

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 188/MP/2015**

- Subject : Petition under Section 79(1)(f) and (c) and other applicable provisions of the Electricity Act, 2003 read with Regulation 32 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, against the arbitrary acts and omissions of respondent inter-alia towards threatening encashment of bank guarantee furnished by petitioner under the terms of Agreement for Long Term Access with System Strengthening (Agreement) dated 14.3.2012, executed between the parties.
- Date of hearing : 24.1.2017
- Coram : Shri Gireesh B. Pradhan, Chairperson  
Shri A.K. Singhal, Member  
Shri A.S. Bakshi, Member  
Dr. M.K. Iyer, Member
- Petitioner : Sarda Energy and Minerals Limited.
- Respondent : Power Grid Corporation of Limited
- Parties present : Shri J.K. Chaudhary, Advocate, SEML  
Shri Sitesh Mukherjee, Advocate, PGCIL  
Shri Gautam Chawla, Advocate, PGCIL  
Ms. Akansh aTyagi, Advocate, PGCIL  
Ms. Jyoti Prasad, PGCIL

**Record of Proceedings**

Learned counsels for the petitioner and the respondents argued at length. Learned counsel for the petitioner submitted that the present petition has been filed seeking a direction to restrain PGCIL invoking construction Bank Guarantee of Rs 7.8 crore. Learned counsel further submitted as under:

- (a) The petitioner is in the process of setting up 350 MW thermal power plant in the State of Chhattisgarh. On 14.3.2012, the petitioner entered into a Long Term Open Access Agreement with PGCIL for long term access facilitating inter-State transmission of electricity and furnished construction BG of Rs. 7.8 crore.

(b) The petitioner was allotted 125.77 hectare of land for setting the project which has been identified as coal bearing area by Ministry of Coal and allotted to NTPC for exploration of coal and the petitioner deprived to sue the project land for the purpose of setting up of the power plant. Due to such act of Government towards identifying the project land as coal bearing area and allotting the same to NTPC, have rendered the agreement dated 14.3.2012 frustrated and impossible for being performed.

(c) The petitioner had intended to source its coal requirements for the power plant from the coal block allocated to it for captive consumption, namely, Gare Palma IV/7. The petitioner had made the coal block operational since year 2009 However, Hon`ble Supreme Court vide its judgment dated 25.8.2014 cancelled the said coal block. This was another jolt to the petitioner towards its efforts of setting up of power plant in the subject project land.

(d) It is settled position of law that where a contract suffers frustration, the dissolution of contract occurs automatically absolving the parties of their obligations under the contract. The doctrine of frustration is an aspect of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence, comes within the purview of Section 56 of the Indian Contract Act, 1872.

(e) The terms of the Bank guarantee to be invoked by PGCIL, are conditional requiring PGCIL to make a claim only for the purpose of collecting the transmission charges and damages considering the total estimated capital investment to be made by PGCIL. So far neither the stage of collecting transmission charges has arrived nor has PGCIL made any capital investment entitling it to claim damages.

(f) In support of its arguments, learned counsel relied on the following judgments of Hon`ble Supreme Court and APTEL:

(i) Satyabrata Ghose v. Mugneeram Bangur & Co. and Another, (1954) SCR. 310.

(ii) Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd, AIR 2004 SC 1344

(iii) Uttar Haryana BijliVitrان Nigam Limited v. CERC & Others, APTEL on 7.4.2016 in Appeal No.100 of 2013 ;

2. Learned counsel for PGCIL submitted as under:

(a) The plea of frustration advanced by the petitioner, on the alleged non-allocation of specific land affecting the completion and commencement of the

project, cannot be ground for not fulfilling its obligation under LTAA. The total amount of land required for setting up the project was 208.409 acres and the petitioner was in possession of only 102.665 acres of land as mentioned in the status report submitted by the petitioner in the 7<sup>th</sup> JCC Meeting held on 25.2.2014.

(b) The petitioner has not shown bona fide efforts made by it in further acquisition of land required for setting up the project since February 2013. Now, the petitioner is seeking to take advantage of subsequent event of land acquisition by the Government and the contentions of frustration raised by it are afterthought.

(c) PGCIL being CTU convened various JCC meetings for periodic review of progress of generating projects including the petitioner's power plant and its own transmission system and to re-plan/ review the transmission plans in case there is adverse progress in generation projects. However, the petitioner neither attended the aforesaid JCC meetings nor informed/updated PGCIL on the status of the project.

(d) The petitioner neither signified the event of force majeure nor informed PGCIL not to develop the transmission system upon allocation of project land to NTPC in 2012. In fact, the petitioner for the very first time informed PGCIL about the allocation of land to NTPC and alleged frustration in response to PGCIL's notice dated 24.6.2015.

(e) There is no provision in the LTAA for force majeure event or giving any right to the petitioner to seek injunction against invocation of BG or refund of the proceeds against BG in the bank account of the petitioner on the ground of frustration of LTAA. In fact, clause 6.0 of LTAA provides for renewal or replacement of LTAA. Therefore, there is no unilateral right reserved to the petitioner for seeking variation in LTAA.

(f) LTAA is not a contingent contract on coal supply and, therefore, LTAA cannot be said to be frustrated on account of captive coal mine allocated for the project consequent to the Hon'ble Supreme Court's order dated 25.8.2014.

(g) De-allocation of coal mine has not rendered LTAA impracticable of performance. In fact, the petitioner can procure the coal from alternative sources such as international market. On account of de-allocation, performance may become onerous or difficult to perform but it is not an impossibility to perform, particularly in the context of section 56 of the Indian Contract Act, 1872 as it is a well settled principle of law that the increase in price or terms and conditions making the performance onerous or difficult cannot be said to be an event making the performance impossible.

(h) PGCIL, being a nodal agency, encashed the BG *inter alia* for non-compliance of the Connectivity Regulations, breach of obligations under LTAA, and the non-operationalization of LTA by the petitioner. Therefore, invocation and encashment of petitioner's BG by PGCIL was just and proper and was done in terms of the applicable regulations. Thus, no direction ought to be given to PGCIL to deposit the proceeds of the BG in the bank account of the petitioner.

(i) In support of its arguments, learned counsel relied on the following judgments of Hon'ble Supreme Court and APTEL:

(i) Gangotri Enterprises Limited Vs. UoI & Ors, Civil Appeal No. 4814 of 2016

(ii) Jayaswal Neco Urja Limited vs. PGCIL, APTEL on 15.4.2014 in Appeal No. 197 of 2014,

3. After hearing the learned counsels for the petitioner and PGCIL, the Commission directed the petitioner and the respondent to file their written submissions by 16.2.2017 with copy to each other failing which order would be passed based on documents available on record.

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

**By order of the Commission**

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