

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.188/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Dr. M.K. Iyer, Member

Date of Order : 29th of September, 2017

In the matter of

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 herein.

And

In the matter of

Sarda Energy and Minerals Ltd.
73 A, Central Avenue, Nagpur
Maharashtra - 440018

...Petitioner

Vs.

Power Grid Corporation of India Ltd.
B-9, Qutub Institutional Area,
Katwaria Sarai, New Delhi – 110016

...Respondent

Parties present:

Shri J.K. Chaudhary, Advocate, SEML
Shri Sitesh Mukherjee, Advocate, PGCIL
Shri Gautam Chawla, Advocate, PGCIL
Ms. Akansha Tyagi, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL

ORDER

The Petitioner, Sarda Energy and Minerals Ltd., has filed the present petition seeking a declaration that the Long Term Open Access Agreement dated 14.3.2012 has been frustrated due to de-allocation of coal mine and non-allocation of specific land for the generating station and therefore, the Petitioner is not liable for any of the obligations under the LTA Agreement.

2. The Petitioner has submitted that the following facts have led to the filing of the present petition:

(a) The Petitioner entered into Memorandum of Understanding dated 7.1.2005 and 16.10.2006 with the Government of Chhattisgarh for setting up of 350 MW power plant (hereinafter referred to the Project) at Kolam in the State of Chhattisgarh. Subsequently, the Petitioner applied for and was granted LTA for 156 MW. The Petitioner entered into the Long Term Access Agreement (LTA Agreement) dated 14.3.2012 with PGCIL for 156 MW LTA. As required under the LTA Agreement, the Petitioner furnished two bank guarantees of ₹5 crore and ₹ 2.8 crore respectively in favour of PGCIL.

(b) After the execution of the LTA Agreement and also after having put in substantial amount of ₹41 crore towards acquisition of land and obtaining of environment clearance for setting up the project, the land on which the Petitioner was taking steps for setting up of power project was declared by the Government as coal bearing area, whereby any non-coal exploration activity was prohibited on the said land. The Central Mine Planning and Design Institute Ltd. (CMPDI) vide their

letters dated 28.6.2014, 21.7.2014 and 1.8.2014 informed the Petitioner that the subject project land was falling in Bhalumuda Coal Block which had been allotted to NTPC through Government dispensation route and was required to be subjected to coal exploration to be conducted by Mineral Exploration Corporation Ltd. (MECL).

(c) Subsequently, the Petitioner on enquiry got to know that in May 2012, the subject project land was identified by the Ministry of Coal as coal bearing area, while the Petitioner was involved in obtaining various permissions and clearances towards setting up of the power project and during such period, no objection was raised in this regard.

(d) The Petitioner made representations before the Ministry of Power, Ministry of Coal and MNRE and sought their intervention in the matter *inter-alia* for enabling the Petitioner to set up its power plant. However, no response was received from them in this regard.

(e) 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 and had made the said coal block operational since 2009. However, the Hon`ble Supreme Court vide its judgment dated 25.8.2014 cancelled the said coal block which derailed the efforts of the Petitioner to set up the power plant in the subject project land.

(f) Subsequently, NTPC vide its letter dated 8.4.2015 informed the Petitioner that formal allotment of the subject project land has been made in its favour by Ministry of Coal vide its letter dated 31.3.2015 and accordingly, the Petitioner is required to permit the MECL to conduct and complete the coal exploration work for submission of the Geological Report.

(g) In the aforesaid circumstances, the Petitioner vide its letter dated 6.7.2015 informed PGCIL that after having taken substantial steps towards establishment of the project and having incurred an expenditure of about ₹40 crore, the Petitioner is not able to establish the proposed project due to de-allocation of the captive coal mine from which coal was to be sourced to the proposed project and allocation of Bhalumuda coal block to NTPC by Government of India. The Petitioner requested PGCIL to consider the LTA Agreement dated 14.3.2012 void and absolved of its obligations without initiating any penal actions. Subsequently, the Petitioner started receiving waves of adverse indications from PGCIL towards invocation of its bank guarantee furnished under the LTA Agreement dated 14.3.2012 which was came to knowledge of the Petitioner when officials of the Petitioner visited the office of PGCIL on 21.7.2015.

