APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 690 OF 2023 & IA NO. 1724 OF 2024

Dated: 22nd January, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

In the matter of:

ReNew Wind Energy (TN) Pvt. Ltd.	....	Appellant(s)
Versus		
Central Electricity Regulatory Commission & Anr.	....	Respondent(s)

Counsel on record for the Appellant(s)	:	Amit Kapur Anupam Varma Rahul Kinra Girdhar Gopal Khattar Isnain Muzamil Prithu Chawla Aditya Ajay
Counsel on record for the Respondent(s)	:	Suparna Srivastava for Res. 2

ORDER

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

IA NO. 1724 OF 2024
(For interim relief)

I. INTRODUCTION:

Appeal No. 690 of 2023 has been filed against the order passed by the CERC in Petition No. 63/MP/2021 dated 04.05.2023. The reliefs sought by the Appellant in the present appeal are:- (a) to set aside the Impugned Order dated 04.05.2023 passed by the Commission in Petition No. 63/MP/2021; (b) hold and declare that the Transmission Agreement for

Connectivity dated 07.08.2018, LTA Agreement dated 06.09.2018 and TSA dated 06.09.2018 stand frustrated on account of force majeure (under the transmission agreements) and impossibility/frustration in terms of Section 56 of the Contract Act; (c) hold and declare that no relinquishment charges or any other charges or penalties are payable by the Appellant; and/or (d) direct CTUIL to return Bank Guarantee No. 002GM01182260001 dated 14.08.2018 for Rs. 5.00 Crores (Rupees Five Crores only) along with its subsequent amendment dated 29.06.2020 submitted by the Appellant in terms of the Transmission Agreement for Connectivity dated 07.08.2018; (e) direct CTUIL to return Bank Guarantee No. 002GM01182740001 dated 01.10.2018 for Rs. 13.25 Crores (Rupees Thirteen Crore Twenty-Five Lacs only) along with its subsequent amendments dated 27.11.2018 and 03.08.2020 submitted by Appellant in terms of the LTAA dated 06.09.2018; and/or (f) pass any such other and further reliefs as this Hon'ble Tribunal deems just and proper in the nature and circumstances of the present case.

The Appellant filed the present IA No. 1724 of 2024 in Appeal No. 690 of 2023 seeking the following reliefs: (a) stay the directions of Ld. CERC contained in Para 96 of the impugned order and bill dated 12.03.2024 raised on the applicant by CTUIL seeking payment of Rs.16.84 Crores, pursuant to such directions; (b) direct CTUIL not to take any coercive action against the applicant including invocation of connectivity BG dated 14.08.2018 and LTA BG dated 01.10.2018; and (c) pass such further order as this Tribunal may deem just and necessary in the facts and circumstances of the case.

II. CAN INVOCATION OF BANK GAURANTEE BE STAYED?

We shall first examine Prayer (b) in IA No. 1724 of 2024 which is to direct CTUIL not to take any coercive action for invocation the LTAA Bank

Guarantee for Rs.13.25 Crores issued, at the behest of the Appellant, by the Bank in favour of the Respondent. It is not in dispute that the subject Bank Guarantee is an unconditional Bank Guarantee. The mere fact that the said Bank Guarantee refers to the bid process and to the underlying contract would not make such a Bank Guarantee conditional.

In **North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7** (Order in Appeal No. 188 of 2022 dated 23.02.2023), this Tribunal held as under:-

> "(I) A bank guarantee is an independent and distinct contract, between the bank and the beneficiary, and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Subject to limited exceptions, the beneficiary cannot be restrained from encashing the bank guarantee even if the dispute, between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in the performance of the contract. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450;** and **Standard Chartered Bank v. Heavy Engineering Corporation Limited, (2020) 13 SCC 574).**
>
> (II) Both the bank and the beneficiary are bound by, and its invocation should only be in accordance with, the terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574; Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436).**
>
> (III) The dispute, between the beneficiary and the party at

whose instance the bank had given the guarantee, is immaterial and is of no consequence. Ordinarily, the Court should not interfere with the invocation or encashment of the bank guarantee as long as the invocation is in terms of the bank guarantee. (**Standard Chartered Bank v. Heavy Engg. Corpn. Ltd., (2020) 13 SCC 574)**.

(IV) Existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of the bank guarantee. (**Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co., (2007) 8 SCC 110; Adani Agri Fresh v. Mehboob Sharif, (2016) 14 SCC 517).**

(V) Invocation of a bank guarantee does not depend on termination of the underlying contract. The bank guarantee is a separate contract, and is not qualified by the contract on performance of obligations. (***Gujarat Maritime Board* v. *L&T Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46).**

(VI) Whether the action of the beneficiary is legal and proper, and whether on the basis of such a decision the bank guarantee could have been invoked, are not matters of inquiry. Between the Bank and the beneficiary, the moment there is a written demand for invoking the bank guarantee, the Bank is bound to honour the payment under the guarantee. (**Gujarat Maritime Board v. L&T Infrastructure Development Projects Ltd., (2016) 10 SCC 46).**

(VII) Where the bank guarantee furnished is unconditional and

irrevocable, it is not open to the bank to raise any objection for payment of the amounts under the guarantee. The person, in whose favour the guarantee is furnished by the bank, cannot be prevented by way of an injunction from enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee, in terms of the agreement entered into between the parties, has not been fulfilled. **(Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd., (2007) 6 SCC 470; Adani Agri Fresh v. Mehboob Sharif, (2016) 14 SCC 517; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450).**

