

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 278/MP/2018

Subject : Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Petitioner : Jindal India Thermal Power Limited (JITPL)

Respondents : Indian Railways (IR) and Anr.

Petition No. 303/MP/2018

Subject : Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Petitioner : Jindal India Thermal Power Limited

Respondents : Indian Railways and Anr.

Petition No. 304/MP/2018

Subject : Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Petitioner : Jindal India Thermal Power Limited

Respondents : Indian Railways and Anr.

Petition No. 339/MP/2018

Subject : Petition under Section 79(1)(b), 79(1)(c) and 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009.

Petitioner : Jindal India Thermal Power Limited



Respondents : Indian Railways and Anr.

Date of Hearing : 22.3.2022

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

Parties Present : Shri Amit Kapur, Advocate, JITPL
Shri Pradeep Dahiya, Advocate, JITPL
Shri Akshat Jain, Advocate, JITPL
Shri Pratyush Singh, Advocate, JITPL
Shri Pulkit Aggarwal, Advocate, IR and REMCL
Shri Pulak Srivastava, JITPL
Shri Sanjay Singh, REMCL
Shri Manish Towari, REMCL

Record of Proceedings

Cases were called out for virtual hearing.

2. During the course of hearing, the learned counsel for the Petitioner submitted that after hearing the parties, the matters were reserved for order vide Record of Proceedings for the hearing dated 23.11.2021 with direction to the Respondents to file their written submissions by 3.12.2021 and the Petitioner to file its written submissions by 13.12.2021. However, since Respondents failed to file their written submissions within the specified time limit, the Petitioner eventually filed its written submissions on 2.2.2022. The Respondents filed its written submissions only on 21.3.2022. Learned counsel further referred to the written submissions filed in Petition No. 278/MP/2018, mainly submitted as under:

(a) Respondents in their written submissions have reiterated that in terms of the Minutes of Meeting ('MoM') dated 19.11.2019, the PPAs have been deemed to be terminated without any financial liability on either party. However, the Petitioner has already placed of record the relevant factual development including the extension of Bank Guarantee at the instance of Respondents (post meeting dated 19.11.2019) and legal submissions which clearly evince that MoM dated 19.11.2019 has been rendered infructuous.

(b) The entire agreement reached during the meeting dated 19.11.2019 was based on the specific written assurance of the Respondents that they will provide NOC well in time to enable the Petitioner to commence supply w.e.f 1.4.2020. However, when this preliminary condition is not complied even till date, the entire agreement reached during meeting dated 19.11.2019 loses its significance and dispute goes back to the root of the issue i.e. failure of Respondents to fulfil its contractual obligations to arrange NOC to the Petitioner from State Utilities, which was a pre-requisite for availing open access for supply of power.

(c) Accordingly, the Respondents are obligated to either (a) perform its contractual obligations under the agreement, or (b) pay compensation to the Petitioner in case of termination of agreement due to their contractual breach/default of not providing the NOC in time.

(d) In an arrangement where the fulfilment of obligations depends upon the mutual performance of reciprocal promises, a party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party. Reliance was placed on the judgment of Hon'ble Supreme Court in *Sikkim Subba Associates v. State of Sikkim* [(2001) 5 SCC 629].

(e) It is a settled position of law that a party cannot be permitted to take advantage of its own wrong and try to wriggle out of the contract. In this regard, reliance was placed on judgments of Hon'ble Supreme Court in *Nirmala Anand v. Advent Corp. Pvt. Ltd.*, [(2002) 5 SCC 481], *Indore Development Authority v. Manoharlal and Ors.* [(2020) 8 SCC 129], and *Indore Development Authority and Order v. Shailendra & Ors.* [(2018) 3 SCC 412].

(f) Due to failure of the Respondents to provide NOC to the Petitioner to apply for open access, capacity of the Petitioner's power plant tied-up under the agreement remain stranded and the Petitioner has not been able to recover the fixed cost for such stranded capacity. The Petitioner has furnished the detailed computation of the financial loss suffered by the Petitioner including computation of compensation being sought from the Respondents.

(g) The written submissions filed by the Respondents, despite having been filed after filing of written submissions by the Petitioner, do not deal with the submissions made by the Petitioner.

3. Learned counsel for the Respondents submitted that the Respondents have also filed their written submissions. Learned counsel further submitted as under:

(a) As stated during the hearings held on 15.4.2021 and 23.11.2021, the PPAs have been deemed to be terminated without any financial liability on the either party in terms of the MoM dated 19.11.2019.

(b) In the said minutes, it has been clearly agreed and recorded that the deemed termination of the PPA will take place in case of power flow under the PPA is not commenced by 1.4.2020 'due to any reason'. Admittedly, the power flow under the PPA did not commence by 1.4.2020 and therefore, PPA is deemed to have been terminated without any financial liability on either party regardless of the default on the part of Respondent as alleged by the Petitioner.

(c) As regards the Bank Guarantee ('BG'), since the Commission vide Record of Proceedings for the hearing dated 19.12.2018 had directed the Petitioner to keep the BG alive till the next date of hearing, the Respondents did not return the BG as the Petitions before this Commission was still pending.

(d) The Petitioner is trying to wriggle out of the agreement arrived at between the parties on 19.11.2019 by falsely contending that the MoM had been given a waiver by the parties. Accordingly, the Petitions filed by the Petitioner is liable to be disposed of in terms of the settlement recorded in the MoM dated 19.11.2019. After agreeing to the terms and conditions of MoM dated 19.11.2019, the Petitioner cannot be permitted to resile and re-agitate its original claims made in the Petition.

(e) However, in case the Commission comes to a conclusion that the settlement between the parties is not binding and the Petitioner is entitled to re-agitate its original claims made in the Petition, the Respondents may be permitted to make further submissions.

(f) Though the Respondents have filed their reply on merits, the Petitioner cannot be permitted to wriggle out of the settlement arrived at in terms of MoM dated 19.11.2019. Pertinently, neither the Petitioner nor the Respondents argued the matter on merits. Submission advanced during the course of hearing on 15.4.2021 and 23.11.2021 were in light of MoM dated 19.11.2019 only.

(g) In case the matters are decided on merits based on the original claims made by the Petitioner in the Petitions, the counter claim of the Respondent i.e. right to encash the BG amount as the Petitioner failed to supply the power under the agreement, has to be decided upon.

(h) If the Commission deems fit, the Respondents may be permitted to file their written submissions on merits within a week.

4. Learned counsel for the Petitioner objected to the request of the learned counsel for the Respondents seeking further time to file written submissions on merits. Learned counsel submitted that despite having filed their written submissions only on 21.3.2022 as against the specified time limit of 3.12.2021 and also having available the Petitioner's written submissions filed on 2.2.2022, the Respondents deliberately chose not to file their written submissions on merits. Learned counsel submitted that no additional time ought to be allowed to the Respondents to file the written submissions on merits. Parties are at liberty to file brief written submissions containing highlights of the written submissions in not exceeding three pages for a quick look within a week.

5. After hearing the learned counsel for the Petitioner and the Respondents, the Commission reserved the order in the matters.

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