(h) Under the categorical terms of bank guarantees, it is only the money which has become payable by the Petitioner that can be paid by the bank to PGCIL. So far, in the facts and circumstances of the present case, neither the amount of transmission charges has become payable nor PGCIL has made any capital investment, which would render any amount payable by the Petitioner. Any

attempt of invocation of the Bank Guarantee would be beyond the terms of the Bank Guarantee and would entail unjust enrichment upon PGCIL and therefore, such attempt is liable to be restrained.

3. Against the above background, the Petitioner has filed the present petition with the following prayers:

“(a) Declare that the Agreement dated 14.3.2012 has been frustrated and is not capable of being performed and consequently the petitioner is not liable to any of its obligations under the said agreement dated 14.3.2012;

(c) Restrain the respondent from invoking, encashing and/or appropriating the following bank guarantees furnished by the petitioner under the terms of Agreement dated 14.3.2012 which has become frustrated;

(d) Pass any other order in favour of petitioner that may deem fit in the facts and circumstances of the present case.”

4. PGCIL in its reply to the Petition has submitted as under:

(a) After the Petitioner was granted LTA for 156 MW on 5.8.2011 for its proposed 350 MW generating station, the Petitioner entered into a LTA Agreement dated 13.3.2012 with PGCIL. As per the LTA Agreement, Unit-I, II and III of the generating station were scheduled for commercial operation on December, 2014, March 2015 and May, 2015 respectively. In the 5th Joint Coordination Committee meeting held on 19.2.2013, the Petitioner submitted the status report of the project under which the date of commercial operation for the units were unilaterally revised by the Petitioner for unit-I as December 2016 and unit-II as April, 2017. The Petitioner did not attend the subsequent four JCC meetings convened by PGCIL between February 2013 to May 2015. On 24.6.2015, PGCIL issued

notice to the generators, including the Petitioner, for participation in Special JCC meeting for High Capacity Power Transmission Corridors for IPPs to be held on 7.7.2015 and asked the IPPs to share status of their generation projects and dedicated transmission system failing which it would be presumed that the generation projects had been abandoned. In response, the Petitioner vide its letter dated 6.7.2015 informed PGCIL that due to extraordinary situation beyond its control, the implementation of generating station has become impossible and requested PGCIL to consider its LTA Agreement as void and it should be absolved of its obligations.

(b) The Petitioner has never been in possession of the total land required for setting up the project, despite the fact that the date of commercial operation of Unit-I of the project was December 2014. The total land required for setting up the project was 208.409 acres and the Petitioner was in possession of only 102.665 acres land as mentioned in the status report submitted by the Petitioner for the 7th JCC Meeting held on 25.2.2014. Subsequently, the said 102.665 acres of land was declared by the Government as coal bearing area and allocated to NTPC.

(c) The performance of the obligation under LTA Agreement is not conditional upon the generating station established by the Petitioner. There is no provision in the LTA Agreement 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 LTA Agreement. Since, clause 6 of the LTA Agreement provides for renewal or replacement of LTA Agreement, there is no unilateral right reserved to the Petitioner for seeking variation in LTA Agreement.

(d) The Petitioner's claim for non-enforcement of its obligation under LTA Agreement has to be examined only with reference to the provision of LTA Agreement, statutory provision and regulations framed by the Commission, and not with reference to any general plea for waiver or considering any other extraneous and irrelevant aspects sought to be pleaded by the Petitioner. The Petitioner is eligible for relief only if the same is provided in LTA Agreement or if the Petitioner failed to use the open access due to breach on part of PGCIL.

(e) The Petitioner's plea of frustration of LTA Agreement due to de-allocation of captive coal mine is not maintainable. LTA Agreement is not a contingent contract on coal supply and, therefore, LTA Agreement cannot be said to be frustrated on account of de-allocation of captive coal mine allocated for the project consequent to the Hon'ble Supreme Court's judgment dated 25.8.2014. It is a well settled principle of law that increase in the price or terms and conditions making the performance onerous or difficult cannot be said to be an event making the performance impossible. Therefore, on account of de-allocation of the coal mine, the 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.

