

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 701/MP/2020

Coram:

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

Date of Order: 11.01.2024

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 seeking declaration that the transmission Service Agreement dated 28.8.2019, Transmission Connectivity Agreement dated 5.3.2019 and Long-Term Access Agreement dated 28.8.2019 are rendered impossible to perform and thereby void and directions to restrain the Respondent from invoking the bank guarantees and return the same to the Petitioner.

And in the matter of:

Shapoorji Pallonji Infrastructure Capital Company Private Limited,
SP Centre, 41/ 44 Mino Desai Marg Colaba,
Mumbai Maharashtra.

....Petitioner

Versus

1. Power Grid Corporation of India Limited,
Saudamini, Plot No.2, Sector 29,
Near IFFCO Chowk
Gurgaon, Haryana-122001.
2. Central Transmission Utility of India Limited,
PLOT No. -2, Sector-29,
Gurugram- 122001.

...Respondents

For Petitioner : Shri Sujit Ghosh, Advocate, SPICCP
Shri. Mohd Munish Siddique, Advocate, SPICCP
Ms. Manna Wariach, Advocate, SPICCP

For Respondents : Ms. Suparna Srivastava, Advocate, CTUIL



Shri Tushar Mathur, Advocate, CTUIL
Ms. Divya Sharma, Advocate, CTUIL
Ms. Priyansi Jadiya, CTUIL
Shri Swapnil Verma, CTUIL
Shri Ranjeet Singh Rajput, CTUIL

ORDER

The Petitioner, Shapoorji Pallonji Infrastructure Capital Company Limited (SPICCPL), which is engaged in developing and operating infrastructure assets in relation to the generation and supply of power, has been awarded the LoA by SECI for the development of ISTS-connected Solar Power Project for the generation and sale of solar power for 250 MW Solar Project to be set up in Ettayapuram, Tuticorin (hereinafter referred to as 'transmission project'). For the sale of power from the transmission project, the Petitioner entered into a PPA with SECI. For evacuation of power from it, the Petitioner had obtained the connectivity from the Respondent, CTUIL and signed various agreements such as Connectivity Agreement, LTA and TSA. The Petitioner has filed the instant petition seeking directions from this Commission to restrain the Respondent, CTUIL, from invoking the Bank Guarantees submitted by the Petitioner pursuant to the terms of the Agreements entered into by the Petitioner with the Respondent having been frustrated after the termination of the PPA with SECI.

2. The Petitioner has made the following prayers in the instant petition:

“Declare that the performance under the Connectivity Agreement, Long Term Access Agreement and Transmission Service Agreement having been frustrated, makes the Agreements void and consequentially direct the Respondent to return the Connectivity Bank Guarantee dated 2.11.2018 amounting to Rs. 5,00,00,000 and Bank Guarantee amounting to Rs. 25,00,000 submitted under the LTA.

In the interim, injunct the Respondent from encashing the Connectivity Bank



Guarantee dated 2.11.2018 amounting to Rs. 5,00,00,000 and Bank Guarantee amounting to Rs. 25,00,000 submitted under the LTA or taking any other coercive steps detrimental to the interest of the Petitioner.

Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

3. Ministry of Power, vide Gazette Notification dated 9.3.2021, notified 'Central Transmission Utility of India' (CTUIL), a Government Company and wholly owned subsidiary of Power Grid Corporation of India Limited (PGCIL) as the 'Central Transmission Utility' (CTU) to undertake and discharge all functions of CTU under the Electricity Act, 2003. Accordingly, the terms 'PGCIL', 'CTUIL' or 'Respondent(s)' have been used in this order alternatively for the 'Respondent'.

IA No. 72 of 2020

4. The Petitioner, vide affidavit dated 15.10.2020, had submitted the IA No. 72 of 2020 in the Petition No. 701/MP/2020 with the prayer to restrain CTUIL from encashing the Connectivity Bank Guarantee dated 2.11.2018 amounting to ₹5 crore and Bank Guarantee dated 24.5.2019 amounting to ₹25 lakh or taking any steps which may be detrimental to the interest of the Petitioner/Applicant during the pendency of the petition. The IA was disposed of by the Commission on 27.3.2023 by extending the interim protection of encashing the BGs granted to the Petitioner, vide RoP dated 4.6.2021.

Submissions of the Petitioner

5. The submissions made by the Petitioner in support of its prayers, vide affidavit dated 15.10.2020 and Written Submissions dated 6.6.2023, are as follows:



- a) The Petitioner was issued a Letter of Award on 27.7.2018 for the development of a solar power project of 250MW in Tamil Nadu.
- b) The CTUIL granted the Stage-I connectivity to the Petitioner for the 250 MW Solar Power Project in the state of Tamil Nadu, vide intimation no. C/CTU/Con St-I/SR/1200001532 dated 24.8.2018.
- c) The Petitioner applied for Stage-II connectivity in accordance with the Procedure laid down under the Detailed Procedure for “Grant of Connectivity to Projects Based on Renewable Sources to Inter-State Transmission System” (‘RE Connectivity Procedure). Accordingly, Stage-II connectivity was granted to the Petitioner on 8.10.2018, to be applicable with effect from 1.6.2020, which was extended by the Petitioner to 1.10.2020. The Petitioner incorporated Arina Solar Private Limited (hereinafter to be called ‘Arina Solar’) as the project SPV.
- d) The following conditions were attached to the grant of Stage -II connectivity:
 - i) The Petitioner was required to sign the Transmission Agreement for Connectivity and furnish the Connectivity Bank Guarantee within the period of 30 days of the Intimation.
 - ii) The grant of connectivity does not entitle the Applicant to interchange any power with the grid unless it obtains Long-term Access, Medium-Term Open Access or Short-term Open Access.
 - iii) Stage-II connectivity grantee is required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months from the date of intimation of bay allocation at existing or new/ under-construction ISTS sub-station. The dedicated line, including terminal bays at both ends is to be developed by the Petitioner at its own cost.
- e) Connectivity Agreement was signed on 31.10.2018 (with supplementary agreement on 5.3.3019) pursuant to which connectivity Bank Guarantee of



₹5,00,000,00 was submitted on 2.11.2018. The Connectivity Procedure also permits the use of connectivity by the wholly owned subsidiary of the grantee.

- f) According to the PPA entered into between Arina Solar and SECI on 22.11.2018, the SCOD of the transmission project was 25.10.2020, and Arina Solar agreed to develop a Solar Power Project based on PV technology of 250 MW in the state of Tamil Nadu, whereas SECI agreed to purchase power from Arina Solar and sell it to a Buying Utility on a back-to-back basis. The term '*force majeure*' and procedure and consequences in relation to the same have been defined under Article 11 of the PPA, providing a right to the Parties to terminate the PPA, in case the *force majeure* event or its effects continue beyond a period of three months.
- g) The Petitioner applied for LTA on 31.5.2019 for 250 MW for the Project in Ettayapuram, Tuticorin Area, Tamil Nadu, to the target beneficiary in Eastern Region by furnishing a bank guarantee dated 24.5.2019 of ₹25,00,000 which was to be kept valid and subsisting till the operationalization of the long term access.
- h) The LTA was granted to the Petitioner by CTUIL on 30.7.2019 for the period from 2.10.2020 to 25.10.2045, requiring the Petitioner to enter into LTAA within 30 days. The LTAA was entered into with CTUIL on 28.8.2019 for long term access of 250 MW.
- i) As a condition for the grant of long term access, the Petitioner entered into



the TSA dated 28.8.2019 ('TSA'), providing the Petitioner to connect to and use the ISTS for certain charges to be paid by them. Article 14 of the TSA deals with the provision with regard to the *force majeure*. No bank guarantee/ security was issued under the TSA.

