

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 43/MP/2021
along with IA No.9/2021**

Subject: Petition under Section 79 of the Electricity Act, 2003 read with Articles 11 and 13 of the Power Purchase Agreements dated 28.6.2018 executed between the Petitioner and Solar Energy Corporation of India Limited.

Date of Hearing : 5.3.2021

Coram : Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Petitioner : Adani Wind Energy Kutchh One Limited (AWEKOL)

Respondents : Solar Energy Corporation of India Limited (SECI) and 5 Ors.

Parties Present : Shri Amit Kapur, Advocate, AWEKOL
Ms. Poonam Verma, Advocate, AWEKOL
Ms. Aparajita Upadhyay, Advocate, AWEKOL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Shri Shubham Arya, Advocate, SECI
Shri Noor Shergill, AWEKOL
Shri Rajeev Lochan, AWEKOL
Shri Dipak Panchal, AWEOL
Shri Shreedhar Singh, SECI
Shri Shubham Mishra, SECI
Ms. Jyoti Prasad, CTU
Shri Bhaskar Wagh, CTU
Shri Siddharth Sharma, CTU

Record of Proceedings

Case was called out for virtual hearing.

2. Learned counsel for the Petitioner submitted that the instant Petition has been filed, *inter-alia* for seeking directions that the Petitioner be relieved from performing its obligations under the Power Purchase Agreements (PPAs) on the ground of force majeure, without any financial implication and further for restraining the Respondent No.1, Solar Energy Corporation of India Limited (SECI) from encashing the Performance Bank Guarantee (PBG). Learned counsel mainly submitted the plea on the following counts:-

(a) Due to occurrence of various force majeure events as detailed in the Petition, beyond the control of the Petitioner, the construction and

commissioning of 250 MW (5x50 MW) Wind Projects became impossible within the timelines under the PPAs.

(b) However, refusing to recognize the force majeure claims of the Petitioner, SECI vide its e-mail dated 1.1.2021 informed that PBG submitted by the Petitioner shall be invoked upon expiry of 21 days i.e. by 13.1.2021.

(c) Since the Commission was not holding the hearing in terms of the order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (C) No. 429/2020 in C.A No. 14697/2015, the Petitioner had filed Writ Petition (C) No. 340/2021 before the Hon'ble High Court of Delhi, *inter alia*, seeking directions to SECI to maintain the status quo as regards PPAs and restraining from encashing/invoking the PBG till the time Petition is heard by this Commission. The Hon'ble High Court of Delhi vide its orders dated 13.1.2021 and 22.1.2021 directed SECI to maintain the status quo and finally vide order dated 3.2.2021 disposed of the Writ Petition with direction to SECI not to take any coercive steps till the first date of hearing before this Commission and that this Commission to take up the Petition filed by the Petitioner within a period of 30 days.

(d) In the present case, the various force majeure events that have rendered the performance of its obligations impossible are, namely, (i) delay in commissioning of transmission system, (ii) outbreak of Covid-19 and imposition of lockdown, (iii) delay in construction of the Petitioner's dedicated transmission line, (iv) delay due to damages caused to the Petitioner's transmission tower by villagers, (v) delay caused due to occurrence of cyclone Vayu in Gujarat, (vi) delay and damages caused due to heavy rains in Gujarat, and (vii) delay in filing of adoption of tariff Petition under Section 63 of the Act by SECI, etc.

(e) Petitioner has also filed IA No. 9/2021, *inter-alia*, for direction to SECI not to take any coercive action against the Petitioner including invocation of PBG until final adjudication of the instant Petition by the Commission. It is submitted that as per the Article 13.5 read with Articles 4.5.1 and 4.5.3 of the PPA, party can terminate the PPA in case force majeure event continues for more than 12 months without any liability. Thus, there is a plausible case in the favour of the Petitioner and during the pendency of main Petition, SECI be directed to maintain the status quo.

3. Learned senior counsel for the Respondent, SECI objected to the grant of any interim order as prayed for in the IA and submitted that SECI has also filed its objections to the said IA to this effect. Learned senior counsel mainly submitted as under:

(a) Article 13.5 of the PPA provides for termination of the PPA by either party only in case of continuation of force majeure event or its effect beyond the period of 12 months. However, documents and various communications themselves show that the primary claim of the Petitioner in regard to force majeure i.e. non-commissioning of associated transmission system (13 months) is incorrect.

(b) The Petitioner had voluntarily agreed and accepted that the associated transmission system shall be available only by 31.12.2020 or later and accordingly had sought time to implementation of the Projects till 31.12.2020 or operationalization of such system, whichever is later. Even, SECI had confirmed that it is willing to consider the extension for commissioning of the Project till May, 2021. Despite the above, the Petitioner chose not to take requisite steps to implement the Project and subsequently chose to surrender the LTA stating to utilise the same for the other projects (Tranche VI) of the Petitioner's group.

(c) It is argued that the Law on the invocation of bank guarantee is well settled. Bank Guarantee being an independent and separate contract, the existence any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain its enforcement. It is argued that the exceptions to this rule being (a) when there is a clear case of fraud (b) irretrievable injustice (c) special equities. It is vehemently argued that any such exception is not available in the instant case. In this regard, reliance was placed on the judgments of Hon'ble Supreme Court in the cases of Standard Chartered Bank v. Heavy Engineering Corp. Ltd., Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Limited and Anr., Gujarat Maritime Board v. Larsen & Turbo Infrastructure Development Project Limited and Anr.

(d) It is pointed out that Petitioner in its letter dated 26.12.2020 itself has stated to submit the corresponding amount of BG in cash in lieu of encashment.

4. After hearing the learned counsel for the Petitioner and the learned senior counsel for the Respondent, SECI, the Commission admitted the Petition and directed to issue notice to the Respondents.

5. The Commission directed the Petitioner to serve copy of the Petition including IA on the Respondents immediately, if not already served. The Respondents were directed to file their reply including on IA by 22.3.2021 with advance copy to the Petitioner who may file their rejoinder, if any, by 9.4.2021. The due date of filing of reply and rejoinder should be strictly complied with.

6. It was observed that the Commission has not examined the matter on merit and further that the Hon'ble High Court has passed restraint order for not invoking bank guarantee and time to time extended it. It has further directed to extend the order till the hearing is made by this Commission. In view of the facts, the Commission directed SECI not to invoke/encash the Bank Guarantee furnished by the Petitioner till the next date of hearing and the Petitioner was directed to keep the Bank Guarantee valid.

7. The Petition along with IA shall be listed for hearing in due course for which separate notice will be issued.

By order of the Commission
Sd/-
(T.D. Pant)
Joint Chief (Legal)