

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO.197 OF 2014**

**Dated: 15<sup>th</sup> April, 2015.**

**Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member.**

**IN THE MATTER OF:**

Jayaswal Neco Urja Limited, Siltara )  
Growth Centre, Siltara, Raipur – 493 )  
111, Chhattisgarh. ) ... Appellant

Versus

1. Power Grid Corporation of India )  
Limited, through the Chairman )  
and Managing Director, )  
Saudamini, Plot No.2, Sector – )  
29, Near IFFCO Chowk, Gurgaon )  
– 122001 (Haryana). )
2. Central Electricity Regulatory )  
Commission through Secretary, )  
4<sup>th</sup> Floor, Chanderlok Building, )  
36, Janpath, New Delhi. ) ... Respondents

Counsel for the Appellant(s) ... Mr. Pradeep Dahiya

Counsel for the Respondent(s) ... Mr. M.G. Ramachandran  
Sr. Adv.  
Ms. Rajnitha Ramachandran  
Ms. Anushree Bardhan  
Ms. Poorva Saigal for **R-1**.  
  
Mr. M.S. Ramalingam for **R-2**.

## JUDGMENT

### PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON

1. The Appellant – Jayaswal Neco Urja Limited (“**JNUL**”), is a company incorporated under the provisions of the Companies Act, 1956. Respondent No.1 is Power Grid Corporation of India Limited. It is the Central Transmission Utility (“**CTU**”) and an interstate transmission licensee. Respondent No.2 is the Central Electricity Regulatory Commission.

2. The Appellant’s case could be shortly stated:

The Appellant is a subsidiary Company of Jayaswal Neco Industries Limited (“**JNIL**”) which was allocated captive coal block Gare Palma Block IV/4 and IV/8 at Tehsil Tamnar District

Raigarh in the State of Chhattisgarh. The Gare Palma Block IV/4 is in operation and JNIL is installing a coal washery at Gare Palma IV/8 pithead. After washing the coal, the coal having Gross Calorific value of 4000 K cal/kg and above will be utilized in its existing and future Sponge Iron Plant and the balance coal, which is below 4000 K cal/kg (i.e. middling / rejects), will be utilized in its power plant. In view of this, JNIL proposed to set up a 1 x 300 MW thermal power plant revised to 2 x 300 MW in District Raigarh, Chhattisgarh under the banner of RAIGARH ENERGY LIMITED (“**REL**”) which name was changed to Jayaswal Neco Urja Limited (the Appellant herein) w.e.f. 21/10/2010.

3. The Appellant has given details of the interaction between the Appellant and various authorities to show how earnest was its desire to set up the power plant. The said details are as under:

(a) On 22/9/2008, JNIL entered into a Memorandum of Understanding with the Government of Chhattisgarh and

- the Chhattisgarh State Electricity Board for setting up a Thermal Power Project (“**TPP**”) in the State of Chhattisgarh.
- (b) REL submitted its proposal to the Ministry of Environment & Forests (“**MoE&F**”) for Environment Impact Assessment (“**EIA**”) clearance. The MoE&F vide its letter dated 11/2/2010 prescribed the Terms of Reference for EIA Report and Environment Management Plan.
- (c) Vide letter dated 7-10/5/2010, the Airport Authority of India issued NOC for the construction of the proposed erection of Chimney by the REL.
- (d) Vide letter dated 1/6/2010, the MoE&F intimated to REL that the Expert Appraisal Committee has decided to reiterate Terms of Reference earlier prescribed for 1 x 300 MW capacity TPP vide letter dated 11/2/2010 in respect of the revised proposal of REL for 2 x 300 MW capacity.

