in its judgment dated 2.12.2013 in Appeal No. 139/2012 has held that the delay in obtaining Section 164 approval from the Government of India is to be construed as a force majeure event.

(e) As per Article 3.2.1 of the TSA, LTTCs are under an obligation to provide within 6 months from the effective date an irrevocable letter to the lenders, which was only done on 18.9.2012 by MSEDCL, which also resulted in delay in financial closure. This delay was completely attributable to the LTTCs and also resulted in the delay in completion of the project. Accordingly, in terms of the Article 3.3.4 of the TSA, the petitioner is entitled to 3 months. The period is not required to be calculated on day wise basis. Therefore, the petitioner is entitled to the period prescribed under Article 3.3.4 of the TSA without any problem.



(f) In the event that TSP is prevented from performing its obligations due to fault of LTTCs or in case of delay due to force majeure, the COD shall be extended on “day for day” basis, for a maximum period of 180 days in terms of Article 4.4.2 of the TSA.

(g) The procedure under Article 16.2 for amicable settlement is not mandatory. The petitioner was left with no choice but to approach the Commission when MSEDCL threatened the petitioner to invoke the contract performance guarantee and demanded liquidated damages.

(h) During the pendency of the Petition No. 331 of 2013, CEA was being regularly informed and updated with respect to the blockade and other issues faced by it. During the hearing before the Commission, notices were issued to all stakeholders including MSEDCL and therefore, there was no further requirement of a notice for force majeure under the TSA.

(i) The definition of force majeure under the TSA is inclusive and not exhaustive in nature. The petitioner is entitled to relief for the period where difficulties were being faced by the petitioner. It was impossible for the petitioner to execute and continue with the performance of the tasks necessary for the completion of the project.

(j) The contention of MSEDCL that BG is an independent contract and injunction against the invocation of a bank guarantee cannot be issued is completely erroneous. The TSA is a statutory agreement and



has been approved by the Commission and the contract performance guarantee has been issued by the petitioner in terms of the TSA.

(k) During execution of the project, the petitioner encountered various difficulties and therefore, the petitioner is not liable for the delay caused in achieving COD and as such, the BG issued to the long-term beneficiaries should be returned to the petitioner.

14. Per contra, learned counsel for MSEDCL submitted as under:

(a) Force majeure as defined under Article 11.3 (a) of the TSA does not include adverse weather condition. It is not even the case of the petitioner that the weather conditions were exceptionally adverse and in excess of the statistical measures for last hundred years. Further, other reasons stated by the petitioner cannot be covered under the non anticipated events. While relying on a force majeure clause, the petitioner ought to show that it has taken all reasonable steps to avoid the event or events concerned. However, in the present case, no such case has been made by the petitioner.

(b) As per Article 11.5 of the TSA, the party is required to give notice to the procurers of any event of force majeure as soon as reasonably practicable, but not later than seven days after the date on which such party knew or should reasonably have known of the commencement of the event of force majeure. Therefore, in the absence of any such written notice, the petitioner cannot claim any



relief of force majeure.

(c) The petitioner has pleaded that CEA was regularly informed about the difficulties being faced by it while executing the project. However, no such notice required under Article 11. 5 of the TSA was sent by the petitioner to any other party under TSA. Therefore, the petitioner cannot claim condonation of delay in COD of the project. The petitioner has not complied with the direction of CEA and the delay in COD is due to lack of efforts by RSTCL. As per the judgment of the Hon'ble Supreme Court in *Rajasthan State Road Transport Corporation and another V Bajrang Lal in [(2014) 4 Supreme Court Cases 693]*, in the absence of necessary pleading and supporting evidence, the court is not under an obligation to entertain the pleas.

(d) The petitioner's reliance on the Judgment of Appellate Tribunal of Electricity dated 2.12.2013 in Appeal No. 139 of 2012 is misplaced because even the notice has not been sent by the petitioner in terms of Article 11.5 of the TSA.

(e) As per the law laid down by the Hon'ble Supreme Court in *Vinitec Electronics Private Ltd. Vs HCL Infosystem Limited [(2008) 1 Supreme Court Cases 544]* in the course of commercial dealings an unconditional bank guarantee is given, the beneficiaries are entitled to release such a bank guarantee in terms of the contract irrespective of any pending disputes. Therefore, calling for an order of injunction to



restrain enforcement of bank guarantee is incorrect.