(VIII) The mere fact that the Bank Guarantee refers to the principal agreement without referring to any specific clause in the preamble of the deed of guarantee does not make the guarantee furnished by the bank to be a conditional one. **(Shapoorji Pallonji Energy (Gujarat) Private Limited v. Gujarat Electricity Regulatory Commission, 2017 SCC OnLine APTEL 35).**

(IX) The duty of the bank under the guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must, ordinarily, honour the same and make payment. **(U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; State of Maharashtra v. National Construction Co. [(1996) 1 SCC 735)**

(X) Encashment of the amount specified in

the bank guarantee does not depend upon the result of the decision in the dispute between the parties. (**Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450).**

(XI) When, in the course of commercial dealings, an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. **(U.P. State Sugar Corpn. [(1997) 1 SCC 568).**

(XII) Absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee. (**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., (1997) 6 SCC 450).**

(XIII) The two exceptions, for the refusal to grant an order of injunction to restrain the enforcement of a bank guarantee, are (i) fraud committed in the notice of the bank which would vitiate the very foundation of the guarantee; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself. **(Himadri Chemicals Industries Limited v. Coal Tar Refining Company (2007) 8 SCC 110).**

(XIV) Interference by Courts, with the enforcement of a bank guarantee, is only in cases where fraud or special equities are prima facie made out as a triable issue by strong evidence so as to prevent irretrievable injustice to the parties.

(**Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450; Standard Chartered Bank v. Heavy Engineering Corporation Limited, (2020) 13 SCC 574).**

(XV) To attract the ground of irretrievable injury, it must be decisively established and proved, to the satisfaction of the Court, that there would be no possibility whatsoever of recovery of the amount by the beneficiary. (**Itek Corporation v. First National Bank of Boston, (566 Fed Supp 1210)**; **Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineerings Works (P) Ltd.; U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568; ITD Cementation India Ltd. v. Reliance Infrastructure Limited 2014 SCC OnLine Bom 198).**

(XVI) Proof of loss or damage being suffered by the Respondents, in terms of the underlying contract, is not necessary for invocation and encashment of a Bank Guarantee. (**Shahpoorji Pallonji Energy (Gujarat) Private Limited v. Gujarat Electricity Regulatory Commission, (decision in I.A. No. 384 of 2017 in Appeal No. 161 of 2017 dated 29.05.2017).**

(XVII) There is no question of making out any prima facie case much less strong evidence or special equity for interference by way of injunction by the court in preventing encashment of Bank Guarantee. Final adjudication is not a pre-condition to invoke the Bank Guarantee and that is not a ground to issue injunction restraining the beneficiary from enforcing the Bank Guarantee. **(Shapoorji Pallonji Energy (Gujarat)**

Private Limited v. Gujarat Electricity Regulatory Commission, 2017 SCC OnLine APTEL 35).

(XVIII) The question of examining whether a prima facie case is made out, and in whose favour the balance of convenience lies, does not arise as the Court cannot interfere with the unconditional commitment made by the bank in its guarantees. **(Adani Agri Fresh v. Mehboob Sharif, (2016) 14 SCC 517; U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., (1988) 1 SCC 174).**"

A similar view, as was taken in **North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLineAPTEL 7** (Order in Appeal No. 188 of 2022 dated 23.02.2023), was also taken by this Tribunal in **Inox Green Energy Services Limited vs. CERC (2023 SCC OnLine APTEL Page 8)** and in **Maitra Vayu (Brahmaputra) Private Limited vs. M/s. Solar Energy Corporation India Limited** (order in IA No. 83 of 2024 in Appeal No. 29 of 2024 dated 18.03.2024).

Against the order passed by this Tribunal, in **North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7** (Order in Appeal No. 188 of 2022 dated 23.02.2023), North Karanpura Transmission Company Ltd. filed Civil Appeal (Diary) No. 8290 of 2023 which was dismissed by the Supreme Court by its order dated 03.03.2023 holding that they found no error in the order of this Tribunal. Against the order passed by this Tribunal in **Inox Green Energy Services Limited vs. CERC (2023 SCC OnLine APTEL Page 8)** (ie Order in Appeal No. 292 of 2022 and IA No. 1010 of 2022 dated 24.02.2023), M/s. Inox Green Energy Services Limited filed Civil Appeal No. 1948-1943 of 2023 which was dismissed by the Supreme Court by its order dated 04.05.2023 holding that they found no reason to interfere with the order of this Tribunal.

Sri Amit Kapur, Learned Counsel appearing on behalf of the Appellant, would fairly state that, in the light of the afore-said judgements of this Tribunal (which had relied on several judgements of the Supreme Court holding that, save fraud or special equities, interference with the invocation of bank guarantees is not justified), the Appellant was not pressing for grant of stay of invocation of the Bank Guarantee (ie prayer (b)); and their prayer in the IA is confined only for grant of the relief as sought in prayer (a).

III. SHOULD THE IMPUGNED ORDER OF THE CERC BE STAYED?

As the relief sought in prayer (a) is to stay the direction of the CERC in para 96 of the impugned order, and the bill dated 12.03.2024 raised on the Applicant seeking payment of Rs. 16.84 Crores pursuant to such directions of the CERC, it is useful to note the contents of the impugned order passed by the CERC albeit in brief.

A. IMPUGNED ORDER OF THE CERC:

Petition No. 580/MP/2020 and Petition No. 63/MP/2021 were filed by the Appellant herein before the CERC. The reliefs sought by the Appellant herein, in Petition No. 580/MP/2020, were (a) to hold and declare that the Appellant-Petitioner is entitled to terminate the PPA on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5; (b) hold and declare that the PPA stands frustrated on account of force majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872; (c) in the alternate, exercise its powers under Section 79 and relieve the Appellant-Petitioner of its obligations under the PPA; and (d) restrain and injunct SECI from taking any adverse or coercive action against the Appellant- Petitioner.