- (e) Vide letter dated 5/8/2010, the Jindal Steel & Power Ltd. issued NOC letter to REL for installing chimney for the proposed TPP.
- (f) Vide letter dated 13/8/2010, REL received the requisite Site Clearance certificate from the Forest Department, Raigarh, Chhattisgarh.
- (g) The Registrar of Companies, Mumbai issued Certificate dated 21/10/2010 certifying change of name of REL to Jayaswal Neco Urja Ltd. i.e. the Appellant herein.
- (h) Vide letter dated 23/12/2010, the Water Resource Department, Raipur, Government of Chhattisgarh accorded its approval for 10.00 million cubic meter annual allocation of water for the TPP of the Appellant.
- (i) Vide letter dated 10/2/2011, the Appellant received approval from the Power Finance Corporation for grant of

- Rupee Term Loan to the extent of Rs.993 crores for 2 x 300 MW power project.
- (j) Vide letter dated 7/6/2011, the Appellant received approval from the Rural Electrification Corporation Ltd. for grant of Rupee Term Loan to the extent of Rs.890 crores for 2 x 300 MW power project.
- (k) Vide letter dated 12/8/2011, the Energy Department, Mantralaya, Raipur, Government of Chhattisgarh intimated to the Appellant that its request for additional allotment of water for enhanced capacity shall be considered on the basis of availability of water.
- (l) Vide letter dated 15/2/2012, the Appellant received the confirmation of 'No Coal Bearing Area' in respect of Appellant's power plant from the Geological Survey of India.

- (m) Vide letter dated 16/3/2012, the Appellant received approval from India Infrastructure Finance Company Ltd. for grant of Rupee Term Loan to the extent of Rs.300 crores for 2 x 300 MW power project.
- (n) Vide letter dated 29/3/2012, the Appellant received approval from the Ministry of Coal, Government of India for utilization of middling's/rejects which may be generated during washing of coal from Gare Plama IV/4 and IV/8 coal blocks in the power plant to be set up by the Appellant.
- (o) Vide letter dated 28/6/2012, the Appellant received 'No Defence Establishment Letter' from the office of District Business and Industrial Centre, Raigarh, Chhattisgarh.

4. It is the case of the Appellant that the above actions taken by the Appellant establish its *bona fides* regarding the timely completion of the power project. According to the Appellant, it

has taken all the necessary approvals and has already invested Rs.44.28 crores till 31/12/2013.

5. In the meantime, the Appellant had applied to Respondent No.1 on 17/3/2011 for grant of Long Term Open Access (“**LTOA**”) for its 600 MW generation project in Chhattisgarh in Western Region. This application was accompanied by a Demand Draft of Rs.6,00,000/- (Rupees Six Lakhs only) as non-refundable application fee and a Bank Guarantee of Rs.60,00,000/- (Rupees Sixty Lakhs only) @ Rs.10,000/- per MW in compliance with 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 (“**Connectivity Regulations**”) prescribing procedure for making application for grant of LTOA to ISTS.

6. As per the Connectivity Regulations, the Bank Guarantee of Rs.10,000/- (Rupees Ten Thousand only) per MW shall initially be valid for one year and shall be revalidated, if required, till the



execution of the long-term access agreement (“**LTAA**”) (in case when augmentation of transmission system is required) or till operationalisation of LTA (in case when augmentation of transmission system is not required) as per format given at FORMAT-LTA-4. The aforesaid Bank Guarantee shall stand discharged with operationalization of LTOA, when augmentation of transmission system is not required or the submission of appropriate Bank Guarantee required to be given by the applicant to the CTU during construction phase when augmentation of transmission system is required as the case may be.

7. As per the Connectivity Regulations read with Detailed Procedure approved by the CERC, the Bank Guarantee may be encashed by the nodal agency, (i) if the application is withdrawn by the applicant or (ii) the LTA rights are relinquished prior to the operationalisation of such long term access when augmentation of transmission system is not required, (iii) if the applicant fails to sign the LTAA with CTU or a tripartite agreement with CTU

and transmission licensee, as the case may be, and fails to furnish appropriate Bank Guarantee for construction phase, within stipulated time as indicated in the intimation letter, (iv) if the applicant fails to revalidate the earlier furnished Bank Guarantee at least 30 days prior to its expiry, (iv) if the applicant fails to firm up beneficiaries in terms of clause 22.7, 3 years prior to intended date of long term access. Genuine requests for extension of time shall be suitably accommodated on merit upon furnishing of documentary evidence(s).