(f) The delay in COD is attributable to the sole conduct of the petitioner and it is liable to pay for the liquidated damages as provided under TSA.

15. After the above hearing, KSEBL filed Affidavit dated 21.1.2015 submitting the following:

(a) As regards the issue of delay of 3 months in grant of transmission license by the Commission, it has been stated that the public notice inviting suggestions/objections in granting transmission license was published on 29.3.2011 and the hearing on the aforesaid matter was conducted only on 18.8.2011. The petitioner ought to have made proper submissions and follow ups for early hearing of the matter and ought to have obtained transmission license from the Commission through interim orders for early commencement of work and should have avoided the delay. However, the same had not occurred. Hence, the delay in getting transmission license from the Commission for the project has been caused due to laxity from the side of the petitioner.

(b) As regards the delay in grant of authorization under Section 164 of Electricity Act 2003, a person thus authorized may proceed with the works of placing electric lines without acquiring the land in question. As per the TSA, it is not mandatory for starting the work. The authority under section 67 read with work of Licensees rules, 2006 is adequate



for the petitioner to start the work. Only when there is any objection from the land owners, the issue of non grant of authorization under section 164 comes into play. Hence, the petitioner could have started the work under Section 67 without waiting for authorization under section 164.

(c) The Commission in the order dated 9.5.2013 in Petition No 169/MP/2011 and Petition No 170/MP/2011 filed by Talcher-II Transmission Co. Ltd. in a similar matter in the construction of Talcher-II Transmission system has held that the authorization under section 164 of the Electricity Act, 2003 is not a condition precedent for execution of the project under TSA as the licensee can execute the works of laying the transmission lines in accordance with the works of Licensee Rules, 2006 framed under section 67(2) of the Electricity Act,2003. Hence, it cannot be said that in absence of an authorization under section 164 of the Electricity Act,2003 a licensee is without any legal authority to start the work.

(d) As per clause 5.1.3 of TSA, it is the sole responsibility of the TSP to obtain all consents, clearances and permits in order to carry out its obligations. Hence, the delay in getting authorization from Ministry of Power is a fault on the part of TSP and cannot be passed on to LTTCs.

(e) The only obligation of LTTCs as per this clause is to assist the TSPs in getting consents. But it may be noted that the petitioner has



not appraised the LTTCs about the issues being faced for getting the approval under section 164 of Electricity Act, 2003.

(f) Moreover as per clause 5.3 of the TSA, TSP shall provide progress reports on a monthly basis so as to enable the LTTCs to monitor and co-ordinate the development of the project, matching with the interconnection facilities. But the Petitioner has not provided such progress reports and hence, LTTCs cannot be held liable for the delay in getting authorization for the project from Ministry of Power. Had the long term customers been informed, they might have taken up the matter in SRPC forums and would have assisted the Petitioner in getting this authorization. Hence, there is no default on the part of the beneficiaries in providing such assistance.

(g) Plea of the delay in providing irrevocable letter to the lenders by MSEDCL, is also not tenable because as per clause 11.6 of the TSA, the affected party i.e. the Petitioner is expected to use its reasonable efforts to make follow ups with the LTTCs for enabling the irrevocable letter to the lenders from MSEDCL and MSEDCL cannot be fully made liable for the delay.

(h) As per clause 6.4.1 of the TSA signed between RSTCL and the LTTCs, the TSP is liable to pay liquidated damages and other compensation to LTTCs for not achieving the scheduled COD as per the provisions in clause 6.4 of TSA.



(i) In view of the foregoing the petitioner is liable to provide liquidated damages as per clause of the TSA entered into between the petitioner and the beneficiaries.

(j) As per clause 6.5.1 of the TSA, if the TSP fails to achieve COD of any of the elements on their respective scheduled COD specified in the agreement, subject to conditions mentioned in Article 4.4, the LTTCs shall have the right to en-cash the contract performance Guarantee and appropriate in their favour as liquidated damages an amount specified in Article 6.4.1, without prejudice to other rights of the LTTCs under this agreement.

(k) As per clause 6.5.2 of the TSA, the contract performance guarantee shall be released by the LTTCs within 3 months from the COD of the project and in the event of delay in achieving scheduled COD of any of the elements by the TSP and consequent part invocation of the contract performance guarantee.