Likewise, the relief sought by the Appellant herein before the CERC in Petition No. 63/MP/2021 were:- (a) to hold and declare that Transmission Agreement for Connectivity dated 07.08.2018, LTA Agreement dated 06.09.2018 and TSA dated 06.09.2018 stand frustrated on account of force majeure (under the transmission agreements) and impossibility / frustration in terms of Section 56 of Indian Contract Act; (b) declare that no relinquishment charges or any other charges or penalties are payable by the Petitioner; (c) direct PGCIL to return Bank Guarantee No. 002GM01182260001 dated 14.08.2018 for Rs. 5.00 Crores (Rupees Five Crores only) along with its subsequent amendment dated 29.06.2020 submitted by the Appellant-Petitioner in terms of the Transmission Agreement for Connectivity dated 07.08.2018; (d) direct PGCIL to return Bank Guarantee No. 002GM01182740001 dated 01.10.2018 for Rs. 13.25 Crores (Rupees Thirteen Crore Twenty-Five Lacs only) along with its subsequent amendments dated 27.11.2018 and 03.08.2020 submitted by the Appellant-Petitioner in terms of the Long-Term Access Agreement dated 06.09.2018; and (e) pass any such further order as the Commission may deem necessary in the interest of justice.

In its order in Petition No. 580/MP/2020 and Petition No. 63/MP/2021 along with IA No. 11 of 2021, the CERC framed the following issues: (1) **Issue No. 1**: Whether the Petitioner is entitled to terminate the PPA on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5? ; (2) **Issue No. 2**: Whether the PPA stands frustrated on account of force majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872? ; (3) **Issue No. 3**: Whether the Transmission Agreement for Connectivity dated 07.08.2018, LTA Agreement dated 06.09.2018 and TSA dated 06.09.2018 stands frustrated on account of force majeure (under the transmission agreements) and impossibility/frustration in terms of Section 56 of Indian Contract Act?; (4)

Issue No. 4: Whether the Commission should exercise its powers under Section 79 and relieve ReNew TN of its obligations under the PPA? ; (5) **Issue No. 5**: Whether the Petitioner is liable to pay relinquishment charges as per the methodology determined by the Commission in the order dated 08.03.2019 in Petition No. 92/MP/2015?; and (6) **Issue No. 6**: Whether SECI should be restrained from taking any adverse or coercive action against the Petitioner?

The CERC, thereafter, held that Issues No. 1 to 4 were interlinked and hence were being taken up together for discussion; the Appellant had submitted that it became impossible for them to commission the project within the timelines under the PPA due to the following force majeure events:- (i) Delay in allocation of Revenue Land for the Project; (ii) Outbreak of Covid-19 pandemic and the consequent National lockdown; (iii) Delay in tariff adoption by SECI; and (iv) Delay in commissioning of Transmission System; and, as such, the Appellant had submitted that it was entitled to terminate the PPA dated 04.09.2018 along with the Transmission Agreement for Connectivity dated 07.08.2018, LTA Agreement dated 06.09.2018 and TSA dated 06.09.2018 on account of force majeure and impossibility in terms of Article 4.5.3 read with Article 13.5 of the PPA.

With respect to delay in allocation of Revenue Land for the project, the CERC observed that the Appellant had the option for allotment of private land, but preferred not to avail the same; they failed to bring on record the factors and circumstances which prevented it from exercising the option; the delay in allocation of revenue land for the project was not covered under Article 11.3 of the PPA dated 04.09.2018; and, therefore, no relief could be extended to the Appellant under the said issue.

On the outbreak of Covid-19 pandemic and the consequent National lockdown, the CERC observed that the Ministry of Home Affairs, vide its notifications dated 24.03.2020, 15.04.2020, 01.05.2020 and 17.05.2020, had imposed a nation-wide lockdown from 25.03.2020 to 31.05.2020, throughout the country in order to curb the spread of corona virus; however, as per the PPA, the Appellant was to commission the project by 29.02.2020 which was before imposition of lockdown on account of Covid-19 i.e. 25.03.2020; the Appellant had failed to sufficiently justify on record the circumstances due to which it could not commission the project by the Commercial Operation Date i.e. 29.02.2020; and, therefore, no relief can be extended to the Appellant under this issue.

On the delay in tariff adoption by SECI, the CERC observed that, in terms of the PPA, the Appellant was to achieve financial closure within 7 months of the effective date i.e. by 30.03.2019 (which was later revised by SECI to be the SCoD i.e. 29.02.2020 on interim basis); the Appellant had raised the issue of adoption of tariff for the first time by its letter dated 20.09.2019 after the lapse of scheduled timeline of financial closure viz. 30.03.2019; subsequently, SECI approached the Commission for adoption of tariff in November 2019, and the tariff was finally adopted by the Commission vide Order dated 19.02.2020 in Petition No. 162/AT/2019 i.e. well before the Scheduled date of Commissioning i.e.29.02.2020; as per Article 3.1 of the PPA, the Appellant had to make Project financing arrangements at its own risk and cost, and provide necessary certificates to SECI; furthermore, Article 11.4 of the PPA excluded ‘insufficiency of finances or funds or the agreements becoming onerous to perform’ as Force Majeure event; and, as such, no relief could be extended to the Appellant for delay in tariff adoption.