8. Vide letter dated 5/8/2011, Respondent No.1 granted long term access (“**LTA**”). This LTA was granted for 300 MW from July 2014 and balance 300 MW from October, 2014 and the validity of this LTA is till July, 2034.

9. Vide communication dated 22/11/2011, Respondent No.1 provided draft agreement for LTA with System Strengthening between Respondent No.1 and JNUL and M/s. Sarda Energy and Minerals Ltd. (third party to share the common system).

Respondent No.1 asked the Appellant to sign this agreement and submit the Bank Guarantee of Rs.30 crores @ Rs.5 Lakh / MW for 600 MW.

10. Respondent No.1 in its 3<sup>rd</sup> Co-ordination Committee meeting of IPPs granted LTOA in WR and asked the Appellant to extend the existing Bank Guarantee of Rs.60,00,000/- (Rupees Sixty Lakhs only) and sign the LTAA at the earliest. The Appellant revised the COD as U# 1-Jan 2015 and U# 2-Sep 2015.

11. On 24/1/2012, the Appellant extended the Bank Guarantee of Rs.60,00,000/- (Rupees Sixty Lakhs only) till 15/3/2013.

12. On 10/5/2012, Respondent No.1 asked the Appellant to provide Phasor Measurement Unit at IPP generation switch yard along with Optical Ground Wire link on the dedicated transmission line upto grid pooling station.

13. Vide letter dated 29/5/2012, the Appellant accepted the above request of Respondent No.1. Vide letter dated 11/6/2012, the Appellant informed Respondent No.1 that the LTAA will be signed once environment clearance is accorded by the MoE&F.

14. On 9/7/2012, the Appellant again revised the COD to U#1-September 2016 U# 2-Dec 2016.

15. Vide letter dated 11/9/2012, Respondent No.1 asked the Appellant to sign LTAA on 25/9/2012 or else LTA granted to the Appellant will be processed for cancellation.

16. Vide letter dated 21/9/2012, the Appellant requested Respondent No.1 to defer the signing of LTAA owing to pending environmental clearance. Vide letter dated 4/10/2012, the Appellant requested Respondent No.1 to reduce the auxiliary consumption and mandatory sale to the Government of Chhattisgarh from 600 MW and revise the LTA quantum to 508 MW.

17. On 8/1/2013, Respondent No.1 requested the Appellant to extend the Bank Guarantee of Rs.60,00,000/- (Rupees Sixty Lakhs only) by one year. On 1/02/2013, Respondent No.1 considered the Appellant's request to reduce the auxiliary consumption of 51 MW and modified LTOA quantum to 549 MW.

18. Vide letter dated 11/3/2013, the Appellant renewed the Bank Guarantee and extended it upto 15/3/2014. Vide letter dated 13/6/2013, Respondent No.1 informed the Appellant about the revised LTA of 549 MW. On 4/9/2013, Respondent No.1 asked the Appellant to sign the LTAA during second week of September, 2013. On 27/9/2013, Respondent No.1 again revised the COD to U# 1 Sep 2017 U# 2-Dec 2017.

19. Vide letter dated 15/10/2013, Respondent No.1 asked the Appellant to sign the LTAA. Vide letter dated 9/11/2013, the Appellant requested Respondent No.1 to keep LTA on hold due to certain uncertainties beyond the Appellant's control and to defer

signing of the LTAA till the time prevailing uncertainties are resolved. The Appellant assured that till such time the Bank Guarantee of Rs.60,00,000/- will be kept valid.

20. On 8/1/2014, Respondent No.1 asked the Appellant to extend the Bank Guarantee of Rs.60 lakhs and on 22/2/2014, the Appellant submitted renewed Bank Guarantee of Rs.60 Lakhs to Respondent No.1.

21. On 11/3/2014, Respondent No.1 served notice to the Appellant for signing of the LTAA by 30/4/2014 and informed the Appellant that in case, the LTAA is not signed by 30/4/2014, the LTA will be cancelled without serving any further notice.