- (f) Clause 1 of the LTA Agreement and provisions of BGs clearly provide that PGCIL can encash the BG in case of adverse progress of work under the scope of the Petitioner or if the Petitioner makes an exit from the project.
- (g) The settled position of law is that courts must be slow to grant a stay on the encashment of letters of credit and/ or bank guarantees subject to two exceptions, namely (i) fraud of an egregious nature committed in the notice to the bank, which would vitiate the very foundation of the letter of credit and the beneficiary seeks to take advantage of the situation; and (ii) injustice of the kind which would make it impossible for the generator to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned.
- (h) The work expected from PGCIL in regard to LTA of the Petitioner was to allocate two nos. of bay in the Raigarh (Tamnar) pooling station and the said work was duly allocated as may be seen in the single line diagram of the Raigarh (Tamnar) pooling station prepared in December 2013 with respect to the extension of the Raigarh pooling station for augmentation of transformers and bus-reactors.

6. The Petitioner in its rejoinder has submitted as under:

(a) The regulations and agreements governing the parties do not provide for any express provision to deal with the situation wherein the land on which the power station was to be built was acquired by the Government. In this situation, where parties have expressly or impliedly not agreed to any such term, the application of the doctrine of frustration is most natural consequence and is binding as it has force of the law of the land. The effect of frustration is that as soon as the frustrating event occurs, the parties are automatically released from their respective obligations without any action or election of the parties and thus in the present case the LTA Agreement dated 14.3.2012 does not exist.

(b) The contract between the Petitioner and PGCIL was frustrated automatically on the day the frustrating event occurred i.e. on 30.5.2012. Since, the state of things did not continue to exist i.e. the land was lost to coal block and the future event will not take place i.e. the power plant cannot come up on the lost land and thus, the contract stands frustrated. The bank guarantees were given by the petitioner on 2.6.2012 and 19.5.2012 i.e. after the parties were discharged from their respective liabilities. The bank guarantees were given and retained by the respondent under mistake of fact and same was liable to be returned to the Petitioner. Instead of returning the bank guarantees to the Petitioner, PGCIL invoked the same.

(c) The Petitioner under the Agreement cannot retain any money under the bank guarantees as same stand frustrated before it was decided by the respondent to invoke the bank guarantees and the bank guarantees in itself were retained without any authority as the agreement under which the bank guarantees were given got frustrated even before the bank guarantees were issued. In essence, the Petitioner was discharged from its liabilities and obligations with effect from 30.5. 2012.

Analysis and Decision:

7. We have considered the submissions of the parties. The following issues arise for our consideration:

- (a) Whether the LTA Agreement dated 14.3.2012 stood frustrated on account of the non-availability of land and cancellation of coal mines relieving the Petitioner from its obligation under the LTA Agreement?
- (b) Whether any direction can be issued to PGCIL with regard to Bank Guarantee submitted by the petitioner in accordance with LTA Agreement?

These issues have been analyzed and discussed in the succeeding paragraphs.

Issue No.1: Whether the LTA Agreement dated 14.3.2012 stood frustrated on account of the non-availability of land and cancellation of coal mines relieving the Petitioner from its obligation under the LTA Agreement?

8. The Petitioner has submitted that it entered into LTA Agreement with PGCIL on 14.3.2012 after the land on which proposed power station was to be built was allotted to it by the State Government. The Petitioner has submitted that the LTA Agreement was location specific and Regulation 12(1) of the Connectivity Regulations acknowledges the location of the land as the basis for contract and provides that in case of change of

location, new application is to be made for fresh consideration. The Petitioner has submitted that on 30.5.2012, Ministry of Coal identified an area of 16.4 sq. km. in Mand Raigarh as Bhalumunda coal block and decided to allot the same to the Government Company, NTPC. The specified land of the Petitioner for the purpose of power plant and LTAA formed part of the Bhalumunda coal block. According to the Petitioner, the act of the identification and earmarking of the Bhalumunda Coal Block constituted frustration of LTA Agreement as the whole basis of the contract was frustrated and LTA Agreement became impossible due to the act of the sovereign by which the sovereign intended to acquire the coal block. The Petitioner has submitted that it was not aware of the contract being frustrated when it furnished the bank guarantee under the covering letter dated 11.6.2012. The Petitioner has submitted that even after identification of the land for coal block, the following authorities took action on account of their being not aware of the said development:

- (a) On 5.5.2014, the Ministry of Environment and Forest gave approval for grant of 32.4 acres of forest land to the Petitioner for the purpose of power plant and LTAA.
- (b) On 7.8.2014, the Ministry of Environment and Forest granted environmental clearance to the Petitioner.
- (c) The State Government of Chhattisgarh went ahead with acquisition of 122.5 acres of land for industrial purpose and issued notice under Section 4(1) of the Land Acquisition Act and the competent authority passed the award on 6.10.2012 under the Land Acquisition Act.

(d) Coal India Limited or any other Department of Government of India did not submit any objection invited under Section 5(1) of the Land Acquisition Act for such coal block.

(e) The State Government completed the formalities and gave possession of land to the Petitioner after the coal block was identified.

9. The Petitioner has submitted that when the Central Government and State Government were not aware about the status of the land, it cannot be expected from the Petitioner to know about the same. The Petitioner has submitted that it came to know about the identification and earmarking of the Bhalumunda Coal Block around August 2014. The Petitioner has submitted that in September 2014, the captive coal block of the Petitioner was de-allocated by the Hon'ble Supreme Court. The Petitioner informed PGCIL about the land and captive coal block to PGCIL on 6.7.2015. The Petitioner has submitted that the supervening act of the sovereign by which it identified and earmarked the land for coal mining, the right of the Petitioner over the said land became void and the performance under LTA Agreement became impossible. The Petitioner has submitted that where there is frustration, dissolution of the contract occur automatically. In this connection, the Petitioner has relied upon the judgment of the Hon'ble Supreme Court in *Satyabrata Ghose V Mungeeneram Bangur & Co & Anr* {AIR 1954 SC 44} and *Boothilinga Agencies Vs V.T.C. Poriaswami Nadar* {1969 (1) SCR 65}.

10. PGCIL has submitted that as per the LTA Agreement, units I, II, and III of the project were scheduled to be commissioned by December, 2014, March, 2015 and May

2015 respectively. In the 5th Joint Coordination Committee meeting held on 19.2.2013, the Petitioner submitted status report of the project and unilaterally revised the scheduled COD of the units-I and II as December 2016 and April, 2017 respectively. PGCIL has submitted that after the 5th JCC meeting, the Petitioner chose not to attend any of the subsequent four JCC meetings convened between February 2013 and May 2015. On 24.6.2015, PGCIL issued a final notice inviting participation in the Special JCC meeting for High Capacity Transmission Corridor for IPPs to be held on 7.7.2015. In the said notice IPPs were informed that in case of non-participation, it would be presumed that the generation project has been abandoned. PGCIL has submitted that after the issue of the notice dated 24.6.2015, the Petitioner has informed for the first time vide letter dated 6.7.2015 that the implementation of the project has become impossible due to extraordinary circumstances beyond the control of the Petitioner. PGCIL has submitted that the Petitioner has abandoned the generating station instead of taking any meaningful step in setting it up and therefore, the subsequent event of acquisition and allocation of the Petitioner's land to NTPC did not result in frustration of LTA Agreement.

11. As regards the frustration of LTA Agreement, PGCIL has submitted that on 30.5.2012, land allocated for the generating station was declared as coal bearing area and allotted to NTPC and the Petitioner was informed about the reallocation of the land allocated for the generating station by Central Mine Planning and design Institute Limited. Further, the Hon'ble Supreme Court cancelled the captive coal block allocated to the Petitioner vide judgment dated 25.8.2014. However, the Petitioner has informed

about the alleged frustration of LTA Agreement on 6.7.2015. The PGCIL has submitted that the Petitioner could not explain during the hearing on 24.1.2017 as to why it was not aware of the acquisition of land in the year 2012. PGCIL has further submitted that the Petitioner despite being aware of the acquisition of its land and cancellation of coal block did not inform PGCIL about the same for one year.

