

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 20/MP/2023

Subject : Petition under Section 79(1)(f) read with 79(1)(b) of the Electricity Act, 2003 and Agreements for Procurement of Power dated 03.03.2022 and 10.03.2022 challenging the Termination Notice dated 18.08.2022 issued by South Western Railways under Article 4.4 of the APP dated 03.03.2022 and all consequential actions pursuant to the Termination Notice.

Date of hearing : **27.3.2023**

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

Petitioner : Jindal India Thermal Power Limited (JITPL)

Respondents : South Western Railways, Indian Railways (SWR) & Anr.

Parties present : Shri Sajan Poovayya, Senior Advocate, JITPL
Shri Akshat Jain, Advocate, JITPL
Ms Shefali Tripathi, Advocate, JITPL
Shri Shikhar Verma, Advocate, JITPL
Shri Abhishek Kakkar, Advocate, JITPL
Shri Venkatesh, Advocate, TPTCL
Shri Jatin Ghuliani, Advocate, TPTCL
Shri Anant Singh, Advocate, TPTCL
Ms Poorva Saigal, Advocate, SWR
Shri Shubham Arya, Advocate, SWR
Ms Shikha Sood, Advocate, SWR
Ms Anumeha Smiti, Advocate, SWR

Record of Proceedings

Learned counsel for the Petitioner submitted that present Petition has been filed challenging the Termination Notice dated 18.8.2022 issued by the Respondent No. 1, South Western Railways (hereinafter referred to as 'SWR') under Article 4.4 of the Agreement for Procurement of Power (hereinafter referred to as 'APP') dated 3.3.2022, Learned counsel mainly submitted as under:

(a) The Petitioner operates a 1200 MW (2 x 600 MW) Thermal Power Plant at Derang village in the State of Odisha. The Petitioner had entered into APP with



TPTCL on 10.3.2022 for supply of 50 MW power to SWR through TPTCL under a back-to-back APP dated 3.3.2022 executed between TPTCL and SWR.

(b) The Petitioner was required to obtain Medium Term Open Access (MTOA) to the transmission system for supply of electricity from CTUIL. In order to apply for grant of MTOA, No Objection Certificate ('NOC') from SLDC was required. Thus, SWR had provided the NOC to the Petitioner, from Karnataka State Load Dispatch Centre ('KSLDC') on 6.5.2022 for drawl of 50 MW power from JITPL through TPTCL for railways traction utility.

(c) Thereafter, the Petitioner submitted its bid to supply power to SWR from coal procured through e-auction of Coal India Limited ('CIL'). However, pursuant to CIL Circular dated 1.3.2022, sufficient e-auction coal was not available, the Petitioner had to procure the requisite coal under Para B (iii) of the Shakti Policy and on 17.6.2022, MCL issued Letter of Award to the Petitioner for allocation of 1540000 MT coal under FSA to be executed with MCL. The same was communicated to SWR by TPTCL on 22.6.2022 and 28.6.2022 along with the fact that the Petitioner will commence its supply to SWR w.e.f 1.12.2022.

(d) Due to the above, NOC dated 6.5.2022 was not valid and consequently, a revised NOC from KSLDC was provided by SWR to the Petitioner on 22.6.2022 for drawal of 50 MW power from JITPL through TPTCL i.e. after the period of 90 days provided for fulfilment of Conditions Precedent under Article 4.1.3 of APP dated 10.3.2022. Thereafter, TPTCL made an application to CTUIL for grant of MTOA and 10.08.2022, CTUIL granted MTOA for supply of 50 MW to SWR.

(e) The Appointed Date would be achieved only after fulfilment of all Conditions Precedent. Under Article 4.4 of the APP, it was agreed between the parties that if the Appointed Date does not occur 120 days from the date of the APP (i.e. on or before 8.7.2022), or the extended period provided in accordance with the APP, all rights, claims, and entitlements of the Petitioner under or arising out of the APP, shall be deemed to have been waived, and to have ceased with the concurrence of the Petitioner and the APP shall be deemed to have been terminated by mutual agreement of the parties.

(f) On 18.8.2022, SWR issued the Termination Notice under Article 4.4 of the APP. Pursuant to the Termination Notice being issued, on 29.8.2022, TPTCL wrote to the Petitioner intimating that it had received an e-mail from its banker, ICICI Bank regarding the receipt of an unconditional claim from SWR for encashment of Bank Guarantee of Rs. 5 crore submitted by TPTCL on behalf of the Petitioner towards Performance Security Deposit (PSD) as per the APP.

(g) The intimation of Bank Guarantee being encashed was received during the period when the Commission was not assembling i.e., till 6.9.2022, and as a consequence, and on considering the looming threat of encashment of Bank Guarantee, the Petitioner on 30.8.2022 filed a Writ Petition bearing W.P.(C) 12550 of 2022 before the Hon'ble Delhi High Court seeking urgent directions staying the invocation/encashment of the Bank Guarantee.