- j) A Consultancy Agreement was also signed between the Petitioner and CTUIL for obtaining the consultancy. The Petitioner submitted an amount of ₹6.21 crore vide Bank Guarantee dated 24.5.2019, which was replaced with an indemnity bond.
- k) As a supplier to its SPV, the Petitioner also entered into a Module Supply Contract with suppliers in China for delivery of photovoltaic modules between the first week of April 2020 and second week of June 2020.
- l) Due to the onslaught of Covid-19 in China the Petitioner started receiving detailed communications from its module/ inverter suppliers in China informing them about the outbreak and its consequent impact on the manufacturing facility and the supply chain. Despite the Petitioner's best attempt, no supply schedule could be agreed upon between the module suppliers and the Petitioner. In view of the unprecedented circumstances, the Petitioner had to invoke the *force majeure* under the terms of the PPA. A mail was sent to the SECI on 11.2.2020
- m) The Ministry of Finance vide OM dated 19.2.2020 declared the outbreak of Covid-19 as *force majeure* followed by Ministry of New and Renewable Energy ("MNRE") issuing several office memorandums declaring the Covid-



19 pandemic and the resultant lockdown as a *force majeure* event and thereby directed the Renewable Implementing Agencies to treat both the outbreak of Covid-19 and nation-wide lockdown as *force majeure*. Further, MNRE directed that all RE Projects under implementation as on the date of lockdown i.e. 25.3.2020 will be given a time extension of 5 months from 25.3.2020 to 24.8.2020.

- n) Because of the cumulative effect of the *force majeure*, which extended beyond the period of three months, Arina Solar exercised its right to terminate the PPA in accordance with Article 13.5.1 of the PPA read with Article 4.5.3 of the PPA enunciating that if an event or its effect continued for a period beyond 3 months, either party has the right to terminate the PPA with no liabilities on either party. The Termination Notice was sent on 7.8.2020
- o) Upon termination of the PPA, Arina Solar filed Petition No. 605/MP/2020 before the Commission, seeking the return of performance Bank Guarantees that were submitted with SECI under the PPA. The Commission admitted the Petition and passed an interim order dated 20.8.2020 restraining SECI from encashing the bank guarantee submitted by the Petitioner until the next date of hearing.
- p) The Petitioner, vide letter dated 19.3.2020, invoked *force majeure* under Clause 14 of the TSA and communicated to CTUIL that the outbreak of COVID-19 and restrictions were hampering the progress of the



transmission project and would lead to a delay in the commissioning of the transmission line and bay for the transmission project.

- q) As the premise for entering into the LTA, Connectivity Agreement, TSA, and Consultancy Agreement was the PPA for the development of a 250 MW transmission project, which was terminated by Arina Solar, the Petitioner also proceeded to terminate the other agreements like the Connectivity Agreement, LTAA, TSA, and Consultancy Service Agreement on 7.10.2020.
- r) Since the PPA stands terminated by Arina Solar on account of the continuance of *force majeure* beyond a period of three months, the performance of obligations by the Petitioner under the said Agreements, i.e. the LTA, TSA, and Connectivity Agreement being intrinsically linked to the PPA, is rendered impossible.
- s) There are no alternative means available to the Petitioner to carry on performance. Accordingly, the contract has become void under the provisions of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as "Contract Act"). The Petitioner is entitled to invoke Section 56 of the Contract Act as the Agreements have been rendered impossible to perform. Further, since there was no alternative available to perform the contractual agreement, Section 56 is invoked by the Petitioner in this case, which is in line with the view held by the Supreme Court in the Energy Watchdog case.



- t) Further, in terms of Section 65 of the Contract Act, a person who has received any advantage under a contract that becomes void is required to restore the benefits to the person from whom they were received. Accordingly, the CTUIL is liable to return the Connectivity Bank Guarantee and the Bank Guarantee submitted under the LTA.

Submission of the Respondent, CTUIL

6. In reply to the submissions made by the Petitioner, CTUIL, vide affidavit dated 2.2.2022 and Written Submission dated 25.5.2023, has made the following submissions:

- a) The LTA and Stage-II Connectivity granted to the Petitioner were regularly monitored on a quarterly basis in the Joint Coordination Committee (JCC) Meetings for the Southern Region between March 2019 and September 2020. Some of the observations from the said meetings are as follows:
- i) The Petitioner's project was stated to be scheduled for commissioning on 1.10.2020. However, as per the 26th JCC Meeting held on 25.3.2019, the Petitioner had not acquired the required portion of land (1100 acres), the Connection Agreement had not been signed, and the financial closure was expected to be achieved by 1.5.2019;
- ii) The Petitioner revised the SCOD from 1.10.2020 to 25.10.2020 and also revised the date of achieving financial closure from 1.5.2019 to 16.8.2019. The Petitioner could acquire only 379 acres of land out of the required 1100 acres; the 5 acres of land required for the construction of



the Pooling Station was also to be acquired (As per the 27th JCC Meeting held on 25.6.2019);

iii) The Petitioner revised the commissioning date of the dedicated transmission line and the Pooling Station to 21.9.2020. The Petitioner has only acquired 410 acres of land (As per the 28th JCC Meeting held on 26.9.2019);

iv) The Petitioner once again revised the SCOD from 25.10.2020 to 15.4.2021 and also revised the expected date of the dedicated transmission line and the Pooling Station to 15.3.2021. No work on the ground had been started, and the Petitioner had requested SECI for an extension till April 2021 (As per the 30th JCC Meeting held on 29.6.2021)

v) The Petitioner informed in the 31st JCC Meeting that no work on the ground had been started. The Petitioner had requested SECI for termination of the PPA as the project had become unviable due to *force majeure* conditions and had also filed Petition No.605/MP/2020 before the Commission in this regard. The Petitioner was informed in the meeting that LTA shall be made effective with the commissioning of the 3rd ICT and common facilities at Tuticorin-II PS (As per the 31st JCC Meeting held on 28.9.2020).

b) The Petitioner, vide letters dated 19.3.2020, 29.4.2020, and 29.7.2020, sought an extension in the LTA operationalization date on account of *force majeure*



occurrences stating it to be beyond its control, citing various Office Memorandums issued by the Government of India in the wake of Covid-19 outbreak. However, no such clause of *force majeure* was provided under the Connectivity Agreement or the LTA Agreement. That being so, the notices issued by the Petitioner were without any legal basis.

- c) On 20.3.2020, MNRE, recognizing the adverse effect of supply chain disruption in China and its impact on renewable energy (RE) generators in India issued an OM directing agencies such as NTPC and SECI to treat delays in commissioning/construction on account of disruption in supply chains due to the spread of Covid-19 in China or any other country as an event of *force majeure*. On 13.8.2020, MNRE granted a blanket extension of 5 months to all RE based generation developers.
- d) As per the said OM, a blanket extension of 5 months was to be granted to any generator upon invoking it. Rather than invoking the same, the Petitioner, vide its letter dated 7.10.2020 to CTUIL, sought cancellation of the Stage-II connectivity. The extension of 5 months under the connectivity granted as per the above OM, therefore, did not inure to the benefit of the Petitioner.
- e) In the meantime, the Petitioner had terminated its PPA with SECI. There was no inter-dependence of PPA and the Transmission Agreements as has been wrongly pleaded by the Petitioner since PPA was an issue between the Petitioner and SECI, and CTUIL was not a party in the said Petition. An occurrence of a *force majeure* event under the PPA has no effect whatsoever