12. As regards the status of the transmission system covered under the LTA Agreement, PGCIL has submitted that the system strengthening as per Annexure 5 to the LTA Agreement involved up-gradation of the +/- 800 kV, 3000 MW HVDC Bipole terminal capacity to 6000 MW between Champa Pooling Station in Chhattisgarh and Kurukshetra Terminal Station in Haryana alongwith dispersal lines beyond Kurukshetra. PGCIL has further submitted that during the time period between occurrence of the alleged frustration of the LTA Agreement and the notice of frustration served upon PGCIL, the pooling station at Raigarh (Tamnar) with space provision for the Petitioner to construct its bays for its dedicated transmission line has been established and thus PGCIL has completed its scope of work under the LTA Agreement. PGCIL has submitted that in the 7th JCC meeting of IPPs that were granted LTA in WR held on 25.2.2014, the commissioning schedule of the generation project has been provided by the Petitioner as December 2017 (Unit 1) and April 2018 (Unit 2).

13. PGCIL has submitted that it was continuously and consciously developing the transmission system for the Petitioner's generating station despite frustration of the LTA Agreement. If the Petitioner's contention is that the contract in question had become

void, then the Commission should invoke the principles under Section 56 of the Indian Contract Act by upholding the encashment of the construction phase bank guarantee in terms of the principles of restitution under an agreement becoming impossible to perform.

14. We have considered the submission of the parties. The Petitioner had applied for LTA and after system study, CTU found that system strengthening is required. In terms of Regulation 12(6) of the Connectivity Regulations read with the Detailed Procedure, the Petitioner has paid the bank guarantee of Rs.7.8 crore at the rate of Rs.5 lakh/MW. As already stated in Para 12 above, the Petitioner has given the commissioning schedule of Unit 1 as December 2017 and Unit 2 as April 2018. Based on the LTA Agreement and commitment given by the Petitioner, PGCIL has implemented the common transmission system required for evacuation of power from the region including that of the Petitioner.

15. The Petitioner has submitted that the LTA Agreement has been frustrated due to acts of the sovereign as the land acquired by the Petitioner for its power project was declared as a coal bearing area on 30.5.2012. Annexure P-14 is a public notice issued on 30.5.2012 and it cannot be said that the Petitioner was not aware of the notification. The Petitioner has submitted that the Ministry of Environment and Forest issued forest clearance and environment clearance and the Government of Chhattisgarh completed all formalities and gave possession of the land to the Petitioner after 30.5.2012 and, therefore, the Petitioner's lack of knowledge about the re-allocation of the acquired land

for coal block was *bonafide*. Even if for the sake of argument, it is accepted that the Petitioner was not aware of the declaration of its acquired land as coal-bearing area and it could only know in June 2014, the Petitioner has not explained as to why it took one year to inform PGCIL about the same. The Petitioner has also not revealed if the Petitioner had taken up with the State Government for alternative location adjacent to the original location and the response of the State Government thereto or made efforts through its own source to acquire land at alternative site for the power station. In our view, declaration of the land acquired by the Petitioner as coal bearing areas cannot be the reason beyond the control of the Petitioner for abandoning the power project. The Petitioner could have chosen an alternative site for the power project. The other reason is de-allocation of coal block by the judgment of the Hon'ble Supreme Court. This cannot be a reason beyond the control of the Petitioner as the Petitioner could have arranged the coal from alternative sources including participation in auction of coal block. In our view, the project has been abandoned by the Petitioner for commercial consideration and therefore, the Petitioner cannot claim frustration of LTA Agreement on account of de-allocation of coal block and declaration of acquired land as coal bearing area. It is pertinent to observe that LTA Agreement was not premised on allocation of land to the Petitioner for the power project. As per the LTA Agreement, the Petitioner was to develop the dedicated transmission line from its generating station to the pooling station of PGCIL and the Petitioner could have re-planned its dedicated transmission line, had the Petitioner decided to identify an alternative site for development of the power project. The LTA Agreement is predicated on the commitment of the PGCIL to build the transmission system and the commitment of the