16. MSEDCL, vide its affidavit dated 29.1.2015 has vehemently denied the allegation that delay in issuing irrevocable letters to the lenders has caused delay in financial closure which consequently led to delay in execution of project within time. According to the Respondent, Clause 3.2.1 of TSA extracted hereunder, provides that LTTC shall furnish the letter to petitioner within a period of 6 months from entering into TSA.

“3.2 satisfaction of conditions subsequent by the Long Term Transmission Customers:



1.2.1. The Long Term Transmission Customers shall provide, within six(6) months from the Effective Date, an irrevocable letter to the Lenders duly accepting and acknowledging the rights provided to the Lenders as per Article 15.3 of this Agreement and all other RFP Project documents”.

17. In the light of the above, it has been contended that the petitioner was required to provide the details of lenders who have agreed on or before COD of the project to provide the TSP with debt financing described in the capital structure schedule and any successor banks or financial institutions to whom their interests under the Financing Agreements may be transferred or assigned before the irrevocable letter could have been provided by the answering respondent.

18. The petitioner requested MSEDCL for this letter vide its letter dated 13.8.2012. However, the petitioner failed to divulge any detail in respect of the lender in whose favour the irrevocable letter was to be issued by the answering respondent. Thereafter, on the request of the answering respondent, the petitioner furnished the said detail vide its letter dated 12.9.2012 wherein the name of the AXIS Bank as the lender was suggested by the petitioner. The said letter was received by the answering respondent on only on 13.9.2012. Immediately after receiving the said letter, answering respondent provided the irrevocable letter specifically in favour of the AXIS bank on 18.9.2012 i.e. within a period of 5 days. Thus, there is no delay on the part of the answering respondent and hence, the contention of the petitioner that the answering respondent has not furnished the letter on time is totally misleading and fraudulent and the same is liable to be rejected.



19. In response to the Petitioner's contention that no notice was required for Force Majeure, MSEDCL has cited Clause 3.3.4, extracted hereunder:

“3 Conditions Subsequent

3.3 Consequences of non fulfillment of conditions subsequent

3.3.4 In case of inability of the TSP to fulfill the conditions specified in Article 3.1.3 due to any Force Majeure event, the time period for fulfillment of the conditions subsequent as mentioned in Article 3.1.3, shall be extended for a period of such Force Majeure Event, subject to a maximum extension of three(3) months, continuous or non-continuous...”

20. As per MSEDCL, to get the benefit under this clause, the petitioner first has to prove that the delay has occurred due to Force Majeure reasons. The petitioner has miserably failed to do so. It is settled law that the contract should be read as a whole and not in bits and pieces as held by the Hon'ble Supreme Court in *Puravankara Projects Ltd. Vs Hotel Venus International, (2007) 10 SCC 33*. In the present matter, the benefit under Clause 3.3.4 can be claimed only in the case of Force Majeure Event, the said Clause of the TSA merely mentions for the period to be extended in case of Force Majeure Event.

21. MSEDCL has also cited clause 11.5.1, extracted herein below, in support of its submission that notice is necessary for claiming benefit under Force Majeure.

“11.5 Notification of Force Majeure Event:

11.5.1 The affected Party shall give notice to the other party of any



event of Force Majeure as soon as reasonably practicable, but not later than seven(7) days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one(1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the affected party's entitlement to claim relief under this agreement. Such notice shall include full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. The affected party shall give the other Party regular reports on the progress of those remedial measures such other information as the other party may reasonably request about the Force Majeure

22. The Petitioner has vide its affidavit dated 29.01.2015 submitted as under:

(a) The Transmission License was granted by this Commission by order dated 24.8.2011. There was a delay of 2 months 7 days beyond the 6 months period specified under article 3 of the TSA for fulfillment of conditions subsequent to the effective date. The petitioner also by its letters dated 27.6.2011 and 14.7.2011 had requested this Commission for an early grant of transmission license.

(b) The documents submitted by the petitioner to MSEDCL under Article 3.1.3(c) of the TSA indicated in the milestone chart that the time period for grant of license, adoption of tariff and grant of permission under section 164 of the Electricity Act, 2003 was to be completed before 15.8.2011. Due to undisputed facts of the instance case, the same was not done.