On the delay in commissioning the transmission system, the CERC observed that the Detailed Procedure mandated that the Stage-II Connectivity grantees had to complete the dedicated transmission line(s) and pooling substation(s) within 24 months from the date of intimation of bay allocation at existing or new/under-construction ISTS sub-station failing which the Conn-BG of the grantee could be encashed and Stage-II connectivity revoked; the condition 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 substation was included in the terms and conditions annexed with 'Intimation for Grant of Stage-II Connectivity' dated 19.07.2018, and the Transmission Agreement for Connectivity dated 07.08.2018; as per Long-Term Access Agreement (LTAA) dated 06.09.2018, in case Long-Term Transmission Consumer (LTC) fails to construct the generating station /dedicated transmission system or makes an exit or abandons its project, CTU had the right to collect transmission charges and/ or damages as the case may be in accordance with the notification/ regulation issued by CERC from time to time.

The CERC further observed that, in the instant petition, the Appellant-Petitioner had applied for grant of Stage-II connectivity for 265 MW at the Bhuj PS on 08.06.2018; Stage-II connectivity was granted vide intimation dated 19.07.2018; the connectivity was granted w.e.f. 15.01.2020 at Bhuj PS through a 220kV S/c line from the generating station to the Bhuj PS (with minimum capacity of 300 MW) and, as per the terms of the grant, construction of the dedicated/connectivity line along with terminal bays at Bhuj PS and the generation switchyard were under the scope of the Appellant-Petitioner; the Appellant-Petitioner had knowledge about the changes in allotment of revenue land in the State of Gujarat since 19.04.2018, whereas the Appellant-Petitioner had the option for allotment

of private land and to change the proposed Project location and delivery Point for the projects within the State; the Appellant-Petitioner had to produce documentary evidence of possession of 100% of the land acquired for the Project at its own risk and cost by 30.03.2019; however, the Appellant-Petitioner preferred not to change its location and instead informed SECI about the status of applications vide letter dated 27.11.2019; SECI in principle extended the timeline of Conditions Subsequent up to the SCoD to facilitate implementation of project; SECI advised the Appellant-Petitioner to provide alternate plan in case of further delay in allotment of revenue land, and provided time up to 30.06.2020 to submit the documentation; however, the Appellant-Petitioner failed to submit the documents, and rather terminated the PPA on 26.07.2020.

After extracting the minutes of the 49th meeting of the Western Region constituents regarding LTA and connectivity applications held on 30.07.2020, the CERC observed that, for the required evacuation of power from the Appellant-Petitioner's project, margins had always been available for which the Appellant-Petitioner had approached PGCIL, and their LTAs had accordingly been operationalized; there was certainly a delay in commissioning of the Appellant-Petitioner's projects; the Appellant-Petitioner revised COD of unit 1 (150MW) to 28.04.2021 and for unit 2 (115MW) to 26.05.2021 with no progress in construction of the dedicated transmission line; whereas, the transmission system for evacuation of the entire capacity of its generation project had been available at Bhuj PS by May, 2021; Stage-II connectivity was granted vide intimation dated 19.07.2018 w.e.f. 15.01.2020 at Bhuj PS through a 220kV S/c line from the generating station to the Bhuj PS (with minimum capacity of 300 MW); as per the terms of the grant, construction of the dedicated/connectivity line along with terminal bays at Bhuj PS and the generation switchyard were under the scope of the Appellant-Petitioner within 24 months from the date

of connectivity i.e. on or before 18.07.2020; however, it was an admitted position on record that the Appellant-Petitioner had failed to complete the dedicated line and the pooling sub-stations by 18.07.2020; as such, the delay in commissioning of Transmission System was not covered under Article 11.3 of the PPA dated 04.09.2018; and no relief could be extended to the Appellant-Petitioner under this issue.

Regarding applicability of Section 56 of the Indian Contract Act, the Commission observed that, in the pleadings, SECI in its reply had submitted that SECI had already granted the time extension in SCoD in case of other similarly placed wind power developers executing the projects in Gujarat, who had submitted their request for extension quoting the reason of delay in executing the project because of Change in land policy by GoG along with documentary evidence; considering the delay in allotment of revenue land, a few developers had procured private land and were executing the project combining revenue and private land; during the hearing, SECI had further clarified that even M/s ReNew Wind Energy Private Limited had procured private land for other projects in the State; SECI in principle extended the timeline of Conditions Subsequent up to the SCoD to facilitate implementation of the project; the Appellant-Petitioner was advised to provide alternate plan in case of further delay in allotment of revenue land, and was provided time up to 30.06.2020 for submission of documentation; however, the Appellant-Petitioner failed to submit documents, and rather terminated the PPA on 26.07.2020; and, in the given facts and circumstances, the Commission did not find any case justifying impossibility of performance of contracts by the Petitioner; no relief could be granted to the Appellant-Petitioner under Section 56 of the Indian Contract Act, 1872; further, the Appellant-Petitioner had itself submitted that the criterion of termination of PPA on 26.07.2020 may be adjudged vis-à-vis specific provisions of the PPA; the PPA was signed by

the Petitioner with clear understanding of the implications of various provisions including those of force majeure; in some cases, options (for instance, leasing of Government land and alternatively leasing of private land) were available with the Petitioner to mitigate the alleged hardships, but it chose not to exhaust those options; in some others, reliefs were already extended by the Respondent (SECI); and, as such, the Commission found no case to invoke Regulatory powers provided under Section 79 of the Act.