(h) On 2.9.2022, Hon'ble Delhi High Court vide its Interim Order dated 2.9.2022 had observed that SWR has failed to establish that JITPL is not in a position to commence supply of power which was to start from December 2022. Accordingly, restrained SWR and ICICI Bank from taking any coercive actions against the Petitioner including encashment of Bank Guarantee till the next date of hearing i.e., 30.11.2022.

(i) Subsequently, on 30.11.2022, the Hon'ble Delhi High Court vide its order dated 30.11.2022 granted liberty to the Petitioner to approach CERC within a month and continued the interim order dated 2.9.2022 till the first date of listing before CERC.

(j) Accordingly, the Petitioner has filed the present Petition *inter-alia* seeking the quashing of the termination notice dated 18.8.2022 issued by SWR and restraining SWR from taking any precipitative/coercive action against the Petitioner including but not limited to invocation/encashment of the Bank Guarantee.

(k) Under the terms of APP, there was no mandatory requirement for the Petitioner to supply power by procuring fuel under the Fuel Supply Agreements dated 24.1.2013 and 12.9.2020. Further, the parties herein before issuance of Termination Notice were ad-idem that supply of power under the APP would commence in the month of December 2022.

2. Learned senior counsel for the Petitioner additionally submitted that under the APP, the supply of power was not predicated from and under a particular FSA. The Petitioner from the date of signing of the APP has maintained its stand that it is its responsibility to procure coal to supply power to SWR and the source of the coal for such supply is of no consequence. He further added that even after issuing the Force Majeure and Change in Law Notice dated 1.4.2022, the Petitioner still participated in bids to procure coal under SHAKTI B(iii) and made efforts to arrange fuel for supply of power. Now coal is available with the Petitioner to supply power at the rates envisaged under the APPs, without asking for any escalation. The Petitioner is ready to use such coal for supply of power to SWR. Learned senior counsel submitted that the termination notice is predicated on the FSAs, but the APPs were not predicated on FSAs.

3. Learned counsel for Respondent No. 1, SWR submitted that SWR is not willing to offtake power from the Petitioner under the APP. The Petitioner cannot be allowed to pick and choose the fuel supply source. The FSA has been entered into for three years and as per the FSA, the Petitioner is required to supply power for the immediate usage by the Indian Railways. However, the Petitioner has failed to supply power in terms of the FSAs. The Petitioner has issued Force Majeure and Change in Law Notice dated 1.4.2022 stating that the CCEA's decision dated 22.6.2022 and CIL Circular dated 1.3.2022, resulted in shortfall of the availability of sufficient coal required to generate and supply the 50MW under the APP. Furthermore, there was never an understanding between the SWR and the Petitioner of the fact that the Petitioner will commence the supply of the fuel from

1.12.2022. Learned counsel submitted that the law relating to the grant of injunction restraining the invocation of the BG is settled in terms of catena of judgments of Hon'ble Supreme Court. Learned counsel submitted that BG is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and validity of the primary contract between the person at whose instance the BG was given and the beneficiary. Learned counsel referred the recent judgment of the APTEL dated 22.12.2022 in IA No. 1467 of 2022 (Arian Solar Pvt. Ltd. v. CERC & Ors.) in detail and submitted that the said decision squarely applies to the present case. Learned counsel added that in light of above judgment of APTEL, the Respondent No. 1 be allowed to encash the Bank Guarantee in the present matter.

4. Learned counsel for Respondent No.2, TPTCL submitted that TPTCL is an intermediary which has entered into the APP with the Petitioner for supply of power to SWR. The Termination Notice dated 18.8.2022 issued by SWR to the Petitioner is arbitrary, based on erroneous grounds and thus, not tenable. Further, SWR, in the said Termination Notice dated 18.8.2022, has failed to establish that the Petitioner is not willing to supply. He further submitted that neither the bidding documents nor the APP, mentions that the coal has to be procured from specific source.

5. After hearing the submissions of the learned senior counsel and the learned counsels for the parties, the Commission ordered as under:

(a) Admit. Issue notice to the Respondents;

(b) The Respondents to file their replies within two weeks after serving copy of the same to the Petitioner, who may file its rejoinder, if any, within two weeks thereafter;

(c) Stay granted by Hon`ble Delhi High Court on the encashment of bank guarantee will be continued till the next date of hearing; and

(d) The Parties to complete the pleadings within the given time period and no additional time will be granted in this regard.

6. Petition shall be listed for hearing on 4.5.2023.

By order of the Commission

**Sd/-
(T.D. Pant)
Joint Chief (Law)**