(c) There were various other factors such as blockade, unprecedented rainfall, national general elections and Karnataka legislative elections during the period of May, 2013 which also contributed to the delay of the project.

(d) CEA has specifically acknowledged that there were ROW and blockade issues, which is nothing but force majeure under TSA. RSTCL has informed the project delays to CEA and MSEDCL regularly. A progress meeting was held at MSEDCL office at Mumbai on 27.9.2013 and the petitioner clearly brought out force majeure issues being faced by the petitioner.

(e) The Commission started monitoring the Project pursuant to letter dated 30.9.2013, a fact duly noted in order dated 10.12.2013 passed by this Commission. The CEA was the monitoring agency and referred the matter to this Commission under Article 5.8 of the TSA. This Commission took cognizance of the letter dated 30.9.2013 and exercised jurisdiction under section 79 (1) (c) of the Act read with Regulation 10 (2) of the 2009 Regulations.

(f) This Commission specifically noted in its order dated 10.12.2013 in paragraph 5 that

"In view of the above, the respondents are directed to explain, latest by 12.12.2013 regarding the reasons for delay and the remedial measures being taken by them to implement the project within the schedule time."



(g) The Commission had had issued notice to the lead LTTC, being Respondent No.23, and had in its order dated 15.10.2014 disposing off Petition No. 331 of 2013 accepted the contentions of the Petitioner and in its supervisory and regulatory capacity did not pass any adverse order for the delay in the completion of the Project from the Scheduled COD, i.e. January 7, 2014.

(h) Further, the lead LTTC being MSEDCL had also filed a reply before this Commission. While submitting the reply MSEDCL had also filed copy of the letters written by the Petitioner herein on 3.10.2013, and 2.12.2013 wherein issue of blockade (RoW) was raised and it was clearly mentioned that the same resulted in no work for 3-4 months. However, the lead LTTC being MSEDCL rejected the same and had also written to the Ministry of Power regarding the same. Therefore, it cannot be their case that notice was not given regarding blockade, which is indirect non-natural force majeure event. Further, proof of exceptionally heavy rainfall, being an act of god falling under natural force majeure event and also covered under the general force majeure clause and the damages caused to the construction at different construction sites as well as non-possibility of commencement of work in such areas has been provided to all concerned, which is an admitted fact. However, it is a dispute whether it would qualify for force majeure only because of one category being "exceptionally adverse weather conditions which are in excess of statistical measures for the last 100



years". Unprecedented rainfall and the damages caused by it including stoppage of work clearly falls under force majeure event under Article 11.3 of the TSA as well as act of god (Article 11.3(a)) and it is not mentioned in the inclusive but not limited clause thereon and therefore, definitely not hindered in any manner under the general category of "exceptionally adverse weather conditions".

(i) The entire submission of MSEDCL on the issue of interim relief on invocation of BG is misplaced and erroneous. TSA is a statutory agreement and has been approved by this Commission by order dated 29.4.2011. The contract performance guarantee has been issued by the Petitioner in terms of the TSA. In fact the calculation of liquidated damages and the demand thereto by MSEDCL has been in terms of the TSA. In fact, the threat of invocation has also been made by MSEDCL in terms of the TSA. Reference to letter dated 18.10.2014 issued by MSEDCL is instructive in this regard:

"As per the Transmission Service Agreement (TSA) signed on 04.08.2010, the Raichur Sholapur 765 kV transmission line-1 has to be completed before 06.01.2014. However, CoD of the said line has been declared on 04.07.2014. Thus, there is considerable delay of 179 days for achieving CoD of the said line.

In accordance with Article 6.4.1 of the TSA, if the TSP fails to achieve CoD of any element of the project, then the TSP shall pay to the Long Term Transmission Customers (LTTCS), a sum equivalent to 3.33% of Monthly Transmission Charges applicable for each day of delay upto 60 days of delay and beyond that time limit at the rate of 5% of the Monthly Transmission Charges, as Liquidated Damages (LD). The first year tariff as per bid is Rs. 35.20 Crs p.a. & accordingly Monthly Transmission Charges comes to Rs. 2.93 Crs. Thus, the total amount of LD as per Article 6.4.1 works out to Rs. 23.31 Crs.