The CERC observed that the Appellant-Petitioner had failed to prove occurrence of any Force Majeure event under Article 11 of the PPA dated 04.09.2018; accordingly, the Appellant-Petitioner's Termination Notice dated 26.07.2020, claiming discharge, was not in accordance with Article 4.5.3 read with Article 13.5 of the PPA; the Appellant-Petitioner had failed to prove on record that it had completed the dedicated line and the pooling sub-stations by 18.07.2020; and, accordingly, the Appellant-Petitioner's notice dated 29.07.2020 claiming discharge was not in accordance with the Transmission Agreements.

On issues 5 and 6, the CERC observed that, in view of the findings of the Commission on Issue Nos.1 to 4, no relief was made out in favour of the Appellant; and, accordingly, the Appellant shall be liable to pay relinquishment charges in accordance with CERC Connectivity Regulations, 2009 and the order in Petition No. 92/MP/2015 dated 08.03.2019. Both the Petitions were accordingly disposed of.

B. APPLICABLE TESTS FOR GRANT OF INTERIM STAY/RELIEF:

The grant or refusal of interlocutory relief is covered by three well established principles viz., (1) whether the Appellant has made out a prima

facie case, (2) whether the balance of convenience is in their favour i.e., whether it would cause greater inconvenience to them if interim relief is not granted than the inconvenience which the opposite party would be put to if it is granted, and (3) whether the Appellant would suffer irreparable injury. With the first condition as a sine quo non, at least two conditions should be satisfied by the Appellant conjunctively, and a mere proof of fulfilment of one of the three conditions does not entitle them to the grant of interlocutory relief in their favour. (**Nawab Mir Barkat Ali Khan v. Nawab Zulfiquar Jah Bahadur, AIR 1975 AP 187; Gone Rajamma v. Chennamaneni Mohan Rao, (2010) 3 ALD 175; Kishoresinh Ratansinh Jadeja v. Maruti Corpn, (2009) 11 SCC 229; Best Sellers Retail (India) Private Ltd. v. Aditya Birla Nuvo Ltd., (2012) 6 SCC 792; State of Mizoram v. Pooja Fortune Private Limited, 2019 SCC OnLine SC 1741)**.

C. PRIMA FACIE CASE:

The first of the three tests, to be satisfied for the grant of interlocutory relief, is whether the Appellant has made out a prima facie case. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had been made out or not, the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. **(Nirmala J. Jhala v. State of Gujarat, (2013) 4 SCC 301; Vidya Drolia v. Durga Trading Corporation - (2021) 2 SCC 1).** The burden is on the Appellant by evidence aliunde, by affidavit or otherwise, to show that there is “a prima facie case” in its favour which needs adjudication. Prima facie case is a substantial question raised, bona fide, which needs

investigation and a decision on merits. (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276; Mahadeo Savlaram Shelke v. Puna Municipal Corporation, (1995) 3 SCC 33).**

For the purpose of determining whether or not a prima facie case has been made out, this Tribunal should satisfy itself that the averments in the interlocutory application, if taken to be true, is a possible view, and that it raises substantial questions which needs investigation, and a decision on merits. A finding on "prima facie case" would be a finding of fact. While arriving at such a finding of fact, the court must arrive at a conclusion that a case for trial has been made out (**M. Gurudas v. Rasaranjan, (2006) 8 SCC 367).** A prima facie case means a case which can be said to be established if the evidence which is led in support of the same were believed. The probability of the Appellant's success must be comparatively higher (**Gujarat Electricity Board v. Maheshkumar & Co., 1982 SCC OnLine Guj 29)**.

D. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Sri. Amit Kapur, Learned Counsel for the Appellant, would refer extensively to the impugned order passed by the CERC in support of his submission that the said order suffers from serious infirmities in holding that the events referred to by the Appellant do not constitute force majeure events; reliance placed by the CERC on its earlier order, in Petition No. 92/MP/2015 dated 08.03.2019, is misplaced as the said order does not relate to cases where abandonment is because of force majeure events; in any event, the subject matter of the present Appeal is covered by the judgement of this Tribunal in **Himachal Sorang Power Pvt. Ltd. Vs. CERC: 2024 SCC OnLine APTEL 30**; and, therefore, the impugned order should be stayed pending disposal of the present appeal.

E. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT:

On the other hand, Mrs. Suparna Srivastava, Learned Counsel for the Respondent, would contend that the CERC was justified in holding that the events referred to by the Appellant do not constitute force majeure events; the earlier order of the CERC, in Petition No. 92/MP/2015 dated 08.03.2019, also considered cases where the project was abandoned because of force majeure events; the judgment of this Tribunal in **Himachal Sorang Power Pvt. Ltd. Vs. CERC: 2024 SCC OnLine APTEL 30** related to a case where the project was sought to be abandoned after LTA was operationalised; the earlier judgment of this Tribunal, in **Himachal Sorang Power Pvt. Ltd. Vs. CERC** (**Judgement in Appeal No. 54 of 2014 dated 30.04.2015**) dealt with a case where abandonment was before operationalisation of the LTA; and, as in the present case also LTA has not been operationalised, it is the judgment of this Tribunal in **Himachal Sorang Power Pvt. Ltd. Vs. CERC** (**Judgement in Appeal No. 54 of 2014 dated 30.04.2015**) which is applicable, and not the subsequent judgment in **Himachal Sorang Power Pvt. Ltd. Vs. CERC: 2024 SCC OnLine APTEL 30.**