- upon the performance of obligations under the transmission agreement. So, the Petitioner's contention that PPA is a pre-condition for performance under the Transmission Agreement is not correct.
- f) The Commission, in various orders, has held that PPA is not a condition precedent either for applying for LTA or for regulatory approval. It cannot be pleaded that PPA is a necessary pre-condition for the LTA, and hence its absence cannot be considered a force *majeure* frustrating the operation of the LTA.
- g) The Commission in Record of Proceedings (ROP) dated 20.8.2020 restrained SECI from encashing the Performance Bank Guarantee of the Petitioner furnished under the PPA till the next date of hearing, and SECI had admitted that it did not intend to invoke/ encash the performance bank guarantee furnished by the Petitioner.
- h) As the Commission was not functioning in view of the directions of the Supreme Court vide orders dated 28.8.2020 and 25.9.2020, the Petitioner filed an Original Petition before the APTEL, seeking to restrain the CTUIL from invoking the PBG amounting to ₹5 crore and the BG amounting to ₹25 lakh, and restrain the CTUIL from taking any coercive action against the Petitioner pending the hearing of the present petition and till the time the dispute is decided by the Commission.
- i) The CTUIL, vide its affidavit dated 9.11.2020 undertook that it would not take any coercive action against the Petitioner with respect to the subject bank



guarantees till the listing and hearing on admission of the present petition before the Commission, subject to the Petitioner keeping the bank guarantees alive. The APTEL passed an order on 10.11.2020 that till the Commission heard and decided the interim applications pending before them pertaining to LTA and connectivity charges, the bank guarantee furnished for those items would not be encashed and directed the Petitioner to keep the validity of the bank guarantee till such time.

- j) CTUIL, vide its letter dated 2.2.2021, revoked the connectivity and LTA granted to the Petitioner and further informed that the Petitioner shall be liable for payment of applicable relinquishment charges. As far as the revocation of the Bank Guarantees of ₹5 crore and ₹25 lakh, the same will be on hold in view of the APTEL's directions.
- k) Subsequently, vide letter and email dated 12.4.2021, CTUIL notified the relinquishment charges for the LTA of 250 MW to be ₹138.78 crores.
- l) Pending the adjudication of the petition, the Commission notified the Revised Procedure. In terms of Clause 5 of the Revised Procedure, the Commission has prescribed the treatment for Stage-II Connectivity and bank guarantee(s) for such entities that were granted Stage-II Connectivity under the Pre-revised Procedure. In the present case, the Petitioner was granted Stage-II Connectivity under the Pre-Revised Procedure, and therefore, the treatment of its Stage-II Connectivity and Conn-BG(s) is subject to Clause 5 of the Revised Procedure. The Stage-II Connectivity had already been revoked on 2.2.2021



(along with Stage-I Connectivity & LTA), and therefore the only subject matter remaining to be administered under the aforesaid Clause 5 is with respect to the treatment of its Conn-BG of ₹5 crore. Sub-clauses (1) and (2) of Clause 5.1 of the Revised Procedure differentiate in the treatment of Conn-BG based upon whether “any action” had been “initiated for revocation of Stage-II Connectivity or encashment of Bank Guarantee” prior to the issuance of the Revised Procedure dated 20.2.2021. The Petitioner’s Stage-II Connectivity had been revoked on 2.2.2021. The Petitioner had also been informed that its Conn-BG was encashable. However, no action was being taken towards the encashment of the same in terms of the interim protection granted to the Petitioner by the APTEL’s order dated 11.10.2020 in O.P. No. 13 of 2020, which stood extended vide the Commission’s order vide RoP dated 4.6.2021. Therefore, appropriate directions may be given for the treatment of the Petitioner’s Conn-BG in terms of Clause 5 of the Revised Procedure in the specific facts and circumstances of the present case.

- m) As for the BG of ₹25 lakh submitted by the Petitioner along with its LTA application, the same is liable to be treated in terms of Para 23.8 (iii) of the Detailed Procedure notified (and amended from time to time) under Regulation 27 of the Connectivity Regulations, which provides that the bank guarantee may be encashed by the Nodal Agency if the long-term access rights are relinquished prior to the operationalization of such long-term access when augmentation of the transmission system is not required. The same had also



been intimated to the Petitioner vide letter dated 2.2.2021. However, CTUIL shall be guided by the directions of the Commission in this regard. As the Petitioner's relinquishment charge liability has been computed and notified on 12.4.2021, the application bank guarantee may be directed to be kept alive against the liability towards relinquishment charges.

- n) The LTAA and TSA are statutory in nature, governed by the Regulations of the Commission, and are immune from the general pleas of frustration of a contract under Section 56 of the Contract Act. The said bank guarantees cannot be termed an 'advantage' received by the CTUIL, which are liable to be returned to the Petitioner.
- o) The contention of the Petitioner is that the termination of the PPA led to the discharge of obligations based on the *force majeure* provisions of the TSA, which have not come into force and are thus inapplicable.

Petitioner's rejoinder to the reply filed by the CTUIL

7. The Petitioner, vide affidavit dated 10.5.2023, has submitted the following in its rejoinder to the reply of the CTUIL:

- a) The Petitioner shall be governed in terms of the "Grant of connectivity to projects based on renewable sources to inter-state transmission system," 2021 (Revised Procedure) issued on 20.2.2021 in supersession of the Detailed Procedure for "Grant of connectivity to projects based on renewable sources to inter-state transmission system," dated 15.5.2018 ("Pre-Revised Procedure").



- b) As per the Revised Procedure, if revocation of Stage II connectivity or encashment of Bank Guarantee has been initiated after the issuance of the Revised Procedure, such action shall be governed in terms of the Revised Procedure. In the instant case, CTUIL revoked the Stage II Connectivity granted to the Petitioner on 2.2.2021 i.e., prior to the issuance of the Revised Procedure. However, CTUIL has not taken any action towards encashment of the Bank Guarantee even until the present date. The contention of CTUIL that it has not taken any action towards the encashment of bank guarantees owing to the stay granted by the APTEL is not tenable since the relief granted was not challenged by CTUIL.
- c) The Connectivity Bank Guarantee of ₹5 crore submitted under the Pre-Revised Procedure shall be treated as Conn-BG1 for ₹50 lakh and Conn-BG2 for the balance amount as per the Revised procedure.
- d) In the instant case, as the bay at the ISTS sub-station was to be constructed by the Petitioner, as per clause 5.1(4)(i) of the Revised Procedure, CTUIL would have to return the Conn-BG2 amounting to ₹4.5 crore to the Petitioner.
- e) CTUIL, vide its letter dated 28.12.2021 to the Petitioner had given an option for a reduction in the amount of Conn BG from ₹5 crore to ₹0.5 crore. However, in the hearing dated 27.3.2023, CTUIL had submitted that the said letter was generic in nature and was given to all the entities after notification of the Revised Procedure. However, on perusal of the contents of the said letter, it could be discerned that the said letter was issued specifically to the Petitioner



(reference should be drawn to the details of the LTA mentioned in the said letter).

- f) The issue regarding the applicability of the Revised Procedure where no action has been initiated towards the encashment of Bank Guarantee by the CTUIL is no longer *res integra* and, the APTEL, vide its judgment dated 12.4.2022, in Appeal No. 53 of 2022, has held that since no action towards the encashment of the Bank Guarantee has been initiated by the CTUIL, the Revised Procedure shall be applicable in the present case.
- g) CTUIL has failed to bring on record any loss that it may have incurred due to the revocation of the Stage II Connectivity granted to the Petitioner. On 15.2.2019, bay 210 was allotted to the Petitioner for its 250 MW Solar PV Project (referred to therein as Project-A) and as per the Status of the allocation of bay(s) at the existing or proposed ISTS sub-stations for Stage-II Connectivity as on 3.3.2022, bay 210 is now no longer allocated to Petitioner. Hence, even as per the CTUIL, there is no bay allocated by it to the Petitioner for the said project, and hence there can be no loss to the CTUIL. Furthermore, as the bay at the ISTS sub-station is being constructed by the Petitioner itself, the CTUIL has no basis to withhold the ₹5 crore bank guarantee and should return the same to the Petitioner. The CTUIL has also refunded the remaining consultancy charges and Adhoc O&M Charges on 14.10.2021 and returned the indemnity Bond on 14.10.2021 submitted by the Petitioner to the CTUIL implying that even as per the CTUIL, the LTA Agreement is not valid any more.