22. On 30/4/2014, the Appellant filed Petition No.MP/080/2014 along with I.A. No.19 of 2014 for stay for adjudication of the dispute arising out of the LTOA granted to Respondent No.1. The following prayers were made in the petition.

- “(a) Hold and declare that the rights and obligations of the parties under the letter dated 5/8/2011 issued by PGCIL granting approval for long term access to the petitioner have been frustrated on account of the existence of the force majeure condition in the non-development of the generating station by the Petitioner;*
- (b) Hold and declare that the Respondent is not entitled to invoke or otherwise retain the bank guarantee of Rs.60 Lakhs provided by the Petitioner to the Respondent.*
- (c) Direct the Respondent to return the bank guarantee of Rs.60 Lakhs provided by the Petitioner in view of prevailing force majeure conditions; in view of prevailing force majeure conditions.”*

23. The Appellant also prayed for ex-parte orders against Respondent No.1 not to encash the Bank Guarantee of Rs.60 Lakhs (Rupees Sixty Lakhs only) given by the Appellant. On 1/5/2014, Respondent No.2 issued notice to Respondent No.1, however, it declined to grant any interim relief without hearing Respondent No.1.

24. According to the Appellant, on 15/5/2014, Respondent No.1 sent its representative to the Appellant's Banker for encashment of the Bank Guarantee. The Appellant's counsel mentioned this fact before Respondent No.2. Respondent No.2 directed Respondent No.1 to maintain status-quo. According to the Appellant, in breach of the status-quo order, Respondent No.1 got the Bank Guarantee encashed on 15/5/2014. The matter was listed on 20/5/2014. The Respondent, however, sent a letter dated 16/5/2014 offering to return the demand draft received by them towards the proceeds of Bank Guarantee on the Appellant furnishing a fresh Bank Guarantee. According to the Appellant, it sent its reply on 26/5/2014 requesting Respondent No.1 to send its representative with the demand draft and assuring Respondent No.1 that fresh Bank Guarantee would be furnished simultaneously. However, on 27/5/2014, the Appellant came to know that Respondent No.1 had already encashed the demand draft despite the fact that there was a status-quo order of Respondent No.2 dated 15/5/2014. By the impugned order, Respondent No.2 rejected the Appellant's



petition and held that the Appellant is not entitled for refund of the Bank Guarantee amount.

25. We have heard Mr. Pradeep Dahiya, learned counsel for the Appellant at some length. We have perused the written submissions filed by him. Gist of the written submissions is as under:

- (a) Respondent No.1 is not justified in encashing the Bank Guarantee submitted by the Appellant due to non-signing of LTAA by the Appellant with Respondent No.1 because the Bank Guarantee was submitted by way of a tripartite agreement between the Appellant, Respondent No.1 and State Bank of India and due to force majeure conditions, the said tripartite agreement got frustrated.
  
- (b) The second paragraph of the tripartite agreement stipulates that in case of failure / delay to construct the generating station / dedicated transmission system or in case the

Appellant makes an exit or abandons the project, the Respondent shall have right to collect transmission charges or damages. The third paragraph stipulates that as per the aforesaid agreement, the Appellant is required to furnish a Bank Guarantee for a sum of Rs.60 Lakhs as a security for fulfilling its commitment to Respondent No.1. Therefore, the Bank Guarantee was in the nature of security to compensate Respondent No.1. After the application was submitted by the Appellant, Respondent No.1 did not incur any expenses for development of infrastructure or other facilities. Therefore, Respondent No.1 could not have forfeited the security by encashing the Bank Guarantee.

- (c) A contract can be frustrated because of supervening impossibility of performance. Impossibility need not be an absolute one. It is sufficient to show that further performance has become impracticable. The doctrine of frustration of contract is a part of law of discharge of contract by reason of supervening impossibility or illegality.

In this connection, Section 56 of the Contract Act may be referred to.