F. FINAL RELIEF CANNOT BE GRANTED BY WAY OF AN INTERIM ORDER:

It is well settled that interim relief is granted in aid of, and as ancillary to, the main relief which may be available to the party on the final determination of his rights in a suit or proceedings. As this is the purpose to achieve which power to grant temporary relief is conferred, in cases where the final relief cannot be granted in the terms sought for, temporary relief of the same nature cannot be granted (**State of Orissa v. Madan Gopal Rungta, 1951 SCC 1024 : AIR 1952 SC 12; Cotton Corporation**

of India v. United Industrial Bank, (1983) 4 SCC 625; **TEESTA URJA LTD. V. CERC, 2023 SCC ONLINE APTEL 26).** A relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of an interim order. (**State of U.P. v. Desh Raj, (2007) 1 SCC 257**). By way of interim relief, final relief should not be granted till the matter is decided one way or the other. **(Mehul Mahendra Thakkar v. Meena Mehul Thakkar, (2009) 14 SCC 48).** The final relief, sought in a petition, cannot be granted at an interlocutory stage, that too without deciding the issues involved in the case. (**Union of India v. Modiluft Ltd., (2003) 6 SCC 65).**

Where the grant of an interim relief would tantamount to granting the final relief itself, the availability of a very strong prima facie case, of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Such would be rare and exceptional cases. The court would grant such an interim relief only if it is satisfied that withholding it would prick its conscience, and do violence to its sense of justice, resulting in injustice being perpetuated throughout the hearing and, at the end, the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and which cause extreme hardship. **(United Breweries Ltd. v. State of A.P., 2015 SCC OnLine Hyd 1059).** Unless there is any special reason, to be indicated in clear terms in the interlocutory order, as a rule final relief cannot be granted at the interlocutory stage. (**Dr. B. Sheetal Nandwani, AIR 1992 SC 671; United Breweries Ltd. v. State of A.P., 2015 SCC OnLine Hyd 1059)**

Relying on its earlier decisions, in **CCE v. Dunlop India Ltd., (1985) 1 SCC 260, State of Rajasthan v. Swaika Properties, (1985) 3 SCC 217, State of U.P. v. Visheshwar (1995 Supp (3) SCC 590), Bharat bhushan Sonaji Kshirsagar (Dr.) v. Abdul Khalik Mohd. Musa (1995 Supp (2) SCC 593), Shiv Shankar v. Board of Directors, U.P. SRTC (1995 Supp (2) SCC 726) and Commr/Secy to Govt. Health and Medical Education Deptt. Civil Sectt. v. Dr. Ashok Kumar Kohli (1995 Supp (4) SCC 214),** the Supreme Court, in **State of U.P. v. Ram Sukhi Devi, (2005) 9 SCC 733,** held that time and again the Supreme Court had deprecated the practice of granting interim orders which practically give the principal relief sought in the petition.

As noted hereinabove, the CERC has held against the Appellant in the impugned order, and has assigned fairly elaborate reasons for its conclusion that the events relied upon by the Appellant do not constitute force majeure events. It is only if this Tribunal were to hold that these events attracted the force majeure clause, would it then be justified in granting the relief sought for by the Appellant in the Appeal. As no such conclusion can be arrived at the interlocutory stage, it is impermissible for us to grant the Appellant the interim relief sought for by them, which in effect is the relief they seek in the main appeal.

As this Tribunal would, ordinarily, not grant an interim relief which can only be granted as the main relief when the appeal is finally heard, we may not be justified in granting the Appellant the interim relief which they may be entitled to only on the appeal being allowed, and the order impugned in the appeal being set aside, when both such orders can only be passed after the main appeal is finally heard and decided.

G. ORDER OF THE CERC IN PETITION NO. 92/MP/2015 DATED 08.03.2019:

Power Grid Corporation of India Ltd ("PGCIL" for short) filed Petition No. 92/MP/2015 seeking directions from the CERC with regards the difficulties faced by them in implementing some of the directions given by the CERC earlier. While seeking clarifications from the CERC, PGCIL highlighted the difficulties which they faced in implementation of the directions passed by the CERC in its earlier order in Petition No. 92/MP/2015 dated 16.02.2015, and related petitions whereby CERC had directed PGCIL to determine and levy relinquishment charges in accordance with Regulation 18 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Short Term Open Access in inter-State Transmission and related Matters) Regulation 2009 (" the 2009 Regulations" for short).

In Para 161 of its order, in Petition No. 92/MP/2015 dated 08.03.2019, the CERC recorded the summary of its decisions as under: (a) the transmission capacity which is likely to be stranded due to relinquishment of LTA shall be assessed based on load flow studies with clearly laid out assumptions. CTU is directed to calculate the stranded capacity and the compensation (relinquishment charges) payable by each relinquishing long-term customer as per the methodology specified in this Order respectively within one month of the date of issue of this Order and publish the same on its website. The compensation shall be payable for the years of stranded capacity falling short of 12 years, subject to (g) below; (b) Notice period for relinquishment shall be considered from the date the application was made to CTU for relinquishment and, if no application was made, the date from which the Commission directs the CTU to accept the relinquishment; (c) Compensation payable under alternative scenarios of LTA relinquished prior to the date of start of LTA or after the date of start of LTA shall be as per Para 139 of this Order; (d) No compensation for change in Target Region shall be payable by the relinquishing LTA holders,

if the effective date of start of LTA in the changed region is same as date of relinquishment in original region and the change in region is sought for entire capacity relinquished. If there is a gap between effective date of LTA as per fresh application for new region and relinquishment in previous region, transmission charges for stranded capacity shall be levied for such interim period and for such capacity for which LTA to changed region has not been effective; (e) For cases where no identified system augmentation was carried out to grant LTA, relinquishment charges shall be calculated at All India Minimum PoC rate; (f) Relinquishment on account of auxiliary consumption and overload capacity shall be allowed without any liability to pay the relinquishment charges; (g) In case there are applicants for LTA for the same corridor as being relinquished, the relinquishment charges shall be calculated for the number of years (period) till the effective date of LTA of incoming customer; and (h) Relinquishing LTA customers shall deposit the charges calculated and billed by CTU as relinquishment charges, within a period of six months of raising the bill by CTU.