- h) The terminal bay which was allotted to the Petitioner, has already been utilized and allotted to another project developer, and as such, there is no stranded capacity of terminal bay no. 210 at Tuticorin II Sub-station which may lead to any losses to the CTUIL. In the absence of any such loss, the Petitioner is entitled to the return of the bank guarantees as prayed for in the present petition.
- i) The request for revocation of Stage-II connectivity was made by the Petitioner to the CTUIL on 7.10.2020, more than four months prior to the issuance of the Revised Detailed Procedure and the said request was acceded to by the CTUIL on 2.2.2021 with effect from 8.10.2020, prior to the issuance of the Revised Detailed Procedure. Furthermore, CTUIL has failed to bring on record any losses that it may have incurred owing to the non-utilization of bay terminal 210 and losses on account of stranded capacity.
- j) Even if the LTA, TSA, and Connectivity Agreements are Statutory Contracts, the provisions of the Contract Act shall still be applicable if the said Statutory Contracts do not contain any terms or embody any provisions of a statute that deal with frustration or the impossibility of performance. This view is held by the Supreme Court in cases such as *Kerala SEB v. Kurien E. Kalathil*, (2000), 6 SCC 293, *Mary v. State of Kerala*, (2014), 14 SCC 272, etc. The Supreme Court in *Mary v. State of Kerala* held that since the statutory contracts stipulated consequences of non-performance of the contract, Section 56 cannot be invoked. Accordingly, applying the corollary, if there are no consequences



stipulated under the statutory contract, a party, whether it has entered into a regular contract or a statutory contract, can take shelter under Section 56 of the Contract Act if the performance of the contract has been rendered impossible.

Analysis and Decision

8. We have considered the submissions of the Petitioner and CTUIL and have perused the documents on record.

9. On the basis of the submissions made by the Petitioner and the CTUIL, the following three issues arise for our consideration:

a) *Whether the contention of the Petitioner that the alleged events leading to the termination of the PPA can be termed force majeure events as per Article 11.3 of the PPA dated 22.11.2018?*

b) *Was the performance under the Connectivity Agreement, LTA, and TSA frustrated in terms of Section 56 of the Contract Act?*

c) *Whether CTUIL can be directed to return the connectivity Bank Guarantee dated 2.11.2018 amounting to ₹5 crore and Bank Guarantee amounting to ₹25 lakh submitted towards the LTA?*

a) *Whether the contention of the Petitioner that the alleged events leading to the termination of the PPA can be termed force majeure events as per Article 11.3 of the PPA dated 22.11.2018?*

10. The Petitioner had incorporated Arina Solar as the SPV to develop a Solar Power Project based on PV technology of 250 MW in Tamil Nadu. Arina Solar had entered into



a PPA with SECI on 22.11.2018, wherein SECI agreed to purchase power from Arina Solar. As per the PPA, the SCOD of the solar project was 25.10.2020 which was later extended by SECI to 31.1.2021

11. The Petitioner has submitted that, due to the onslaught of COVID-19 in China, followed by lockdown in the country, the Petitioner was not able to arrange for the module/inverter from China despite the best attempts. Therefore, the Petitioner had to invoke force *majeure* under the terms of the PPA. A mail was sent to SECI on 11.2.2020, exercising its rights under the above provisions in the PPA. The Ministry of Finance, vide OM dated 19.2.2020 declared the outbreak of Covid-19 as a *force majeure*, followed by the Ministry of New and Renewable Energy (“MNRE”) issuing several office memoranda declaring the Covid-19 pandemic and the resultant lockdown as a *force majeure* event and thereby directing the Renewable Implementing Agencies to treat both the outbreak of Covid-19 and the nation-wide lockdown as *force majeure*. The Petitioner issued the termination notice to SECI on 7.8.2020.

12. The *force majeure* has been defined in the PPA as follows:

“11.3 Force Majeure

11.3.1 A 'Force Majeure' means any event or circumstance or combination of events those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

a) Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon or tornado if and only if it is declared/ notified by the competent state/ central authority/ agency (as applicable);

b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action if and only if it is declared/notified by the competent state/central authority/agency (as applicable); or



c) radioactive contamination or ionising radiation originating from a source in India or resulting from another Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Project by the Affected Party or those employed or engaged by the Affected Party.

d) An event of Force Majeure identified under Buyer-Buying Entity(ies) PSA, thereby affecting delivery of power from SPD to Buying Entity(ies).”

13. Article 4.5.3 of the PPA read with Article 13.5 of the PPA, provides for the parties to terminate the PPA, in case of the continuation of a *force majeure* event beyond a period of three months. The relevant portions of the PPA are extracted hereunder:

“4.5.3. In case of extension due to reasons specified in Article 4.5.1 (b) and (c), and if such Force Majeure Event continues even after a maximum period of three (3) months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 13.5.”

“13.5 Termination due to Force Majeure

13.5.1 If the Force Majeure Event or its effects continue to be present beyond a period as specified in Article 4.5.3, either Party shall have the right to cause termination of the Agreement. In such an event this Agreement shall terminate on the date of such Termination Notice without any further liability to either Party from the date of such termination.”

14. We find that after the termination of PPA on 7.8.2020, Arina Solar filed Petition No. 605/MP/2020 before the Commission seeking the return of performance bank guarantees that were submitted to SECI under the PPA. The Commission, vide order dated 6.9.2022 in Petition No. 605/MP/2020, held that although the Petitioner had sufficient time to commission the project, it failed to do so and terminated the PPA without giving any justification for the same. The Commission, after considering the matter in detail, rejected the contention of the Petitioner regarding the applicability of *force majeure* and consequently rejected any relief to the Petitioner. The relevant portion of the order dated 6.9.2022 is as follows:

“39. We observe that the Petitioner preferred to terminate the PPA on 07.08.2020 i.e. much before the original SCoD i.e. 25.10.2020. Whereas, as already discussed in the preceding paragraphs, even if there was a force majeure, it was temporary in nature and



the commissioning of the project had not become impossible. For the time period, the commissioning of the project became impossible, the SCoD has been duly extended by 98 days i.e. till 31.01.2021 by SECI.

40. We observe that the Petitioner vide letters dated 11.02.2020, 27.02.2020 & 18.03.2020 informed SECI about triggering of Force Majeure events and anticipating a delay of about 3 months in achieving the SCoD. In response to this, SECI sought information from the Petitioner regarding the Schedule of Supply/Agreement with the Supplier, date of intended supply and extent to which supply stands disrupted on 19.03.2020. From the above it can be inferred that the Petitioner intended to seek time extension of SCoD. Further, we observe that in compliance with the OMs dated 17.04.2020 and 30.06.2020, SECI allowed time extension in SCoD for the Petitioner's project (considering disruption due to lock down due to Covid-19) vide letter dated 21.05.2020 and 17.07.2020 and the SCoD was extended till 31.01.2021. Thus, the total time extension was given for 98 days. However, the Petitioner preferred to terminate the PPA on 07.08.2020. We are of the view that sufficient time was available with the Petitioner to implement the project. The Petitioner has failed to sufficiently justify on records that in spite of having 203 days (from 13.07.2020 to 31.01.2021) for commissioning of the project, which factors forced him to terminate the PPA on 07.08.2020. In view of the above, we are of the view that no relief can be given to the Petitioner for invocation of Article 11.3 of PPA dated 22.11.2018. Hence, the issues are decided in line with the above discussion.”