(d) The Appellant has already invested Rs.44.28 crores. The Appellant was not in a position to sign the LTAA due to the following:

- (i) The power project of the Appellant was dependent partly on the captive coal block allocations for its fuel supply. Since the matter of allocation of coal blocks was pending before the Supreme Court, there were prevalent uncertainties.
- (ii) Due to lack of assurance by the Ministry of Coal for grant of long term coal linkage, the Appellant was not able to get loan and was facing liquidity problem.
- (iii) Environment clearance was not given by MoE&F.
- (iv) There was no long term bidding from any State Electricity Board / distribution companies.

Therefore, the project could not have progressed.

For disbursement of loan, the company had to execute a PPA for 420 MW.

- (v) As per the financial tie up, the Appellant had to execute a valid PPA. The State Government was withdrawing commitments made to the private parties by not executing PPAs.
- (vi) As per the Connectivity Regulations, Respondent No.1 could have encashed the Bank Guarantee only if the application is withdrawn by the Appellant or the LTA rights are relinquished prior to the operationalization of such rights when augmentation of transmission system is not required. None of these contingencies existed as the Appellant made repeated requests to defer the signing of the LTAA due to prevailing uncertainties which were in the nature of force majeure events.

- (vii) Whether in this case, the doctrine of frustration of contract could be invoked or not is not considered by Respondent No.2.
- (viii) Respondent No.2 failed to consider the factual matrix and just restricted itself to the statutory rules.
- (ix) Reliance is placed on the judgments of the Supreme Court in **Satyabrata Ghose v. Mugneeram Bangur & Co. & Anr.**<sup>1</sup>, **Boothalinga Agencies v. V.T.C. Poriaswami Nadar**<sup>2</sup> and **Jai Durga Finvest (P) Ltd. v. State of Haryana & Ors.**<sup>3</sup>

26. We have heard Mr. Ramachandran, learned senior counsel appearing for Respondent No.1. We have perused the written submissions filed by him. Gist of the written submissions is as under:

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<sup>1</sup> AIR 1954 SC 44

<sup>2</sup> AIR 1969 SC 110

<sup>3</sup> (2004) 3 SCC 381

- (a) Connectivity Regulations read with the Detailed Procedure provide for circumstances in which the Bank Guarantee can be encashed by Respondent No.1.
- (b) Clause (5) of Regulation 12 of the Connectivity Regulations and Clause 23(5) of the Detailed Procedure are relevant. As per these provisions, the Appellant was under an obligation to sign the LTAA with Respondent No.1 failing which the Bank Guarantee could be encashed by Respondent No.1. Respondent No.1 pursued the issue of signing of LTAA with the Appellant, but the Appellant failed to sign it. Hence, a final notice dated 11/3/2014 for cancellation had to be issued.
- (c) Restrain on encashment of Bank Guarantee is granted only in exceptional circumstances of fraud, etc. In this case, there are no such allegations. Following judgments of the Supreme Court may be referred to:

- (i) **Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company**<sup>4</sup>,
- (ii) **U.P. State Sugar Corporation v. Sumac International Ltd.**<sup>5</sup>,
- (iii) **Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. & Anr.**<sup>6</sup> and
- (iv) **Syndicate Bank v. Vijay Kumar & Ors.**<sup>7</sup>
- (d) At the time of invocation of Bank Guarantee, on 15/5/2014, there was no stay order on such encashment. Respondent No.1 had already issued notice of invocation of Bank Guarantee to State Bank of India. After invocation of Bank Guarantee on 15/5/2014, Respondent No.1 received e-mail dated 15/5/2014 from the Chief Legal Officer of Respondent No.2. No order of Respondent No.2 granting stay on encashment of Bank Guarantee was communicated to the Appellant.

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<sup>4</sup> (2007) 8 SCC 110

<sup>5</sup> (1997) 1 SCC 568

<sup>6</sup> (1996) 5 SCC 450

<sup>7</sup> (1992) 2 SCC 331

- (e) Upon receipt of communication from the Chief Legal Officer, Respondent No.1 vide letter dated 16/5/2014 advised the Appellant to furnish a Bank Guarantee for an equivalent amount so that Respondent No.1 could handover proceeds of the encashment of Bank Guarantee to the Appellant. This was in the context of Respondent No.1 having duly invoked the Bank Guarantee on 15/5/2014 before any stay order was passed by Respondent No.2. In any event, final order is passed by Respondent No.2 after hearing parties and, therefore, the encashment of Bank Guarantee is in accordance with law.
- (f) The Appellant's submission that the LTAA could not be signed because of force majeure, deserves to be rejected because liability to sign the LTAA is independent of any such circumstances which the Appellant might have faced.