Further, as per Article 6.4A of the TSA, if the TSP fails to pay amount of LS within said period of ten (10) days, the LTTCs shall be entitled to recover the said amount of the LD by invoking the Contract Performance Guarantee (CPG). If the then existing CPG is for an amount which is less than the amount of LD payable under Article 6.4, the TSP shall be liable to forthwith pay the balance amount.

Therefore, you are requested to pay the LD amount of Rs. 23.31 Crs. to all LTTCs in proportion to their share as per Schedule -1 of the TSA within 10 days. Failing which the action as per provision of TSA will be initiated.”

(j) The contract performance guarantees were issued in terms of the TSA, which is a statutory contract. Further, the liquidated damages have been calculated by MSEDCL in terms of the TSA. For seeking liquidated damages MSEDCL itself has relied on the provisions of the TSA and now it cannot raise a plea that the Contract Performance Guarantee is not relatable to the TSA. Even though the Contract Performance Guarantee may be a different contract, however, the same has been issued in terms of the TSA. Once it has been issued in terms of the TSA it does not lie in the mouth of MSEDCL to plead before this Commission that the Petitioner is not entitled to seek relief in terms of the TSA. Further, it is nobody's case that the Contract Performance Guarantees were not issued by the Petitioner. The Original Contract Performance Guarantees were issued by the Petitioner and were in the possession of the LTTCs. Therefore, now to contend that the Original Contract Performance Guarantees were not affixed at the time of filing of the present petition is not only mischievous but also without any basis. It is an admitted fact the format



of the Contract Performance Guarantee is annexed to the TSA and is part thereof. Therefore, there was no need to annex the copies of the Original BG as they were issued in terms of the TSA.

Analysis and Decision:

23. Having heard the representatives of the parties and perused the material on record, we proceed to dispose of the matter hereunder.

24. The project, Raichur-Sholapur 765 kV S/C Transmission Line, is a tariff-based competitive bidding project on Build, Own, Operate and Maintain (BOOM) basis. Rural Electrification Corporation Transmission Projects Company Limited (RECTPCL) was Bid Process Coordinator. Raichur-Sholapur Transmission Company Limited (RSTCL) was incorporated on 19.11.2009 by RECTPCL as its wholly owned subsidiary to initiate work on the Project to build, own, operate and maintain the transmission system for evacuation of power from Krishnapatnam UMPP (4000 MW) and export of power from various IPPs coming in the Southern Region to their target beneficiaries in Western region and Northern Region and for synchronization of Southern Region with the rest of the Indian Grid and subsequently to act as a Transmission Service Provider (TSP) after being acquired by the successful bidder. The project was incorporated to build, own, operate and maintain the transmission system associated with Krishnapatnam UMPP Synchronous inter-connection between Southern Region and Western Region(Part-B) comprising the following element:



| Name(end points location) | Voltage class (kV) | Length(km) | Type S/C or D/C | Completion schedule |
|---------------------------|--------------------|------------|-----------------|-----------------------------------|
| Raichur-Sholapur | 765 kV | 208 | S/C | 36 months from the effective date |

25. REC Transmission Projects Company Limited invited bids on 26.02.2010 in accordance with the Tariff Based Competitive Bidding Guidelines for Transmission Service issued by the Government of India. Based on the evaluated levelised transmission charges, the Bid Evaluation Committee recommended the consortium of M/s Patel Engineering Limited with Simplex Infrastructure Limited and BS Transcomm Limited as the successful bidder. The letter of intent (LOI) was issued to the Consortium on 16.12.2010 and consortium acquired RSTCL on 7.1.2011. TSA was entered into between the various LTTCs and RSTCL on 4.08.2010.

26. In compliance with the TSA, the petitioner filed Petitions No. 5/2011 and 6/2011 before this Commission for grant of transmission license and for adoption of transmission charges respectively. The Commission vide its order dated 24.8.2011 in Petition No. 5/2011 granted licence and in order dated 12.8.2011 in petition no. 6/2011 adopted the tariff of the transmission systems.

27. Article 2 of the TSA defines the Effective Date as under:

2.1 Effective Date

This agreement shall be effective from later of the dates of the following events:

(a) The agreement is executed and delivered by the Parties; and



(b) The selected Bidder has acquired for the Acquisition Price. one hundred percent(100%) of the equity shareholding of REC Transmission Projects Company Ltd. in Raichur Sholapur Transmission company Limited along with all its related assets and liabilities as per the provisions of the Share Purchase Agreement and

(c) The Selected Bidder on behalf of the TSP, has provided the Contract Performance Guarantee, as per terms of Article 3.1 of this agreement.