15. The Commission has already rejected the Petitioner's contention that COVID-19 and the subsequent lockdown are *force majeure* events rendering the completion of the project impossible to implement in order dated 6.9.2022. Therefore, we reject the applicability of the *force majeure* conditions to the Petitioner and consequently reject the claim of any relief under Article 11.3 of the PPA dated 22.11.2018.

16. The first issue is decided accordingly.

b) Was the performance under the Connectivity Agreement, LTA and TSA frustrated in terms of the Section 56 of the Indian Contract Act 1872?

17. Having decided the first issue, we now consider the second issue, i.e. was the performance under the Connectivity Agreement, Long term Access Agreement, and Transmission Service Agreement frustrated in terms of Section 56 of the Contract Act? We have perused the documents and gone through the rival submissions in this regard.



18. The Stage-I connectivity was granted to the Petitioner on 24.8.2018 after which the Petitioner applied for the Stage-II connectivity, which was, accordingly, granted to it by CTUIL on 8.10.2018 to be effective from 1.6.2020 (extended to 1.10.2020). The conditions attached to the grant of connectivity were that the grantee had to sign the Connectivity Agreement and the Petitioner had to complete the dedicated transmission line within 24 months from the date of intimation of bay allocation at an existing or new/ under-construction ISTS sub-station. The Connectivity Agreement was signed on 31.10.2018, pursuant to which a Connectivity Bank Guarantee of ₹5 crore was submitted on 2.11.2018. The Connectivity Agreement, read with paragraph 11.2 of the RE Connectivity Procedure, entitles CTUIL to encash the Connectivity BG if the dedicated transmission line is not completed within 24 months.

19. On 31.5.2019, the Petitioner applied for an LTA of 250 MW by furnishing a Bank Guarantee of ₹25 lakh. The LTA was granted to the Petitioner on 30.7.2019 and was commenced on 2.10.2020. This was followed by the signing of LTAA on 28.8.2019. TSA was signed on 28.8.2019. A Consultancy Agreement was also signed for a Bank Guarantee of ₹6.21 Crore. The Petitioner invoked Clause 14 of the TSA and, vide letter dated 19.3.2020, communicated to CTUIL that the outbreak of COVID-19 and restrictions were hampering the progress of the transmission project and would lead to a delay in the COD of the transmission line and bay of the transmission project. As already stated, on 7.8.2020, a notice of termination of the PPA was also sent by the Petitioner.

20. The Petitioner contended that post PPA termination, the performance of the Connectivity Agreement stood frustrated and requested the cancellation of connectivity



and the return of BG of ₹5 crore. The Petitioner has also submitted that, in the absence of the generation of any power, the evacuation of power through the use of ISTS was no longer feasible and possible, and accordingly, the LTA was impossible to perform and stood frustrated, relieving the Petitioner from all obligations, including payment of any charges under the LTA, so that its bank guarantee of ₹25 lakh is liable to be returned. On 7.10.2020, the Petitioner proceeded to terminate the other agreements, i.e. Connectivity Agreement, TSA, LTA, and Consultancy Agreement, submitting that it was the PPA between Arina Solar and SECI, which was the core of the other Agreements like TSA, LTA, and Connectivity Agreement it has signed with PGCIL. The other agreements are rendered impossible to perform. The contract, therefore, becomes void in terms of Section 56 of the Contract Act. The Petitioner has prayed for the return of the BGs in respect of the Agreements, i.e., LTA and the Connectivity Agreement.

21. The CTUIL has, however, submitted that there is no interdependence of PPA with the other agreements since PPA was between the Petitioner and SECI, wherein the CTUIL is not a party. The Commission, in its various orders, such as Petition No. 293/MP/2015 and Petition No. 525/MP/2020, etc has held the PPA to be independent of the TSA, etc. The CTUIL has further submitted that the LTAA and TSA are statutory in nature and governed by the Regulations of the Commission and, hence, are immune from the plea of frustration under Section 56 of the Contract Act.

22. We have perused the submission of the rival parties and heard the learned counsels in this regard.

23. Section 56 of the Contract Act deals with the 'doctrine of frustration' as follows:



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

***Contract to do an 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 promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”*

24. Keeping the above premise in mind, the interpretation of the above provision would be that the parties enter into a contract with a general assumption that they will fulfil their contractual obligations and complete the conditions of the contract. The circumstances, however, may make this fulfilment of contractual obligations impossible or impractical. And when these circumstances are out of the control of the parties and render the contract impossible to fulfil, such a contract is said to be frustrated. Frustration is an umbrella that covers all the possible circumstances that might lead to the fulfilment of the contractual obligation being impossible or impractical.

25. The ‘doctrine of frustration’ thus provides a mechanism to deal with such unpredictable circumstances that may lead to a contract being frustrated, providing a mechanism for the parties to protect themselves from paying damages in cases where events transpire that are unpredictable and out of their control. The Contract Act does not explicitly define the term “frustration”, but it still covers all the bases and provisions of the ‘doctrine of frustration’ under Section 56.

26. Going by the above and imagining for a moment that the doctrine of frustration was attracted in this case, we may have to examine the one event that may have caused the



agreements to get frustrated or become impossible to perform. The Petitioner's contention is that as soon as the PPA was terminated by Arina Solar on account of the *force majeure* events, the factum of setting up a power project and consequent generation of power was itself rendered impossible. Then, the unavailability of power generated from the proposed power project has rendered the Agreements with the Respondent impossible to perform.

27. Going by the above definition and interpretation, we have to see if the connectivity agreements, such as LTAA, Connectivity Agreement, etc., had really become an act of impossibility on the part of the Petitioner after the termination of the PPA, which was done unilaterally by the Petitioner. In order to resolve the same, we have to see whether the PPA is interlinked with other agreements like TSA or LTAA. CTUIL maintains that both are separate and are not interlinked in any way.

28. In this regard, the Commission has perused all the agreements entered into between the parties, which include the Connectivity Agreement dated 8.10.2018, Transmission Agreement dated 31.10.2018 (supplementary agreement on 5.3.2019), PPA dated 22.10.2018, LTAA dated 28.8.2019, TSA dated 28.8.2019 and the Consultancy Agreement dated 30.9.2019.

29. In all the above-mentioned agreements, we do not find any reference to the PPA. The Commission, therefore, could not make any inference from all the agreements that, for want of the PPA, these agreements should have been frustrated.