Petitioner to pay the transmission charges for the said transmission line. If the Petitioner intends to exit from LTA Agreement, it could have informed PGCIL sufficiently in advance before the investment decision of PGCIL to build the transmission systems based on LTA Agreement. As per the LTA Agreement, commercial operation date of first unit of the generating station is December 2014. Since PGCIL has stated on affidavit that PGCIL has established the pooling station at Raigarh (Tanmar) by the time notice of frustration was served by the Petitioner on PGCIL, the Petitioner cannot escape its liability under the LTA Agreement.

16. Section 56 of the Indian Contract Act, 1872 deals with frustration of contract. The said section is extracted as under:

“56. Agreement to do impossible act. An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promisee of any loss which such promisee sustains through the non-performance of the promise.”

As per the above Section, if performance of a contract becomes impossible or unlawful after it is made, it becomes void. In the present case, establishment of the generating station by the Petitioner has neither become impossible nor become unlawful after the declaration of the acquired land by the Petitioner as coal bearing area and de-allocation of captive coal mines. The establishment of the generating station was still possible at

alternate site and arranging coal through other sources including participating in coal block auction or e-auction or import of coal. Therefore, the Petitioner cannot claim frustration of LTA Agreement on account of declaration of the acquired land by the Petitioner as coal bearing area and de-allocation of captive coal mines.

Issue No. 2: Whether PGCIL is justified in encashing the Bank Guarantee submitted by the Petitioner?

17. The Petitioner in its written submission has stated that the bank guarantee was given under mistake after the LTA Agreement became void. The Petitioner has further submitted that PGCIL after being aware of fact of the LTA Agreement being frustrated has invoked the bank guarantee which is contrary to the commercially acceptable principle. The Petitioner has submitted that any party which has given anything to the other party under a void contract shall be liable for the restitution of such thing or the price of the same as per Section 65 of the Indian Contract Act. Retaining the thing or unconscionably receiving monies is illegal and PGCIL is liable under law to return the monies received under the bank guarantee particularly when PGCIL has not pleaded or counterclaimed for any damages or expenses and neither it has proved any such damages or losses. The Petitioner has submitted that in the absence of any proof, nothing is payable in terms of the judgment of the Hon'ble Supreme Court in Kailash Nath Associates Vs DDA {(2015) 4 SCC 136}. The Petitioner has also distinguished the judgment of the Appellate Tribunal in in Appeal No. 197 of 2014 (Jaiswal Neco Urja Limited Vs Power Grid Corporation of India Limited) from the case of the Petitioner on the ground that while the decision in Jaiswal Neco was based on Regulation 12(5) of the Connectivity Regulations and clause 23.5 of the Detailed Procedure providing for encashment of bank guarantee in case of non-signing of LTA Agreement, the said

provisions are not applicable in case of the Petitioner who has signed the LTA Agreement and there is no provision either in the Connectivity Regulations or Detailed Procedure to encash the bank guarantee if LTA Agreement is frustrated.

18. PGCIL has submitted that LTA Agreement and BG executed in the present case are based on the formats provided under the Detailed Procedure made under the Connectivity Regulations which have been approved by the Commission. The said formats of LTA Agreement and BG clearly provide instructions to PGCIL being the Nodal Agency, about the circumstances when BG can be encashed. PGCIL has submitted that as per the LTA Agreement and BG, PGCIL can encash the BG in case of adverse progress in the work within the scope of the Petitioner or when the Petitioner makes an exit from the project. The relevant provisions of LTA Agreement and BG are extracted as under:

LTA Agreement

"1.(d) The bank guarantee shall be encashed by CTU in case of adverse progress of work under the scope of LTC, assessed during Joint Co-ordination Meeting... "

BG dated 2.6.2012

"WHEREAS it has been agreed by the LTOA customer in the said Agreement that in case of failure / delay to construct the generating station/ dedicated transmission system or makes and exit or abandon its project by L TOA customer. POWERGRID shall have the right to collect the transmission charges and or damages... "

BG dated 19.5.2012

"WHEREAS it has been agreed by the LTOA customer in the said Agreement that in case of failure/delay to construct the generating station/dedicated transmission system or makes and exit or abandon its project by LTOA

customer, POWERGRID shall have the right to collect the transmission charges and or damages ...