(g) So long as delay in the commencement of commercial operation is not attributable to any act of omission or commission on the part of Respondent No.1, the Appellant cannot claim any relief on account of other reasons, affecting it in the commissioning and commercial operation of the plant. If the contention of the Appellant is accepted, the entire scheme of grant of LTOA will get seriously affected. In the circumstances, the appeal be dismissed.

27. Let us first have the facts. On 17/3/2011, the Appellant made an application to Respondent No.1 for grant of LTOA for 600 MW accompanied by a demand draft for Rs.6,00,000/- (Rupees Six Lakhs only) as non-refundable application fee and Bank Guarantee of Rs.60,00,000/- (Rupees Sixty Lakhs only) in accordance with the Connectivity Regulations and the Detailed Procedure. Respondent No.1 vide its letter dated 5/8/2011 granted LTA to the Appellant for 300 MW from July, 2014 and another 300 MW from October, 2014 valid till July, 2034. By the said letter, the Appellant was informed that transmission system

strengthening is required in connection with LTA granted to the Appellant for which the Appellant had to submit a Bank Guarantee of Rs.30 crores. Vide its letter dated 21/11/2011, Respondent No.1 supplied draft LTAA to the Appellant for signing and for submitting the Bank Guarantee of Rs.30 crores. The Appellant was also informed that the Appellant has to enter into the LTAA within 30 days of receipt of the draft agreement. The Appellant, however, kept on asking for extension of time for signing the LTAA. Respondent No.1 granted extension as requested. However, during 7<sup>th</sup> JCC meeting held on 25/2/2014, it was decided that if the LTAA is not signed by the Appellant by 30/4/2014, the LTA shall stand cancelled as per the provisions of Connectivity Regulations. By letter dated 11/3/2014, Respondent No.1 gave final notice for cancellation of LTA to the Appellant. The Appellant was informed that if the LTAA is not signed by the Appellant by 30/4/2014, its LTA shall be cancelled. From this letter, it is clear that Respondent No.1 had by letters dated 4/9/2013, 15/10/2013, 18/11/2013, 9/12/2013 and 21/1/2014 requested the Appellant to sign the

LTAA. But the Appellant had not complied with the request. The Appellant did not sign the LTAA by 30/4/2014 as required of it vide letter dated 11/3/2014, resulting in cancellation of its LTA.

28. It is the case of the Appellant that the Appellant could not sign the LTAA because of force majeure conditions. The Appellant had to face several difficulties such as non-availability of coal linkage from Ministry of Coal, lack of environmental clearance, allocation of captive coal being sub-judice before the Supreme Court, non-materialisation of long term bidding and lack of support from the State Government for purchase of power from the proposed power plant. The Appellant, therefore, sought return of Bank Guarantee as it was not in a position to go ahead with the project. According to the Appellant, the Bank Guarantee was submitted by way of a tripartite agreement between the Appellant, Respondent No.1 and State Bank of India. Due to force majeure conditions, the said agreement got frustrated. It was impossible of performance.

29. We find no substance in this submission. As per Regulation 12 of the Connectivity Regulations, the application for LTA is to be accompanied by a Bank Guarantee of Rs.10,000/- per MW in favour of the nodal agency, which shall be kept valid and subsisting till the execution of the LTAA where augmentation of transmission system is required or till the operationalisation of the LTA where augmentation of transmission system is not required. Regulation 12(5) says that the Bank Guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the LTA rights are relinquished prior to the operationalisation of such rights when augmentation of transmission system is not required. Regulation 12(5) reads as under:

*“CONNECTIVITY REGULATIONS:*

*12.(5) The bank guarantee may be encashed by the nodal agency, if the application is withdrawn by the applicant or the long-term access rights are relinquished prior to the operationalisation of such rights when augmentation of transmission system is not required.”*