In its order, in Petition No. 92/MP/2015 dated 08.03.2019, the CERC also dealt with cases where force majeure events were the cause for abandoned of the project, and the developers had sought relief from payment of relinquishment charges on the ground that they were affected by force majeure events. Under the head *"Treatment of cases of abandoned projects"*, the CERC (in paras 153 to 155) held that Petition Nos. 319/MP/2013, 315/MP/2013 and 69/MP/2014 were filed by project developers who had abandoned their projects, and had sought relief from payment of relinquishment charges in the said petitions on the ground of being affected by force majeure; the Commission has rejected the plea of force majeure in these cases and decided that, in the light of the provisions of Regulation 18 of the Connectivity Regulations, the Long Term

Customers, in case of abandoned projects, are liable to pay the transmission charges as may be decided in the present petition.

The CERC then noted the relevant observations of the Commission in its order dated 12.7.2016 in the Petition No. 315/MP/2015 which were extracted as under:

"40. Regulation 18 of the Connectivity Regulations provides as under:

Under the above provisions, long term customer may relinquish long term access rights fully or partly, before the expiry of full term of long term access, by making payment of compensation for stranded capacity as provided herein. It is pertinent to mention that the regulations do not envisage any exemption from payment of compensation in case of relinquishment of LTA on any ground. As per regulations, a long term customer is liable to pay compensation of an amount equal to 66% of the estimated transmission charges (net present value) for the stranded transmission capacity for the period falling short of 12 years of access right in case he relinquishes access right before expiry of 12 years upon giving a notice of one year for seeking relinquishment. It is clarified that the Commission vide its order dated 28.8.2015 in Petition No. 92/MP/2015 has constituted a Committee for assessment/determination of stranded transmission capacity with regard to relinquishment of LTA right by a long term customer and relinquishment charges in terms of the provisions of the Connectivity Regulations. Assessment of stranded capacity on account of relinquishment of LTA and determination

of relinquishment charges shall be decided by the Commission after considering the recommendations of the Committee."

The CERC then observed that, thus, the stranded transmission capacity resulting on account of the abandoned projects shall also attract the relinquishment charges liability, as per methodology detailed in this Order.

It is relevant to note that the Appellant herein has not subjected the order of the CERC, in Petition No. 92/MP/2015 dated 08.03.2019, to challenge at any time prior to the institution of the present appeal before this Tribunal, though the said order was applicable to them. They, instead, chose to invoke the jurisdiction of the CERC by filing Petition No. 63/MP/2021 seeking a declaration that the various agreements they had entered into stood frustrated on account of force majeure events.

In the impugned order passed by it, in Petition No. 63/MP/2021 dated 04.05.2023, the CERC considered each of the events which, according to the Appellant constituted force majeure events, and rejected each of them. Issue No.5 as framed by the CERC in Petition No. 63/MP/2021, was whether the Appellant was liable to pay relinquishment charges as per the methodology determined by the Commission in the order in Petition No. 92/MP/2015 dated 08.03.2015, and Issue No.6 was whether SECI should be restrained from taking any adverse or coercive action against them. Both issues 5 and 6 were also held against the Appellant-Applicant in para 96 of the impugned order, wherein the CERC held that, in view of the findings of the Commission on issue No.1 to 4, no relief was made out in favour of the Appellant (Petitioner before the CERC); and, accordingly, the Appellant (Petitioner before the CERC) would be liable to pay relinquishment charges in accordance with the CERC Connectivity

Regulations 2009 and its order in Petition No. 92/MP/2015 dated 08.03.2019.

As the CERC has, in holding the Appellant liable to pay relinquishment charges in accordance with the CERC Connectivity Regulations 2009, followed its earlier order in Petition No. 92/MP/2015 dated 08.03.2019, which order, though binding on the Appellant, has been permitted by them to attain finality in so far as they are concerned, the question whether the Appellant would still be entitled for relief on par with those who have challenged the order of the CERC, in Petition No. 92/MP/2015 dated 08.03.2019, by way of appeals before this Tribunal, must also await final adjudication of the main appeal.

H. WHICH OF THE JUDGEMENTS OF THIS TRIBUNAL ARE APPPLICABLE?

Whether the Appellant is justified in its submission that the subject matter of the present Appeal is covered by the judgement of this Tribunal in **Himachal Sorang Power Pvt. Ltd. Vs. CERC: 2024 SCC OnLine APTEL 30** or whether the Respondent is justified in its conclusion that it is the earlier judgement of this Tribunal in **Himachal Sorang Power Pvt. Ltd. Vs. CERC** (**Judgement in Appeal No. 54 of 2014 dated 30.04.2015**) which is applicable since, in the present case, the abandonment was prior to operationalization of the LTA, are again issues which must await a final adjudication of the main appeal.