28. The TSA was executed and delivered by the parties on 4.08.2010. The consortium of Patel Engineering Limited (Lead member), Simplex Infrastructure Limited and BS Transcomm Limited acquired hundred percent(100%) equity holding in Raichur-Sholapur Transmission Company limited on 7.1.2011. Therefore, the effective date for implementation of the above mentioned project is 7.1.2011.

29. As per schedule 3 of the TSA, the project was contemplated to be completed within a period of 36 months. Therefore, the Scheduled COD of the project was 7.01.2014. However the petitioner has commissioned the assets covered in the instant petition is 4.7.2014. Therefore, the commissioning of the project was delayed by approximately 6 months (179 days) as per scheduled COD.

30. The Petitioner has submitted that it has completed the Project in terms of the TSA. During execution of the Project, it encountered various difficulties in the nature of blockades such as concerned farmers were reluctant to allow the officials to enter their fields, right of way issues, adverse climatic conditions, incessant untimely rain fall, cyclone and presence of black cotton



soil preventing access to many towers locations, etc. The petitioner has submitted that there were various other factors which are relevant and also contributed to the delays. However, it has put in additional resources and compensated for delays. The petitioner has submitted that the only delay, the net delay of 6 months was completely attributable to delay in grant of transmission licensee and issuance of permission under section 164 of the Act.

31. It is noted that although the petitioner has contended that there are various factors which are relevant and also contributed to the delays, net delay of 6 months is completely attributable to delay in grant of transmission licensee and issuance of permission under section 164 of the Act. Therefore, we proceed to analyze the pleadings of the parties only on above two grounds.

32. The petitioner has submitted that it had filed petition No.5/2011 and 6/2011 for grant of transmission licensee and adoption of tariff before this Commission. The Commission vide letter dated 3rdMarch, 2011 had raised certain queries regarding petition No. 5/2011. The petitioner has submitted that it had replied the queries and additional information on 11thMarch, 2011. First hearing of the aforementioned petitions was held on 21.4.2011 and the 2ndhearing was held on 18.8.2011.The petitioner has submitted that the Commission granted Transmission license to the petitioner on 24.8.2011 and informed the petitioner by latter dated 13.9.2011.



33. GUVNL has submitted that in terms of Article 3 of the TSA, the conditions subsequent provided for are to be satisfied by the Petitioner. These include the obligation to obtain the transmission license required under sections 12 and 14 of the Electricity Act, 2003 from the Appropriate Commission and also to obtain the Order for adoption of transmission charges by the Appropriate Commission as per the provisions of Section 63 of the Electricity Act, 2003. It is for the Petitioner to pursue diligently and arrange for the above two, namely, the license and adoption of tariff in a manner that the execution of the project by the Scheduled COD is not affected. The period of 36 months was stipulated in the Bidding Documents for the Scheduled COD after having provided for various conditions subsequent as specified in Article 3. The bidders for the Petitioner's project ought to know that the time taken for obtaining license or the approval of adoption of tariff is included in the period of 36 months. It is for the selected bidder to arrange the affairs in such a manner including doing all preliminary work simultaneously with the application for grant of license and application for adoption of tariff. It is, therefore, not valid for the Petitioner to claim that the time taken for obtaining the license and time taken for getting adoption of tariff need to be excluded either fully or partly or beyond the period of six months. Further, obtaining of license and approval from the Appropriate Commission for adoption of tariff, are the obligations of the selected bidder. It is not open to the Petitioner to raise such issues for seeking extension of time. These are not, in any event, either Force Majeure or an event of default on the part of the LTCC as provided for in Article 4.4 of the TSA.



34. GUVNL has submitted that the Force Majeure Event is defined and provided for in Article 11 of the TSA as an event or circumstance that partly or wholly prevents or unavoidably delays the performance of the obligations under the TSA. Further, in terms of Article 11.5 of the TSA, the Petitioner was required to give notification of the Force Majeure Event within a period of 7 days after the date of the commencement of the event of Force Majeure and such notice is a pre-condition for the Petitioner to claim implications or consequences of Force Majeure. In the present case, the Petitioner did not give the requisite notification of Force Majeure Event and accordingly cannot claim any consequences of the alleged Force Majeure. In any event, the allegation of Force Majeure affecting the project awarded to the Petitioner is vague and without any merit.