30. We have also perused the LTA intimation letter granted to the Petitioner by CTUIL, which is as follows:



POWER GRID CORPORATION OF INDIA LTD.
Intimation for Grant of Long Term Access (LTA)

1 Intimation No.	C/CTU/S/07/1200002127
Date :	30/07/2019
2 Ref. Application No.	1200002127
Date :	31/05/2019
3 Name of the Applicant	M/s Shapoorji Pallonji Infrastructure Capital Company Private Ltd
4 Address for Correspondence	: SP Centre, 41/44, Minoos Desai Marg, Colaba Mumbai, Maharashtra--400005
5 Nature of the Applicant	: Solar Power Generation
Normal Generator (other than captive) Captive Generator Bulk Consumer Electricity Trader Distribution Licensee Others	
6 Details for Long Term Access (LTA)	
6a Quantum (MW) for which LTA is granted	250 MW (Project – A)
7 Injection of Power (more than one only in case of single Drawl)	
Entity-1 State/Region Quantum-1 Connectivity with the Grid	M/s Shapoorji Pallonji Infrastructure Capital Company Private Ltd. Tamil Nadu / SR 250 MW At 230 kV level through Shapoorji Pallonji – Tuticorin-II GIS 230kV D/c line [for both project-A (SECI) and project-B (NTPC)] [with minimum capacity of 300 MW at nominal voltage] along with terminal bays at Tuticorin-II & generation switchyard (under the scope of the applicant)
8 Drawl of Power (more than one only in case of single Injection)	
Entity-1 State/Region Quantum-1 Connectivity with the Grid	Target Eastern Region 250 MW Through ISTS network
9 Transmission System for LTA	Existing transmission system
9a Date from which LTA is granted	25/10/2020
9b Date upto which LTA is granted	25/10/2045



9c	Implementing Agency for transmission system required for LTA	NA
9d	Agencies between which agreement is to be signed for implementation of transmission system	M/s Shapoorji Pallonji Infrastructure Capital Company Private Ltd & POWERGRID
9e	Amount (in Rupees) for which Bank Guarantee is to be provided by the applicant	Nil
10	Transmission Charges Applicable	Transmission charges as per CERC Sharing of ISTS Charges & Losses Regulations, 2010

Note: Long Term Access is granted to the ISTS subject to the following:

1. That the LTA applicant shall enter into Long Term Access Agreement (LTAA) within 30 days of the LTA intimation in default of which the LTA shall be liable for revocation.
2. That the LTA applicant shall enter into Transmission Service Agreement (TSA) in line with the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010.
3. That the LTA applicant shall abide by all the duties and liabilities under the Electricity Act, 2003; all applicable CERC Regulations as amended from time to time, including but not limited to CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009, and; Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010; as also with the CEA (Technical Standards for Connectivity to the Grid) Regulations, 2007 and as amended from time to time.
4. Before injection of power into ISTS, applicant shall ensure the compliance of provision of Low Voltage Ride Through (LVRT) and High Voltage Ride Through (HVRT) as per provision of CEA (Technical Standards for Connectivity to the Grid) Regulations, 2018.
5. That the applicant shall keep the CTU and RLDC/NLDC indemnified at all times and shall undertake to indemnify, defend and keep the CTU, RLDC/NLDC harmless from any and all damages, losses, claims and actions including those relating to injury to or death of any person or damage to property, demands, suits, recoveries, costs and expenses, court costs, attorney fees, and; all other obligations by or to third parties, arising out of or resulting from the long-term access transaction.

Place: Gurgaon
Date: 30/07/2019




Name: (Subir Sen)
Designation: COO (CTU-Ptg)



No reference to the PPA is found either in the LTA Agreement or the LTA Intimation issued by CTUIL to the Petitioner.

31. The Petitioner has placed reliance on the Supreme Court judgement in the case of **Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 SCR 310**. However, we find that the applicability of the same has already been rejected by the Commission in its order in Petition No. 293/MP/2015 dated 18.7.2017. The relevant portion of the said order rejecting this contention is as follows:

“14. We have considered the submissions of the Petitioner and the Respondent in the light of the provisions of Clause 9 of the BPTA above. In the present case, the petitioner does not fulfil the conditions of Clause 9 of the BPTA due to following reasons:-

.....

d) The Petitioner has vehemently argued that due to reasons beyond its control, it is not able to utilize the LTA under the BPTA. This argument cannot be accepted as PGCIL has in no way contributed to the impossibility of performance of contract by the petitioner. The transmission system as per the BPTA has been executed by PGCIL based on the commitment of the Petitioner and therefore, the Petitioner cannot be relieved of its obligation for payment of transmission charges. This issue has been dealt with by the Appellate Tribunal in appeal No. 197 of 2014 (Jayaswal NecoUrja Limited vs. PGCIL) as under:

In view of the above finding of the Appellate Tribunal, it cannot be said that PGCIL by its acts of omission or commission has contributed to the Petitioner’s inability to operationalize the LTA.”

32. As per the above judgement of the Supreme Court, the PPA and the Transmission Agreements are independent of each other, and not signing the PPA is no basis for non-performance under BPTA since the transmission utility has not contributed to the impossibility of the contract of the petitioner.

33. Whether PPA is a pre-condition to applying for LTA had also come up for the Commission’s consideration in Petition No. 303/MP/2015. The Commission in combined



order dated 5.2.2020 in Petition No. 303/MP/2015 & Petition No.3/MP/2026 held as follows:

“30. We have considered the submissions of the Petitioner and Respondent CTU. The subject transmission system based on which LTA was granted to the Petitioner were executed on the basis of the regulatory approval granted by the Commission vide its orders dated 26.3.2010 and 31.5.2010 in Petition No.233/2009. The Petitioner was a party to the said petition. The issue of signing of the PPA was considered at the time of according regulatory approval. Relevant para of the order dated 26.3.2010 is extracted as under:

“17. As regards the requirement for signing of PPAs with the beneficiaries, we observe that the IPPs have not been able to come forward to sign the PPAs, primarily because the States have not yet gone ahead with the bidding process for evacuation of power. However, linking the signing of the PPAs with regulatory approval will hamper the progress of the transmission projects. The Tariff Policy issued vide Govt. of India in para 7.1.4 does not make it mandatory for network expansion by the CTU/STU. The said para reads as under:

“In view of the approach laid down by the NEP, prior agreement with the beneficiaries would not be a pre-condition for network expansion. CTU/STU should undertake network expansion after identifying the requirements in consonance with the National Electricity Plan and in consultation with stakeholders, and taking up the execution after due regulatory approvals.”

In view of the above mandate of the Tariff Policy, we are of the view that the CTU should carry out consultation with the stake holders and satisfy itself about the bonafide nature of generation projects which are likely to materialize during the next three years and submit the detailed report about such projects, including the physical progress made wherever feasible and approach the Commission by first week of April,2010.”

Therefore, the Petitioner is aware that the regulatory approval was granted to the Petitioner on the basis of the LTA and without linking it to PPAs. It was left to the Project Developer for tie-up with the beneficiaries for PPA. When availability of PPA was not a condition precedent either for applying for LTA or for regulatory approval, therefore, it cannot be pleaded at this stage that PPA is a necessary pre-condition of the LTA and hence its absence cannot be considered as force majeure frustrating the operation of the LTA.”

34. The Commission in the above matter held that since PPA is not a condition required for applying for LTA, it cannot be considered a *force majeure* frustrating the operation of LTA.



35. Similar views have been expressed by the Commission in its order dated 23.5.2022 in Petition No. 525/MP/2020 (Sprng Renewable Energy Private Limited Vs. Central Transmission Utility of India Limited and Anr.) holding that PPA and LTA are two entirely different and distinct agreements, and the liability and obligations contained therein are also different as follows:

“28.....

Thus, we observe that RfS/PPA and LTA Agreement are two entirely different and distinct agreements and the liabilities and obligations contained therein are also different. The obligation of the Petitioner arising out of the PPAs is independent of its obligation to meet the timeline which the Petitioner has under the LTA application and LTA Agreement. There is no reference of PPA clauses in the LTA Agreement and deferment of start date of LTA is provided neither in LTA Agreement nor in any Regulation. Therefore, the Petitioner cannot contend that CTU should have matched the SCOD in the PPA and the date of operationalization of LTA. It was the sole responsibility of the Petitioner to correctly assess and inform the correct start date of LTA”.

36. In another matter in Petition No. 137/MP/2016, the Commission, vide order dated 5.2.2020, has held that the existence or absence of PPA has nothing to do with the frustration of the LTA, as follows:

“25...

Therefore, the Petitioner is aware that the regulatory approval was granted to the Petitioner on the basis of the LTA and without linking it to PPAs. It was left to the Project Developer for tie-up with the beneficiaries for PPA. When availability of PPA was not a condition precedent either for applying for LTA or for regulatory approval, therefore, it cannot be pleaded at this stage that PPA is a necessary pre-condition of the PPA and hence its absence cannot be considered as force majeure frustrating the operation of the LTA. The Petitioner has in fact entered into long term PPA for 558 MW and the Petitioner’s failure to enter into PPA for the balance capacity cannot be considered as force majeure.

26. As regards the reasons adduced by the Petitioner to prove that the existence of long term PPA is a necessary condition for availing the LTA and absence of long term PPA has led to frustration of the LTA, we are of the view that these provisions in the Connectivity Regulations and Detailed Procedure have been specified to cater to different requirements and cannot be pleaded as the basis for grant of LTA in the absence of which LTA stands frustrated. Regulation 12 requires an applicant for long term access to indicate the entity from which power is to be procured or supplied and the quantum of power to be supplied. But the first proviso provides that where the source or quantum has not been fixed up,



then the applicant has to indicate the quantum of power alongwith the name of the region where the electricity to be interchanged. Thus, PPA is not an essential condition for applying for LTA. Para 22.7 of the Detailed Procedure requires the LTA Customer to give details of the PPA three years prior to operationalization of LTA, the purpose being that the last mile connectivity could be planned and implemented. As regards Clause 7.1 of the BCD Procedure, scheduling can be done against the LTA quantum when there is long term, medium term and short term PPA. This provision is regarding scheduling and from the said provision, inference cannot be drawn that in the absence of long term PPA, LTA would be frustrated. In fact, Regulations allow for scheduling of medium term and short term power against the LTA quantum and offset is allowed. Regulation 15B of the Connectivity Regulations facilitates operationalization of LTA with PPA of the duration of more than one year. In other words, if the LTA Customer is able to make a medium term PPA of more than one year, it can schedule its power under MTOA. This provision does not support the case of the Petitioner that in the absence of long term PPA, LTA stands frustrated. The requirement for participating in Shakti Scheme or procurement under DBFOO or the observation of the Parliamentary Standing Committee cannot absolve the Petitioner from its liability towards LTA under the BPTA. In our view, the Petitioner had applied for and was granted LTA in the absence of long term Power Purchase Agreements and the Petitioner has taken the business risk by entering into BPTA in the absence of long term PPA. Failure of the Petitioner to enter into long term or medium term PPA for 552 MW cannot be considered as the reasons beyond the control of the Petitioner and hence, is not covered under Clause 9 of the BPTA. This finding of ours is without prejudice to our finding in response to Issue 1 that Clause 9 is not applicable in case of relinquishment of LTA under Clause 5 read with Regulation 18 of the Connectivity Regulations.”

37. In light of the above, we do not find any link to the connectivity agreement or LTA with the PPA. In our opinion, therefore, there still was the possibility of the performance of the agreement since sufficient timeline was available with the Petitioner towards the commissioning after the extension of SCOD, which the Petitioner did not try indicating the intent of the Petitioner.

38. The attitude of the Petitioner can also be assessed based on the minutes of JCC Meetings dated 25.3.2019, 25.6.2019, 23.12.2019, 29.6.2019 and 28.9.2019 duly represented by the Petitioner itself. Almost all the meetings of JCC pointed out the sluggish speed with which the Petitioner was progressing in the implementation of its power project and transmission project. Ultimately, as per the minutes of the 31st JCC



meeting on 28.9.2020, the Petitioner himself had to declare that no groundwork had been started and, therefore, sought the termination of the PPA.

39. This lacklustre attitude of the Petitioner had also come up for discussion in the Commission's order dated 6.9.2022 in Petition No. 605/MP/2020, and the Commission had summed up its observation in this regard, holding that in the given facts and circumstances, the act to be performed had not become impossible; rather, it was not possible to perform in a given time frame. The Commission also observed that a court will not apply the doctrine of frustration to assist a party that has no intention to carry out its obligations under a contract. The relevant portion of the Commission's order dated 6.9.2022 is as follows:

“30. The Petitioner has failed to prove on record sufficient documents regarding delay in supply of equipment/suspension/revocation of the supply contract by the suppliers of the Petitioner or documents as mandated in the OM dated 19.02.2020 issued by the Ministry of Finance. The Petitioner has merely relied upon its detailed submission dated 05.06.2020 without attaching any documentary evidence regarding the same. We observe that the correspondence which exchanged between the parties showed that the petitioner's attitude towards the completion of the project was half -hearted and alternated between inclination and disinclination. It is common principle of contract law that the Doctrine of Impossibility cannot be applied in a manner in which it will weaken the sanctity of a contract. The plea of impossibility is not to be entertained if in spite of intervening supervening events the object and purpose of parties is not rendered useless and the contract can be performed substantially in accordance with the agreement. It was held that the court will not apply the doctrine to assist a party which does not want to fulfil its obligations of the contract and willing to take the shelter of impossibility to back out of it. The doctrine of impossibility, which is based on equity and common sense cannot be permitted to become a device for destroying the sanctity of the contract. (reliance placed AIR 1963, All, 201 to 204).....”

40. In view of the observations/ earlier decision of the Commission as mentioned in the preceding paragraphs, and after perusing the relevant document also, we hold that the ground taken by the Petitioner that the termination of PPA in the instant petition is the



reason for the doctrine of frustration getting attracted to the effectiveness of the agreements is not maintainable and hence rejected.

41. Since we have already rejected the contention of the Petitioner regarding the applicability of the doctrine of frustration in the performance of the contract/ agreements, the contentions regarding the connectivity agreement, LTA, and TSA and are not required to be gone into.

42. The issue is decided accordingly.

c) Whether PGCIL/CTUIL can be directed to return the connectivity Bank Guarantee dated 2.11.2018 amounting to ₹5 crore and Bank Guarantee amounting to ₹25 lakh submitted towards the LTA?

43. Having decided the first two issues, the remaining issue to be decided by this Commission is whether or not the PGCIL/ CTUIL can be directed to return the Connectivity Bank Guarantee dated 2.1.2018 amounting to ₹5 crore and the Bank Guarantee amounting to ₹25 lakh submitted towards the LTA.

44. In our opinion, the Commission, more specifically, has to decide if any relief in terms of the return of the BGs submitted towards these agreements can be given to the Petitioner after we have already rejected the plea by the Petitioner that the said agreements have been frustrated after the termination of the PPA.

45. The Petitioner has submitted that the basis of obtaining the Stage-II Connectivity and Long Term Access was PPA which has since been terminated and, since CTUIL has failed to show any loss due to the revocation of the Stage-II connectivity, the Bank Guarantee provided towards the Connectivity Agreement ought to be returned due to the termination of the PPA. In terms of Section 65 of the Contract Act, a person who has



received any advantage under a contract that becomes void is required to restore the benefits to the person from whom they were received. CTUIL is therefore bound to return the connectivity Bank Guarantee and the Bank Guarantee submitted under the LTA. The Petitioner has further submitted that as per clause 5.1(3) of the Revised Procedure, Connectivity Bank Guarantee submitted under the Pre-Revised Procedure shall be treated as Conn-BG1 for ₹50 lakh and Conn-BG2 for ₹4.5 crore, which shall be liable to be refunded since the action was completed in the currency of the Revised Procedure. CTUIL, however, has submitted that the connectivity bank guarantee of ₹5 crore was deposited as per the provisions of the Pre-Revised Procedure, according to which the Stage-II Connectivity grantees were required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months, failing which, the Conn-BG of the grantee shall be encashed and Stage-II connectivity shall be revoked.