Regulation 13 provides that the nodal agency on receipt of the application for the LTA shall carry out the necessary system studies and based on these studies, shall identify the inter-State transmission system required to give the LTA to the applicant. Regulation 14 requires the nodal agency to communicate to the applicant the date from which the LTA shall be granted and an estimate of the transmission charges likely to be payable based on the prevailing costs, prices and methodology of sharing of transmission charges specified by the CERC. Regulation 15 mandates the applicant to sign the LTAA with the Central Transmission Utility, which shall contain the date of commencement of LTA, the point of injection of power into the grid and point of drawal from the grid and the details of dedicated transmission lines, if any, required. Where augmentation of the transmission system is necessary, the LTAA shall contain the time line for construction of the facilities of the applicant and the transmission licensee, Bank Guarantee required to be given by the applicant, and other details in accordance with the Detailed Procedure.

30. Thus, there are two types of Bank Guarantees that an LTA applicant is required to furnish to the nodal agency. The first Bank Guarantee is required to be given along with the application for the LTA @ Rs.10,000/- per MW. If as a result of system studies, it is found that no further augmentation of the transmission system is required, the applicant will be required to sign the LTAA and the Bank Guarantee already submitted will remain valid till operationalisation of the LTA. If it is found that augmentation of transmission system is required, then the applicant will be required to enter into the LTAA, submit a fresh Bank Guarantee for construction period calculated as per Detailed Procedure and the Bank Guarantee given earlier along with the application for LTA shall stand discharged. Under two circumstances, the Bank Guarantee can be encashed by the nodal agency: firstly, if the applicant withdraws the LTA application; secondly, the LTA rights are relinquished prior to operationalisation of such rights when augmentation of transmission system is not required.

31. It is also necessary to have a look at clause 23.5 of the Detailed Procedure framed under Regulation 27(1) of the Connectivity Regulations. Clause 23.5 reads thus:

*“DETAILED PROCEDURE:*

*23.5 All payments are to be paid through DD or directly credited to POWERGRID account electronically through RTGS (Real-time gross settlement) as per details given below:*

*a) Payee: Power Grid Corporation of India Ltd.*

*b) Name of the Bank: State Bank of Hyderabad.*

*The document showing proof of payment directly credited to above POWERGRID a/c must be attached with the application.*

*Above application shall also be accompanied by a bank guarantee of Rs.10,000/- (Rupees ten thousand only) per MW of the total power to be transmitted. The bank guarantee shall be in favour of “Power Grid Corporation of India Ltd.”*

*The bank guarantee of Rs.10,000/- (Rupees ten thousand only) per MW shall initially be valid for one year and shall be revalidated, if required, till the execution of the long-term access agreement (in case when augmentation of transmission system is required) or till operationalisation of long-term access (in cases when augmentation of transmission system is not required) as per format given at FORMAT-LTA-4. The*

*aforesaid bank guarantee will stand discharged with operationalization of long-term open access, when augmentation of transmission system is not required or the submission of appropriate bank guarantee required to be given by the applicant to the CTU during construction phase when augmentation of transmission system is required, as the case may be. The bank guarantee may be encashed by the nodal agency,*

*(i) If the application is withdrawn by the applicant or*

*(ii) The long-term access rights are relinquished prior to the operationalization of such long-term access when augmentation of transmission system is not required.*

*(iii) If the applicant fails to sign the Long Term Access Agreement with TU or a tripartite agreement with CTU and transmission licensee, as the case may be, and fails to furnish appropriate BG for construction phase, within stipulated time as indicated in the intimation letter.*

*(iv) If the applicant fails to revalidate the earlier furnished BG at least 30 days prior to its expiry*

*(v) If the applicant fails to firm up beneficiaries in terms of clause 22.7, 3 years prior to intended date of Long Term Access. Genuine requests for extension of time shall be suitably accommodated on merit upon furnishing of documentary evidence(s).”*

Thus, one of the reasons for which the Bank Guarantee can be encashed by the nodal agency is not signing of the LTAA.