35. KSEBL has submitted that public notice inviting suggestions/objections in granting transmission license was published on 29.3.2011 and the hearing on the aforesaid matter was conducted only on 18.8.2011. The petitioner ought to have made proper submissions and follow ups for early hearing on the matter and ought to have obtained transmission license from the Commission through interim orders for early commencement of work and should have avoided the delay. However, the same had not occurred. Hence, the delay in getting transmission license from the Commission for the project has been caused due to laxity from the side of the petitioner.

36. We have considered the rival submissions of the parties and perused



the material on record and proceed to dispose of the matter:

37. The Petitioner's thrust is that the delay in achieving COD is attributable to events of the nature of Force Majeure and therefore the delay cannot be held against it. Factors which contributed for delay are as under:

- (a) Delay in award of transmission licence
- (b) Delay in grant of permission under Section 164 of the Electricity Act, 2003
- (c) Lok Sabha and State Legislature elections
- (d) Farmers resistance
- (e) Unprecedented rains
- (f) Unforeseen ground conditions such as inclined rock base under the river bed

38. The question whether obtaining permission under Section 164 of the Electricity Act, 2003 would constitute Force Majeure is no more res integra. This issue has been put to rest in the Hon'ble Appellate Tribunal for Electricity judgment dated 2.12.2013 in Appeal No. 139 of 2013.

39. However, relief to the Petitioner under Force Majeure is subject to another condition as prescribed in clause 11.5.1 of the TSA extracted hereunder:

"11.5 Notification of Force Majeure Event

11.5.1 The affected party shall give notice to the other party of any event of Force majeure as soon as reasonably practicable, but not later than seven(7) days after the date on which such party knew or should reasonably have known of the commencement of the event of



Force majeure.

40. It is an admitted fact that no such notice as mandated under the above clause was issued by the Petitioner. The Petitioner was only contending that its other actions are equivalent to the above notice. The Petitioner in para 7.3 of the Rejoinder has made a feeble attempt to cover up its lapse contending that all the issues raised with respect to force majeure were brought to the notice of this Commission by the Petitioner during the hearings held on 7.1.2014, 13.2.2014, 13.3.2014, 15.4.2014, 22.5.2014 and 11.7.2014. MSEDCL which was put on notice by this Commission, filed its response in the matter in Petition No. 331 of 2013 and chose not to appear. According to the Petitioner, there was no further requirement of a notice for force majeure under the TSA. Even otherwise, the difficulties faced by the Petitioner during the pendency of Petition No. 331 of 2013 were in the nature of force majeure provided for under section 56 of the Indian Contract Act, 1872 and therefore, no separate notice is necessary.

41. We do not find any force in the submission of the petitioner. By the Petitioner's own averments, events of the nature of Force Majeure occurred in 2011 as explained hereunder:

(a) Delay in issue of Transmission licence: Petition No. 5/2011 was filed on 10.1.2011 and heard on 18.8.2011. Commission vide its order dated 24.8.2011 granted Transmission licensee which was intimated to the petitioner vide letter dated 13.9.2011.

(b) Permission under Section 164 of the Electricity Act, 2003: The



petitioner has submitted that it had, vide letter dated 10.1.2011, applied for permission under section 164 of Electricity Act, 2003 which was granted by Ministry of Power vide its letter dated 24.11.2011.

42. In either case it is evident that no notice was issued to the beneficiaries within the prescribed statutory period as mandated by clause 11.5.1 of the TSA. Under these circumstances, we have no hesitation to hold that the primary requirement of issue of notice under clause 11.5.1 of the TSA has not been complied with in the present case for claiming relief under the Force Majeure clause. Therefore, we hold that the petitioner has not complied with the provisions of the TSA before approaching the Commission and accordingly the petition is dismissed.

43. This order disposes of Petition No. 419/MP/2014.

Sd/-
(A. S. Bakshi)
Member

Sd/-
(A.K. Singhal)
Member

Sd/-
(Gireesh B.Pradhan)
Chairperson