46. We have gone through the submissions. The Revised Procedure was promulgated on 20.2.2021 in accordance with Regulation 27 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access, and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009. The provision with regard to Connectivity and the Bank Guarantee has been stipulated in the said procedure in clause 5, which is as follows:

"5. Provisions with regards to Connectivity and Bank Guarantee

5.1 After coming into force of this Procedure, for an entity which has been granted Stage-II Connectivity under the Pre-revised Procedure,

(1) Any action already initiated for revocation of Stage-II Connectivity or encashment of Bank Guarantee prior to the issue of this Procedure shall be completed under the Pre revised Procedure.



(2) Any action including revocation of Stage-II Connectivity or encashment of Bank Guarantee initiated after the issue of this Procedure shall be in accordance with this Procedure.”

(3) Conn-BG submitted under the Pre-revised Procedure shall be treated as ConnBG1 for Rs. 50 lakh and Conn-BG2 for the balance amount.

(4) In the event of encashment of such Conn-BG1 or Conn-BG2 as worked out in terms of sub-clause (3) of Clause 5.1 above, under Clause 10.8 of this Procedure:

(i) If the associated bay(s) at the ISTS sub-station is being constructed by Stage-II grantee itself, amount corresponding to Conn-BG1 shall be forfeited and balance amount being treated as Conn-BG2 under this Procedure shall be refunded.

(ii) If the associated bay(s) at the ISTS sub-station is being constructed by ISTS licensee, amount corresponding to Conn-BG1 and amount of Conn-BG2 in terms of Clause 10.8(a) of this Procedure shall be forfeited and any excess amount submitted as Conn-BG under the Pre-revised Procedure shall be refunded.”

47. As per the details available, the Petitioner was granted Stage-II connectivity on 8.10.2018, and it was revoked by the CTUIL on 2.2.2021. The Pre-revised Procedure was applicable w.e.f. 15.5.2018 to 19.2.2021. Thus, the Stage-II Connectivity granted to the Petitioner was revoked at the time of the currency of the Pre-revised Procedure. As per clause 5.1(1) of the Revised Procedure, if any action is initiated for revocation of Stage-II Connectivity or encashment prior to the issue of the Revised Procedure, it has to be completed under the Pre-revised Procedure. Evidently, the Stage-II Connectivity in the case of the Petitioner was revoked on 2.2.2021, before the notification of the Revised Procedure. Therefore, in the instant case, the Pre-revised Procedure is applicable.

48. The clause 11.2 of the Pre-revised Procedure provides as follows:

“11.2 The Stage-II Connectivity grantees shall be required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months from the date of intimation of bay allocation at existing or new / under-construction ISTS



sub-station. If the grantee fails to complete the dedicated transmission line within the stipulated period, the Conn-BG of the grantee shall be encashed and Stage-II connectivity shall be revoked. The payment received in terms of these provisions shall be adjusted in the POC pool.”

49. As per clause 11.2 of the Pre-revised Procedure, the Stage-II connectivity grantee is required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months from the date of intimation of bay allocation, failing which the Conn-BG of the grantee shall be encashed and the Stage-II connectivity shall be revoked. In the instant case, the Stage-II connectivity has already been revoked, as pointed out above, ostensibly because of the non-completion of the dedicated transmission line and the pooling sub-station by the Petitioner. Accordingly, the connectivity BG amounting to ₹5 crore is liable to be encashed and shall be adjusted in the POC pool as per clause 11.2 of the Pre-revised Procedure.

50. As regards the BG submitted under the LTA, the Commission has considered this issue in Petition No. 111/MP/2014, wherein the Commission, after taking into consideration the LTA grantee's contention that the project has become impossible to implement and therefore the contract has been frustrated, referred to the APTEL's judgement held vide order dated 24.8.2015 that the encashment of the BG by the CTUIL is valid. The relevant portion of the order dated 24.8.2015 is as follows:

“20.....

Therefore, the provision of bank guarantee has been made to ensure seriousness among the LTA applicants. In this connection, observations of the Appellate Tribunal for Electricity in Appeal No. 197 of 2014 (Jayaswal Neco Urja Limited Vs Power Grid Corporation of India Ltd. & Another) are relevant which are extracted as under:

“32.The purpose behind the requirement of furnishing Bank Guarantee and the provisions for its encashment if the LTAA is not signed is to ensure commitment of the project developer to use the transmission line for which LTA has been sought. It gives assurance to Respondent No.1 that the transmission line



would not be stranded after it is built. If the LTA applicants are allowed to withdraw the LTA applications without any deterrent like encashment of Bank Guarantee, then the purpose behind the scheme of grant of LTOA will be frustrated. We, therefore, find encashment of the Appellant's Bank Guarantee to be perfectly legal."

21. The petitioner has vehemently argued that since execution of the project has become impossibility, the contract has been frustrated. This argument cannot be accepted as the CTU has in no way contributed to the impossibility of performance of contract. This issue has also been dealt with by Appellate Tribunal in Appeal No. 197 of 2014 as under:

"33. Assuming that the Appellant's contention about the existence of force majeure conditions is correct, so long as Respondent No.1 by its acts of omission or commission has not contributed to the Appellant's being unable to commence operation of its power plant, Respondent No.1 cannot be held responsible for it and encashment of Bank Guarantee cannot be faulted on that count."

In view of the above finding of the Appellate Tribunal, it can be said that since CTU by its acts of commission or omission has not contributed to the abandonment of the project by the petitioner, CTU cannot be held responsible for it and no direction can be issued prohibiting CTU to encash the bank guarantee".

51. Further, the issue of encashment BG in cases where the generator/ project developer fails to construct/ complete/ commission was also discussed in the 26th JCC meeting on 25th March 2019. The relevant minutes are as follows:

"4. It was also emphasized that Joint Coordination Committee meetings were institutionalized by the Central Electricity Regulatory Commission to enable better coordination of generation and transmission projects in terms of the applicable CERC Regulation, Detailed Procedure and BPTAs/ LTAAAs. It was also mentioned that the BPTAs/ LTAAAs executed with the generation project developers/ companies monitored hereinunder provides that if any of the developers fail to construct/ complete/ commission the generating station/ dedicated transmission line or makes an exit or abandons its project, then POWERGRID shall have the right to collect the transmission charges and / or damages as the case may be in accordance with the CERC Regulations, Orders etc. Further, as per the BPTAs/ LTAAAs, the construction phase bank guarantee submitted by the project developers /LTA customers is also encashable in case of adverse progress/ abandonment of individual generations projects(s)/unit(s) assessed during the Joint Coordination Committee meeting. It was also informed that in light of a number of recent CERC orders, wherein the Hon'ble Commission has emphasized upon strict implementation of the various Regulations, Procedures and statutory Agreement, CTU shall assess the progress of various generation projects and take appropriate actions in terms of the applicable provisions/ clauses of the Regulations/ Procedure/ Agreement."



52. As per the proceedings of the JCC, if any of the developers fail to construct/ complete/ commission or abandon the generating station/ dedicated transmission line, then the CTUIL shall have the right to collect the transmission charges and encash the construction phase BG submitted by the project developers/ LTA customers.

53. On the basis of the finding of the Commission in Petition No. 111/MP/2014 and the decision of the JCC in its meeting on 25.3.2019, we are of the view that the Petitioner cannot be allowed the relief sought, and no directions can be issued in regard to returning the BG in respect of the LTA granted to the Petitioner. As regards the BG towards the Consultancy Agreement, no action is required since, as per the Petitioner's own admission, the same has already been returned to it by CTUIL.

54. Petition No. 701/MP/2020 is disposed of in terms of the above.

**sd/-
(P. K. Singh)
Member**

**sd/-
(Arun Goyal)
Member**

**sd/-
(I. S. Jha)
Member**

**sd/-
(Jishnu Barua)
Chairperson**