32. Since the Appellant did not sign the LTAA, the Bank Guarantee was encashed. The question is whether the alleged force majeure conditions furnishes a good ground for the Appellant to contend that the Bank Guarantee ought not to have been encashed. The Connectivity Regulations do not anywhere state that if the applicant is able to prove the existence of any circumstances beyond its control or existence of any force majeure conditions, which prevented it from performing the contract, its Bank Guarantee should not be encashed. The Connectivity Regulations do not prohibit the LTA applicant from withdrawing its LTA application. The Connectivity Regulations provide that in the event the LTA applicant withdraws LTA application, it will not be required to sign the LTAA but it will have to forgo the Bank Guarantee furnished by it along with the LTA application. The Bank Guarantee can then be encashed by the nodal agency. The purpose behind this provision is correctly stated in the impugned order and we concur with the said reasoning. 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.

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.

34. It is well settled that restraint on encashment of Bank Guarantee can be granted only in exceptional circumstances. There is a long line of judgments of the Supreme Court stating so. The Supreme Court in **Himadri Chemicals & Industries Ltd.** held that such restraint can be put only if it is proved that there is a fraud in connection with the Bank Guarantee which vitiates the very foundation of the Bank Guarantee and where encashment of Bank Guarantee results in irretrievable harm or injustice to one of the parties concerned. We need not refer to the other judgments which reiterate the same principles.

35. We have not examined whether the force majeure conditions, in fact, existed or whether irretrievable harm or injustice is caused to the Appellant. As already stated by us, the Connectivity Regulations are so clear that the encashment of the Bank Guarantee cannot be faulted. The rationale behind the encashment of the Bank Guarantee has also been examined by us and it has impressed us. If as contended by the Appellant,

the Appellant has suffered any loss or damages, in our opinion, Respondent No.1 cannot be held responsible for it. The Appellant has placed reliance on the judgments of the Supreme Court in **Satyabrata Ghose**, **Boothalinga Agencies** and **Jai Durga Finvest (P) Ltd.** In our opinion, the reliance placed on these judgments is misplaced. The facts of these cases are in no way similar to the facts of the present case. In those cases, the contract stood frustrated by the conduct of the contesting Respondents. Such are not the facts here. If the Appellant has, in law, any other remedy qua any other person so far as damages or loss on account of alleged frustration of contract is concerned, it will be entitled to prosecute it. However, on this question, we have not expressed any opinion either way.

36. The Appellant's case that Respondent No.1 committed any contempt of the order passed by Respondent No.2 is not acceptable. It appears from the reply filed by Respondent No.1 which is supported by the affidavit of Mr. Avinash M. Pavgi, the Assistant General Manager of Respondent No.1 that on

13/5/2014, Respondent No.1 issued notice of invocation of the Bank Guarantee to State Bank of India. At the time of invocation of the Bank Guarantee on 15/5/2014, Respondent No.1 received an e-mail dated 15/5/2014 from the Chief Legal officer of Respondent No.2. No order passed by Respondent No.2 staying the encashment of Bank Guarantee was communicated to the Appellant. Upon receipt of the said communication, Respondent No.1 advised the Appellant to furnish a fresh Bank Guarantee for an equivalent amount so that Respondent No.1 could hand over the proceeds of encashment of the Bank Guarantee to the Appellant. In the meanwhile, the matter was listed before Respondent No.2 on 20/5/2014, submissions were advanced by the Appellant and Respondent No.1 and by the impugned order, Respondent No.2 decided the matter on merits. These factual averments could not be successfully traversed by the Appellant. Thus, the allegation that there was any contempt of order dated 15/5/2014 passed by Respondent No.2 is baseless.

37. In the circumstances, we find no merit in the appeal. The appeal is dismissed.

38. Pronounced in the Open Court on this 15<sup>th</sup> day of April, 2015.

**(Rakesh Nath)**  
**Technical Member**

**(Justice Ranjana P. Desai)**  
**Chairperson**

✓ **REPORTABLE/NON-REPORTABLE**