I. THE TEST OF BALANCE OF CONVENIENCE:

The “balance of convenience” must be in favour of granting interim relief. The Court/Tribunal, while granting or refusing to grant interlocutory relief, should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if

interim relief is refused, and compare it with that which is likely to be caused to the other side if the interim relief is granted. If, on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the Appeal, status quo should be maintained, interim relief would be granted. (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276**). The Court/Tribunal must satisfy itself that the comparative hardship or mischief or inconvenience which is likely to occur from withholding grant of interim relief will be greater than that would be likely to arise from granting it (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276).**

The prayer for grant of interlocutory relief is at a stage when the existence of the legal right asserted by the Appellant, and its alleged violation, are both contested and uncertain and remains uncertain till they are examined during the final hearing of the main appeal. The court/tribunal, at this stage, acts on certain well-settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1; Gujarat Bottling Co. Ltd. v. Coca Cola Co, (1995) 5 SCC 545).** The basic principle of the grant of an interlocutory order is to assess the right and need of the Appellant, as against that of the Respondent, and it is a duty incumbent on to the law courts/tribunals to determine as to where the balance lies. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1**). The court/tribunal also, in restraining the Respondent from exercising what it considers to be its legal right but what the Appellant would like to be prevented, puts into the scales, as a relevant consideration, where the balance of convenience lies. (**Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd., (1999) 7 SCC 1).**

All that the Applicant-Appellant has stated in the present IA No. 1724 of 2024, on the test of balance of convenience, is that the balance of convenience lay in their favour, and no prejudice would be caused to the Respondents if relief as prayed for by the Applicant was granted by this Tribunal; on the other hand, the Applicant would suffer irreparable loss and injury if the relief is not granted in favour of the Applicant including invocation of the following bank guarantees by the CTUIL (a) on 14.08.2018 the Applicant had submitted the bank guarantee for Rs. 5 Crores (Connectivity BG) to CTUIL, along with its amendments as submitted from time to time by the Applicant in accordance with Clause 1.0 of the Transmission Agreement for Connectivity and (b) on 01.10.2018, the Applicant had submitted bank guarantee for Rs. 13.25 Crores (LTA BG) to CTUIL along with its amendment as submitted from time to time by the Applicant in accordance with Clause 1.0 of the LTAA.

Their claim, of balance of convenience lying in their favour, is primarily with respect to prayer(b), which is to restrain the Respondents from invoking the bank guarantees. As the Appellant has chosen not to press for grant of prayer (b), they have evidently not made out a case of the balance of convenience lying in their favour, and not in favour of the Respondents. Even otherwise, the Appellant herein seeks stay of the payment of Rs. 16.84 Crores, and thereby indirectly seeks an injunction restraining the Respondents from encashing the LTA Bank Guarantee furnished by them of Rs. 13.25 Crores. While, on the one hand, the Appellant contends that they are not pressing for the relief of stay of invocation of the Bank Guarantee in the light of the earlier judgments of this Tribunal, grant of stay as sought for in prayer (a) of the IA would, in effect, amount to grant of stay of invocation of Bank Guarantee which is impermissible in law. It is clear, therefore, that the test of balance of convenience lying in their favour has not been satisfied by the Appellant.

J. IRREPAIRABLE INJURY:

As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be established at the trial (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276).** Irreparable injury does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages (**Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719 : AIR 1993 SC 276; Mahadeo Savlaram Shelke v. Puna Municipal Corporation, (1995) 3 SCC 33.**

With regards irreparable loss, all that the Applicant stated, in the present IA No. 1724 of 2024, is that, permitting the Respondent to take any coercive steps against the Applicant, including encashment of the Connectivity Bank Guarantee and LTA Bank Guarantee, would lead to irretrievable injustice for the Applicant as the Applicant would be penalised for events beyond its control; the Applicant would suffer irreparable loss and injury if the prayer in the IA were not allowed; no prejudice would be caused to the Respondents in case the relief as sought in the IA was allowed; and as such the balance of convenience lay in favour of the Applicant, and against the Respondents; and the Applicant had a strong prima facie case to succeed on merits.

It is not even the case of the Appellant that, in case of their success in the main appeal, they will not be able to recover the amounts, paid by them in terms of the impugned order, from the respondents or that cannot be adequately compensated, by way of damages, later. The test of “irreparable injury” is also not satisfied in the present case.

IV. CONCLUSION:

Apart from making out a prima facie case, the Appellant was required to satisfy one of the other two tests of balance of convenience and irreparable injury, for them to be entitled to the interim relief sought for. The afore-said averments in the IA, regarding balance of convenience and irreparable injury, are vague and do not suffice to satisfy either of these two tests.

Suffice it, as the Appellant itself has not pressed for prayer (b) which is to stay invocation of the Bank Guarantee and as the LTA Bank Guarantee furnished by them is for Rs. 13.25 Crores out of the total sum for which stay is sought ie for Rs. 16.84 Crores, to direct the Respondents, pending disposal of the main appeal, not to take any coercive steps for recovery of the balance amount of Rs. 3.59 Crores.

The interim order now passed by us shall not be understood as a direction to the Respondents to encash the Bank Guarantee furnished by the Appellant, for a decision, on whether or not the Bank Guarantee should be invoked, is required to be taken by the Respondents, in whose favour such Bank Guarantee was furnished, and not for this Tribunal to direct. All that we have held is that we have not restrained the Respondent, if they so choose, from invoking the Bank Guarantee. Needless to state that, in case the Respondents invoke the Bank Guarantee furnished by the Appellant, the amount so encashed shall be subject to the result of the main appeal; and, in case of their success in the main appeal, the Appellant shall be entitled to claim refund of the amount encashed by the Respondents on invocation of the Bank Guarantee, along with appropriate interest thereon. It goes without saying that such claims, if made on behalf of the Appellant, shall be adjudicated by this Tribunal on its merits and in accordance with law, uninfluenced by any observations made in this Order.

IA No. 1724 of 2024 in Appeal No. 690 of 2023 stands disposed of accordingly.

Pronounced in the open court on this the **22nd day of January, 2025**.

(Seema Gupta) Technical Member	(Justice Ramesh Ranganathan) Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

tpd