19. PGCIL has further submitted that the Appellate Tribunal in Jaiswal Neco case has held that the Connectivity Regulations are so clear that force majeure or existence of circumstances beyond the control of the Petitioner which prevented it from performing the contract cannot be a ground for which encashment of BG can be defaulted. PGCIL has further submitted that Hon'ble Supreme Court in Hindustan Construction Co. Limited Vs State of Bihar & Others {AIR 1999 SC 3710} has held that BG is a common mode of securing payment of money in commercial dealings. Therefore, PGCIL is entitled to encash the BG to realize the whole amount under the BG in terms thereof. PGCIL has further submitted that invocation of BG does not amount to unjust enrichment of PGCIL as according to the Detailed Procedure, the damages collected shall be adjusted for the purpose of claiming transmission charges from the balance developers. PGCIL has submitted that it has encashed the BG for non-compliance of the extant Connectivity Regulations, the breach of obligations under the LTA Agreement and non-operationalisation of LTA by the Petitioner.

20. We have considered the submission of the parties. The main contention of the Petitioner is that since, LTA Agreement is void, encashment of BG is illegal and the Petitioner is entitled for restitution in terms of Section 65 of the Indian Contract Act. The said Section provides that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the

person from whom he has received it.” We have already rejected the claim of the Petitioner that LTA Agreement has become frustrated on account of declaration of the acquired land by the Petitioner as coal bearing area and de-allocation of captive coal mines. On the other hand, the Petitioner has abandoned its obligations under the LTA Agreement. Therefore, LTA Agreement is not void and none of the conditions of section 65 of the Indian Contract Act is applicable in this case. The Petitioner cannot claim restitution on the basis of Section 65 of the Indian Contract Act.

21. On account of adverse progress of the work on the part of the Petitioner as required under the LTA Agreement, PGCIL has encashed BG in terms of the provisions in the LTAA and BG dated 2.6.2012 and 19.5.2012 as extracted in para 18 above. The Commission vide order dated 17.5.2015 has directed the Petitioner to keep the encashed amount of BG in a separate account. It is however observed that PGCIL has implemented the transmission project as per Annexure 5 of the LTA Agreement. On account of abandonment of the generation project by the Petitioner, transmission assets constructed for the Petitioner would remain stranded for which the Petitioner would be required to pay the relinquishment charges. The Commission is considering the issues of stranded capacity and relinquishment charges in Petition No. 92/MP/2015 and the decision in the said petition will be applicable in case of the Petitioner. Accordingly, we direct that the encashed BG amount may be continued to be kept in a separate account which shall be adjusted against the relinquishment charges due from the Petitioner in the light of the decision in Petition No. 92/MP/2015 and balance relinquishment charges shall be recovered from the Petitioner.

22. In the light of the above discussion, the prayers of the Petitioner are disposed of as under:

(a) As regards prayer (a), it is held that LTA Agreement dated 14.3.2012 has not been frustrated on account of declaration of the acquired land by the Petitioner as coal bearing area and de-allocation of captive coal mines. The Petitioner has abandoned its obligations under the LTA Agreement and shall be liable for relinquishment for LTA in terms of the decision in Petition No. 92/MP/2015.

(b) As regards prayer (b), PGCIL has already encashed the BG which has been kept in a separate account. The BG amount shall be utilized for payment of relinquishment charges for the capacity built for the Petitioner in terms of the LTA Agreement which would remain stranded in the light of the decision in Petition No.92/MP/2015.

23. The Petition No. 188/MP/2015 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson