

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

IA No. 16 of 2024 in Petition No. 2341 of 2024.

In the Matter of:

Application under Section 94 (2) of the Electricity Act, 2003 and under Rule 26 of the GERC (Conduct of Business) Regulations, 2004 seeking urgent directions in the captioned Petition No. 2341 of 2024.

And

Petition No. 2341 of 2024.

In the Matter of:

Petition under Section 86 (1) (e), (f) and (k) of the Electricity Act, 2003 read with Article 8 of the PPA dated 15.12.2022 executed between the parties for supply of 400 MW Solar Power from its Solar PV Power Plant in the State of Gujarat, seeking inter-alia extension of the Scheduled Commercial Operation Date on account of certain Force Majeure events affecting the Project Implementation and pass appropriate Order(s)/Direction(s) in relation to certain other incidental issues under the PPA, to the extent prayed by the Petitioner herein.

Petitioner/Applicant : M/s Enren Energy Pvt. Limited
Represented By : Ld. Advocates Mr. Basava Prabhu Patil, Ms. Molshree Bhatnagar, Mr. Sarvaswa Chhajer and Ms. Kanya Sharma

V/s.

Respondent : Gujarat Urja Vikas Nigam Limited
Represented By : Ld. Adv. Ms. Shrishti Khindaria alongwith Mr. L.K. Parmar and Mr. A.H. Chavda

CORAM:

**Mehul M. Gandhi, Member
S. R. Pandey, Member**

Date: 28/05/2024.

DAILY ORDER

1. The present matter was kept for hearing on 21.05.2024.

2. The Applicant/Petitioner has approached the Hon'ble High Court of Gujarat by way of filing SCA No. 7705 of 2024 and the Hon'ble Court vide Order dated 06.05.2024 directed to hear the matter as expeditiously as possible, preferably by the end of May 2024 in accordance with law. The relevant portion of the Order is reproduced as under:

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1. Heard Mr. Rashesh S. Sanjanwala, the learned Senior Advocate assisted by Mr. Anshul N. Shah, the learned advocate appearing for the writ-applicant, Mr. Anal Shah, the learned advocate appearing for the respondent No.1 and Mr. Premal Joshi, the learned advocate appearing for the respondent No. 2.

2. Mr. Anal Shah, the learned advocate having instructions to appear for the respondent No.1 and Mr. Premal Joshi, the learned advocate having instructions to appear for the respondent No.2. Both the learned advocates are permitted to file Vakalatnama with the Registry. Registry to accept the same.

3. Mr. Rashesh S. Sanjanwala, the learned Senior submitted that the writ-applicant herein has approached the respondent No.1 by preferring the petition for extension of schedule commercial operation date pursuant to the Power Purchase Agreement entered into between the writ-applicant and the respondent No.2 dated 15.12.2022. The writ-applicant herein has preferred the petition before the respondent No.1 which is duly produced at Annexure-G at page-119 wherein the prayers as prayed for in paragraph-8 pages 153 to 155 read thus :-

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It is submitted that an application below Ex.5 is also filed by the writ-applicant herein which is also pending before the respondent No.1. It is submitted that in view of the aforesaid till the petition alongwith accompanied application below Ex.5 is listed before the respondent No.1 – Commission, the respondent No.2 be refrained to take any coercive and/or precipitative action against the writ-applicant herein pursuant to the terms and conditions contemplated under the Power Purchase Agreement dated 15.12.2022 executed between the writ-applicant and GUVNL.

4. Mr. Anal Shah, the learned advocate appearing for the respondent No.1 on instructions submitted that the interim application is also filed before

the respondent No.1 after the said petition was filed before the respondent No.1. It is submitted that the interim application filed by the writ applicant which is under objections.

5. Mr. Sanjanwala, the learned Senior Counsel submitted that the writ-applicant herein undertakes to remove the said objections.

6. Mr. Anal Shah, the learned advocate appearing for the respondent No.1 on instruction states that the petition as well as the injunction application pending before the respondent No.1 as also the interim application shall be heard and/or decided by the respondent No.1 as expeditiously as possible.

7. Having heard the learned advocates appearing for the respective parties and in view of the statement made by Mr. Anal Shah, the learned advocate appearing for the respondent No.1 the interim application and/or the petition filed by the writ-applicant herein duly produced at pages 119 to 157 be decided heard by the respondent No.1 as expeditiously as possible, preferably by the end of May, 2024 in accordance with law.

8. The present writ-application stands disposed of accordingly with the consent of the learned advocates appearing for the respective parties.

9. This Court has otherwise not opined on the merits of the matter. Liberty is served in favour of the writ-applicant to approach this Court, in case of difficulty.

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In terms of the above directions, the matter was kept for hearing on 21.05.2024 and the Commission heard the counsels appearing for the parties and have considered the submissions/arguments advanced.

3. Ld. Adv. Mr. Basava Prabhu Patil appearing for the Applicant/Petitioner M/s Enren Energy Pvt. Limited, has made lengthy submissions traversing through Petition, reply/submissions and argued the matter while referring to various provisions of the Electricity Act, 2003, Guidelines, factual aspects, relevant judgments in the present matter.

3.1. It is submitted that the present Petition has filed in respect to disputes arising out of the Power Purchase Agreement (PPA) dated 15.12.2022 executed

between the parties for sale and purchase of power from the 400 MW project of the Petitioner. It is submitted that the Scheduled Commercial Operation Date (SCOD) of the project is 15.06.2024 and due to delay in granting connectivity approval by GETCO and also delay in getting the requisite approvals and permissions from various State authorities, hampered the Petitioner to achieve the milestones as per the PPA for the project. It is submitted that there are various events/factors which are beyond the control of Applicant/Petitioner, which affected the implementation of the project being developed by the Applicant/Petitioner as Force Majeure Events as per the provisions of the PPA and as a consequence, the Applicant/Petitioner by way of the present Petition, seeking indulgence of the Commission to extend the timelines of the SCOD of the project.

- 3.2. It is submitted that the Applicant/Petitioner would not be in a position to achieve SCOD by 15.06.2024 and in terms of the PPA, if the SCOD of the project is not achieved by 15.06.2024 then the Respondent GUVNL is entitled to encash the Performance of Bank Guarantee (PBG) on per day basis and proportionate to the balance capacity not commissioned. It is submitted that the Petitioner is likely to go beyond the SCOD of 15.06.2024 and therefore GUVNL may exercise its rights against the interest of the Applicant/Petitioner by imposing the LD by remaining silent on the request of extension made by Petitioner since more than one year. It is submitted that the PBG of Rs. 37,76,00,000/- of the Applicant/Petitioner in terms of the PPA may be under threat of being encashed by the Respondent.
- 3.3. It is submitted that as of now there is no question of encashment of PBG upto 15.06.2024. It is submitted that GUVNL may wrongfully impose a penalty (i.e., encashment of PBG) in terms of the PPA for delay in commissioning of the project within the stipulated timelines under the PPA. As such, no penalty can be imposed upon the Petitioner under the PPA since the performance of the obligations of the Petitioner under the PPA was prevented or delayed due to Force Majeure events despite being reasonable efforts of the Petitioner.

- 3.4. Referring to Article 4.1.9 of the PPA dated 15.12.2022 in respect of 'Penalty for Delay in commissioning', it is submitted that the maximum time allowed under the PPA for the completion of the Project is six months beyond the SCOD and therefore, the maximum time period for the SCOD is 24 months from the date of execution of the PPA.
- 3.5. He also referred the submissions of the Respondent that *"if the LD is not by way of penalty there is no necessity to enquire into actual loss and the agreement reached between the parties stipulating the LD is binding and is payable. In other words, no actual loss or damages need to be established. What is required to be established is legal injury which is distinct from the quantum of loss to be proved."* It is further referred that the Hon'ble APTEL has already examined the issue of the liability to pay liquidated damages. The Hon'ble Tribunal has considered the difficulty in calculating the actual loss and held that since the compensation payable has been pre-estimated and is not penal in nature, there is no need to provide evidence that actual loss incurred. Therefore, the parties have to go with pre-estimate loss suffered in case of breach of the contract. It is also referred that in case of delay, GUVNL would have to procure power from other sources which are likely to be higher than Rs. 2.49 per unit.
- 3.6. Ld. Counsel for the Applicant/Petitioner relied upon the Judgement dated 09.01.2015 in Civil Appeal No. 193 of 2015 in case of Kailash Nath Associates Vs. Delhi Development Authority & Ors. (2015) 4 SCC 136 and referred the para 30 to 37 and para 43 of the aforesaid judgement and submitted that the penalty amount agreed in delayed in commissioning of the solar power plant as claimed by the Respondent requires to prove the actual loss, if any, incurred by the Respondent as per the decision of the aforesaid judgement. The claim of the Respondent for penalty on the basis of pre-estimate basis is not valid and permissible as per aforesaid judgment.
- 3.7. Referring the Article 3.3 of the PPA, he submitted that bank guarantee is unconditional but the Clauses in the PPA makes it conditional. The said Article of the PPA craves out an exception for the imposition of LD upon the

Applicant/Petitioner. The said exception is in the nature of "Force Majeure Events". Hence, keeping in view the fact that the delay in commissioning the Project is on account of Force Majeure Events, the Respondent GUVNL can neither impose any LD upon the Applicant/Petitioner nor it can resort to the encashment of PBG furnished by the Applicant/Petitioner.

- 3.8. Referring the Article 4.2 of the PPA which pertains to '*Performance Bank Guarantee*', it is submitted that the Respondent GUVNL may be proceeded with encashment of bank guarantee if the Power Producer fails to commission the project on or before Scheduled Commercial Operation Date in terms of Article 3.3 of the PPA. It is also submitted that since the bank guarantee of the Applicant/Petitioner is valid upto 18.01.2025, the Respondent GUVNL has not suffered any loss if the interim relief as sought by the Applicant/Petitioner under the present Application allowed till final disposal of the present Petition by the Commission. Thus, keeping in view the conduct of GUVNL for encashing the bank guarantee for the reasons which are non-attributable to the Applicant/Petitioner, the Applicant/Petitioner has a strong apprehension that GUVNL shall take precipitative steps, i.e., encashment of the Performance Bank Guarantee furnished by the Applicant/Petitioner.
- 3.9. It is also submitted that the Applicant/Petitioner received copy of reply from the Respondent and wants to file its rejoinder reply to the reply filed by the Respondent GUVNL. Therefore, it is requested that the Commission may grant time for filing the rejoinder reply in the matter and post the matter for hearing on any date subject to the convenience of the Commission.
- 3.10. He submitted that the SCOD of the Applicant/Petitioner's Solar Power Plant is 15.06.2024. Hence, any penalty be imposable only thereafter. Further, the penalty is imposed on per day basis and proportionate to the balance capacity not commissioned, upto maximum 180 days. Thereafter, Performance Bank Guarantee will encashable accordingly.

3.11. It is submitted that any coercive action taken by the Respondent GUVNL against the Applicant/Petitioner may cause unnecessary hardship and financial prejudice. In the event the aforesaid interim reliefs are not granted, the Applicant/Petitioner will suffer irreparable harm as its financial standing and credit rating would be hit hard, significantly hampering its ability to secure financing for its projects in India. Therefore, irreparable harm and injury shall be caused to the Applicant/Petitioner if no interim protection is awarded by the Commission.

3.12. Based on the above, it is submitted that the Applicant/Petitioner is ready and willing to keep the Performance Bank Guarantee alive till the pendency of the present Petition and therefore, the balance of convenience is also in favour of the Applicant/Petitioner. No prejudice whatsoever shall be caused to the Respondent GUVNL if the interim protection/relief sought by the Applicant/Petitioner under the present Interim Application are allowed till the final disposal of present Petition. Therefore, The Applicant/Petitioner has preferred the present Application in order to protect the PBG furnished by the Applicant/Petitioner as well as the subject matter of the Petition and also seeking directions thereby restraining the Respondent GUVNL from taking coercive/precipitative steps against the Applicant/Petitioner including invocation and/or encashment of Bank guarantee submitted by the Applicant/Petitioner to the Respondent GUVNL. In light of the emergent/compelling circumstances, the present Application warrants urgent intervention of this Commission.

4. Ld. Adv. Ms. Shrishti Khindaria, appearing on behalf of the Respondent GUVNL, submitted that the Respondent has already filed its reply in the matter with a copy to the Applicant/Petitioner.

4.1. She while referring the prayers of the Applicant/Petitioner as stated in the IA, has vehemently objected to grant of any interim relief as sought for and requesting to reject the present Application. It is submitted that the bank guarantee has three ingredients, viz., it is (i) unconditional, (ii) irrevocable and

(iii) provides for the obligation of the bank to pay to the Respondent GUVNL on its demand without making any reference to the Applicant/Petitioner.

4.2. It is contended that the law on the bank guarantee and its interdiction in the bilateral disputes between the parties, has been settled by a catena of cases decided by the Hon'ble APTEL and by the Hon'ble Supreme Court which are binding precedents. There have been a number of matters in which the Hon'ble Tribunal following the principles settled by the Hon'ble Supreme Court has held against any injunction being granted on enforcement of bank guarantee.

4.3. It is further contended that the Applicant/Petitioner has not even pleaded fraud or special equities much less an attempt to discharge the burden of showing the exceptional circumstances as per the principles laid down by the Hon'ble APTEL and the Hon'ble Supreme Court which are binding precedents, as to why the Bank Guarantee encashment should be interdicted. Therefore, the Commission may also take the consistent view that there can be no stay on encashment of bank guarantee.

4.4. She also drawn the attention of the Commission to the Order dated 22.12.2022 passed by the Hon'ble APTEL in IA No. 1467 of 2022 in Appeal No. 378 of 2022 in case of Arina Solar Pvt. Limited Vs. CERC and referred various aspects relating to invocation of bank guarantee and submitted as under:

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- 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.*
- ii. *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.*
- iii. *In considering whether SECI is entitled to invoke the Bank Guarantee, it is only the conditions stipulated in the Bank Guarantee which need examination, and not the contents of the PPA, for the performance of which*

the Bank Guarantee was furnished, in as much as the Contract of Bank Guarantee is independent of the underlying contract i.e., the PPA.

- iv. Dispute between the parties, in terms of the underlying contract, is immaterial in deciding whether invocation of the bank guarantee should be permitted.*
- 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.*
- vi. It is impermissible in law for an absolute and unequivocal bank guarantee to be read as a conditional one having regard to circumstances attending thereto.*
- vii. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned.*
- viii. The following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee:*
 - (i) While dealing with an application for injunction in the course of commercial dealings, and when 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 relating to the terms of the contract.*
 - (ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.*
 - (iii) The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee.*
 - (iv) since a bank guarantee is an independent and a separate contract, and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees.*
 - (v) Fraud of an egregious nature, which would vitiate the very foundation of such a bank guarantee, and the beneficiary seeks to take advantage of the situation.*

- (vi) *Allowing encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.*
- ix. *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.*
- x. *Vague and indefinite allegations do not satisfy the requirement in law for constituting fraud, much less fraud of an egregious nature, or “irretrievable injustice”, as to vitiate the entire transaction.*
- xi. *Exception of special equities - its scope [Paras 31- 34 at Pages 18-20]- To avail of this exception, therefore, exceptional circumstances which make it impossible for the Guarantor to reimburse himself, if he ultimately succeeds, will have to be decisively established.*
- xii. *As the Appellant has neither pleaded nor proved fraud or special equities, the judgement relied upon by them, in BSES Ltd. v. Fenner India Ltd., (2006) 2 SCC 728, itself requires this Tribunal to reject their prayer for grant of stay of invocation of the bank guarantee.*
- xiii. *Since the Appellant has not made out a case of fraud or special equities, justifying SECI being restrained from encashing the Bank Guarantee, the relief sought by them in this I.A. cannot be granted*
.....”

4.5. She further referred and relied placed upon the recent Order dated 24.02.2023 passed by the Hon’ble APTEL in IA No. 1010 of 2022 in Appeal No. 292 of 2022 in case of Inox Green Energy Services Limited Vs. CERC & Others, which also deals with aspects of invocation of bank guarantee and held as under:

- i. *Encashment of the amount specified in the bank guarantee does not depend upon the result of the decision in the dispute between the parties, in case of a breach.*
- ii. *The financial difficulties which the person furnishing it may face, in case the bank guarantee is encashed, is also not relevant. Having furnished an unconditional bank guarantee with its eyes open and being fully conscious*

of the right of SECI to encash it in its sole discretion, the Appellant cannot now be heard to contend that severe financial hardship being caused to them as a result, would require interference with the encashment of a bank guarantee.

- 4.6. It is also submitted that the present Application filed by the Applicant/Petitioner would not be necessary to be entertained by the Commission. It is submitted that the bank guarantee is separate contract between the bank and the beneficiary of the guarantee and the same is not qualified by the contract on the performance of the obligations under the main contract. The existence of any dispute between the parties to the main contract is not a ground for issuing an Order of injunction to restrain enforcement of bank guarantee.
- 4.7. Referring the Judgement dated 09.01.2015 in Civil Appeal No. 193 of 2015 in case of Kailash Nath Associates Vs. Delhi Development Authority & Ors. (2015) 4 SCC 136, it is submitted that the Hon'ble Court while deciding the case has considered the case of *Fateh Chand v. Balkishan Das, 1964 SCR (1) 515*, wherein it was held that under the common law, a genuine pre-estimate of damages by mutual agreement is regarded as a liquidated damages and binding between the parties and a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. It is submitted that the Hon'ble Court should also be slow in granting an order of the injunction to restraint the realization of bank guarantee.
- 4.8. It is contended that the bank is always obliged to honor its guarantee as long as it is unconditional and irrevocable and on demand by the beneficiary and irrespective of any dispute raised by its customer. The only restricted and limited exceptions for restraining the encashment of bank guarantee is fraud of an egregious nature which vitiates very foundation of the bank guarantee. It is further submitted that the allegation of unjust or improper conduct on the part of beneficiary and evidence or material in support thereof cannot be examined for considering the restraint on encashment of bank guarantee as the same cannot be considered as fraud.

- 4.9. It is further contended that the question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question. Reliance is being placed on the judgement of the Hon'ble Supreme Court in Civil Appeal No. 9217 of 2022 in case of Desh Raj and Others Vs. Rohtash Singh, (2023) 3 SCC 714 in support of above arguments.
- 4.10. She further referred the Clauses 5.6 and 11 of 'Guidelines for Tariff based competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects dated 03.08.2017 and contended that post 15.06.2024 the rights of the Respondent arise to invoke the PBG submitted by the Applicant/Petitioner. It is submitted that any claim with regard to Force Majeure event has to be examined in light of proof of the existence of event being claimed as force majeure and further proof of the impact of such event on the Petitioner's project in terms of the provisions of the PPA. It is also referred that in terms of the principles settled by the Hon'ble Apex Court, it is for the Applicant/Petitioner to prove that the Respondent GUVNL had not suffered any loss and it is not for the Respondent to established that it has suffered any loss. It is submitted that there is legal injury and loss to the Respondent GUVNL as the Applicant/Petitioner's project is meant to supply electricity at Rs. 2.49 per unit which is renewable power and in any case of delay, the Respondent GUVNL have to procure power from other sources which are likely to be higher than Rs. 2.49 per unit.
- 4.11. She further submitted that there is no *prima facie* case of the Applicant/Petitioner. The balance of convenience is in favour of the Respondent GUVNL. If the interim relief is granted by the Commission, then the Respondent is deprived from recovery of penalty amount i.e., encashment of PBG and LD amount as per the terms and conditions of the PPA and also requires to procure electricity at higher rate than rate of Rs. 2.49 per unit as agreed between the parties, which is also loss and irreparable to the Respondent.

- 4.12. Based on the above submissions, it is prayed to the Commission that the Commission may reject the present application seeking direction by the Commission to GUVNL for taking no coercive actions towards bank guarantee submitted by the Applicant/Petitioner.
- 4.13. It is further submitted that the Applicant/Petitioner has filed additional affidavit which was served upon the Respondent just yesterday in the main matter wherein the Applicant/Petitioner has sought an extension of SCOD of 427 days instead of 180 days as previously sought in the main petition. It is requested that the Commission may grant liberty to the Respondent GUVNL to file submissions to such additional affidavit of the Applicant/Petitioner, if need arises, for which weeks' time has been sought for.
5. In response to the above reply/contentions of the Respondent, Ld. Adv. for the Applicant/Petitioner submitted that the Applicant/Petitioner has *prima facie* case as the Applicant/Petitioner is unable to commission the power project and achieve SCOD due to various reasons beyond the control of it. The Applicant/Petitioner also faced Force Majeure conditions in terms of PPA due to which the project is not commission and achieve SCOD within the stipulated time as mentioned the Petition.
- 5.1. He also submitted that the Respondent has not suffered injury if stay is granted against the encashment of Bank Guarantee by the Commission because the Respondent is unable to prove loss, if any, incurred by it. Therefore, the Respondent would not suffer any loss due to delay in achieving SCOD of the power project by the Applicant/Petitioner. If the Respondent GUVNL suffers any injury, then it is required to prove the same by GUVNL.
- 5.2. He further reiterated that balance of convenience is in favour of the Applicant/Petitioner because if the stay against the encashment of bank guarantee is granted, the Applicant/Petitioner will be saved from the financial hardship which may occurs upon encashment of Bank Guarantee by the Respondent GUVNL. He argued that if stay is granted against the encashment of

Bank Guarantee, then in that case the Respondent GUVNL, who has not suffered any financial loss, is not affected in any manner.

6. Heard the parties. We note that the Applicant/Petitioner has filed the Petition alongwith IA No. 16 of 2024 wherein it is prayed to issue directions of the Commission to the Respondent GUVNL to restrain for taking any coercive/precipitative steps including the invocation/encashment of Performance Bank Guarantee submitted by the Applicant/Petitioner till final disposal of the present Petition. We also note that the Respondent GUVNL has filed the reply in the matter against which the Applicant/Petitioner sought time to file its rejoinder reply. We further note that the Respondent GUVNL also sought time to file its additional submissions against the additional Affidavit dated 07.05.2024 filed before the Commission on 20.05.2024 wherein the Applicant/Petitioner sought extension of SCOD for 427 days instead of 180 days as prayed in the Petition. Hence, we decide to proceed with IA No. 16 of 2024 filed the Applicant/Petitioner.
 - 6.1. We note that the present Petition has been filed under Section 86(1)(e), (f) and (k) of the Electricity Act, 2003 read with Article 8 of the PPA dated 15.12.2022 executed between the parties for supply of 400 MW Solar Power from its Solar PV Power Plant in the State of Gujarat, seeking *inter-alia*, extension of the Scheduled Commercial Operation Date on account of certain Force Majeure events affecting the Project Implementation on account of Force Majeure events beyond the reasonable control of the Applicant/Petitioner.
 - 6.2. The Applicant/Petitioner is sister company of Solairedirect Energy Pvt. Limited who was successful bidder for development of Solar Power Projects of 400 MW capacity under the competitive bidding carried out by the Respondent GUVNL under RfS No. GUVNL/750 MW/Solar (Phase - XIV) dated 12.07.2022 to supply electricity to the Respondent at the rate of Rs. 2.49 per unit. The Petitioner has signed the Power Purchase Agreement dated 15.12.2022 with the Respondent GUVNL. As per the PPA the SCOD of project is 15.06.2024.

- 6.3. We note that the Applicant/Petitioner fairly admitted that it would not be in a position to achieve SCOD by 15.06.2024 and in terms of the PPA, if the SCOD of the project does not achieve by 15.06.2024 then the Respondent GUVNL is entitled to encash the Performance of Bank Guarantee (PBG) on per day basis and proportionate to the balance capacity not commissioned. The PBG of Rs. 37,76,00,000/- of the Applicant/Petitioner in terms of the PPA may be under threat of being encashed by the Respondent.
- 6.4. Referring Article 4.1.9 of the PPA, the maximum time allowed under the PPA for the completion of the Project is six months beyond the SCOD and therefore, the maximum time period for the SCOD is 24 months from the date of execution of the PPA. As of now there is no question of encashment of PBG upto 15.06.2024 plus six months as per the PPA.
- 6.5. The Applicant/Petitioner submitted that the delay occurred in commissioning of the project is beyond the control of the Petitioner. Therefore, the Respondent GUVNL may proceed with encashment of bank guarantee if the Power Producer fails to commission the project on or before Scheduled Commercial Operation Date in terms of Article 3.3 of the PPA. Any coercive action taken by the Respondent GUVNL against the Applicant/Petitioner may cause unnecessary hardship and financial prejudice and the Applicant/Petitioner will suffer irreparable harm as its financial standing and hampering its ability to secure financing for its projects. Since the bank guarantee of the Applicant/Petitioner is valid upto 18.01.2025, the Respondent GUVNL has not suffered any loss if the interim relief as sought by the Applicant/Petitioner under the present Application allowed till final disposal of the present Petition by the Commission. It is an apprehension that GUVNL shall take precipitative steps, i.e., encashment of the PBC furnished by the Applicant/Petitioner.
- 6.6. The Petitioner has submitted that it has a strong *prima facie* case and balance of convenience in its favour. Further, if the relief is not granted, the Applicant/Petitioner to face irreparable injury.

- 6.7. Per contra, the counsel for the Respondent GUVNL has vehemently objecting to grant of any interim relief as sought for in the Application requesting to reject the Application and submitted that the bank guarantee in its terms is unconditional, irrevocable and provides for the obligation of the bank to pay to the Respondent GUVNL on its demand without making any reference to the Applicant/Petitioner. Further, the law on the bank guarantee and its interdiction in the bilateral disputes between the parties, has been settled by a catena of cases decided by the Hon'ble APTEL and the Hon'ble Supreme Court which are binding precedents on the parties. It is submitted that the Applicant/Petitioner has not pleaded fraud and has failed to show special equities much less an attempt to discharge the burden of showing the exceptional circumstances as per the principles laid down by the Hon'ble APTEL and the Hon'ble Supreme Court which are binding precedents, as to why the bank guarantee encashment should be interdicted. Therefore, the Commission may also take the consistent view that there can be no stay on encashment of bank guarantee.
- 6.8. It is also argued that the Commission may not entertain the present Application filed by the Applicant/Petitioner as the bank guarantee is separate contract between the bank and the beneficiary of the guarantee and the same is not qualified by the contract on the performance of the obligations under the main contract and the existence of any dispute between the parties to the main contract is not a ground for issuing an Order of injunction to restrain enforcement of bank guarantee.
- 6.9. It is also contended that the bank is always obliged to honor its guarantee as long as it is unconditional and irrevocable and on demand by the beneficiary and irrespective of any dispute raised by its customer and only limited exceptions for restraining the encashment of bank guarantee is fraud of an egregious nature which vitiates very foundation of the bank guarantee. The question of examining the prima facie case or balance of convenience does not arise if the court cannot interfere with the unconditional commitment made by the bank in the guarantees in question.

- 6.10. It is argued by the Ld. Adv. for the Respondent that post 15.06.2024, the rights of the Respondent would arise for invocation of the PBG of the Applicant/Petitioner and any claim with regard to Force Majeure event has to be examined in light of proof of the existence of event being claimed as force majeure and further proof of the impact of such event on the Petitioner's project in terms of the provisions of the PPA. It is also argued that the Applicant/Petitioner has to prove that the Respondent GUVNL had not suffered any loss. As such, there is legal injury and loss caused to the Respondent GUVNL as the Applicant/Petitioner's project is meant to supply electricity at Rs. 2.49 per unit which is renewable power and in any case of delay, the Respondent GUVNL have to procure power from other sources which are likely to be higher than Rs, 2.49 per unit.
- 6.11. The reasons stated by the Applicant/Petitioner for delay/non-completion of the project are extraneous reasons and they do not fall in the category of force majeure events. The Respondent has right under the PPA that in the event of failure to complete the project either with full capacity or part capacity, the Respondent is entitled to recover the liquidated damages and encash the Performance Bank Guarantee as per the agreed terms.
- 6.12. The Performance Bank Guarantee is a separate contract between the banker and its beneficiary, i.e. the Respondent GUVNL in whose favour the Performance Bank Guarantee provided by the Applicant/Petitioner.
- 6.13. The Applicant/Petitioner is required to prove prima facie case, favorable balance of convenience and irreparable loss simultaneously. The contention of the Applicant/Petitioner that it is having prima facie case is not correct because it might be possible that the Petitioner fails to achieve the SCOD upto 15.06.2024 and has sought extension for the period of 427 days, i.e. from 15.06.2024 to 28.04.2025. Further, encashment of bank guarantee is a right ensured by the Petitioner in the PPA in case of delay in commissioning of the project excluding the force majeure event. In case of restricting encashment of performance bank guarantee against the liquidated damages recoverable by the Respondent is

against the provisions of Power Purchase Agreement as well as provisions of RfS of the Respondent GUVNL.

- 6.14. Considering the arguments advanced by both the Ld. Counsels of the Applicant/Petitioner and the Respondent, we decide to IA No. 16 of 2024 wherein the Applicant/Petitioner prayed for granting of stay against the encashment of Performance Bank Guarantee by the Respondent GUVNL.
- 6.15. We note that the parent company of the Applicant Petitioner who has been selected as successful bidder under 750 MW competitive bidding carried out by the Respondent followed by e-reverse auction and in pursuance thereof the Applicant/Petitioner and the Respondent have executed the Power Purchase Agreement dated 15.12.2022. As per the said PPA, the original SCOD was 15.06.2024.
- 6.16. We note that extensive arguments have been advanced by both the parties with regard to restraining the Respondent from invocation / encashment of PBG as prayed by the Applicant/Petitioner. Ld. Adv. Ms. Shristi Khindaria has vehemently opposed grant of interim relief regarding non-encashment of PBG on the ground that it is a separate contract between the Bank and its beneficiary.
- 6.17. She submitted that the right of Respondent for encashment of Performance Bank Guarantee against the failure of the Petitioner to achieve the milestone of SCOD cannot be granted in such proceedings because the Performance Bank Guarantee is separate contract between the Respondent and the bank and the amount of liquidated damages recoverable from the Petitioner is also as per the terms of Article 3.3 of the PPA.
- 6.18. We also note that the Applicant/Petitioner's power plant has not been commissioned fully till now and for which the Applicant/Petitioner in the main matter has sought extension of SCOD on the grounds of force majeure event, which is yet to be decided. We note that granting any relief at this stage on the ground of force majeure event whether occurred or not and/or extension for

completion of project be extended as sought by the Applicant/Petitioner without going into merit on facts and law points and is premature without hearing the parties and examining the relevant documents etc.

- 6.19. We note that the parent company of the Applicant / Petitioner has furnished the said PBG in terms of Clause 3.11 of the RfS and the LoA issued by the Respondent GUVNL pursuant to emerging as successful bidder in competitive bidding process. We note that Ld. Advocate for the Respondent GUVNL referring to various judgments has argued that the law on the invocation of bank guarantee is well-settled and no longer res integra and that we have considered the judgments relied upon by both the sides.
- 6.20. While the PPA no doubt provides for the conditions under which the Performance Bank Guarantee can be encashed, it must also be borne in mind that 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. The dispute between the beneficiary and the party at whose instance the bank has 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 so long as the invocation is in terms of the bank guarantee. Since a bank guarantee is an independent and separate contract and is absolute in nature, 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.
- 6.21. Further, 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. 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.

6.22. Moreover, if 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. The Petitioner/ Applicant cannot, merely because a dispute exists in terms of the underlying contract, prevent the respondent-beneficiary from enforcing the bank guarantee by way of injunction save in exceptional circumstances.

6.23. It is a settled law that the court should be slow in granting an order of injunction to restraint the realization of bank guarantee and extremely limited exceptions are recognized for restraining the encashment of the bank guarantee. Considering the aforesaid judgments/decisions, which state that since the Applicant has not made out a case of fraud or special equities, justifying the Respondents being restrained from encashing the Bank Guarantees, the relief sought by them in this IA cannot be granted because in any case if the Respondent choose to encash the Bank Guarantee the same shall be subject to the result of the Main Petition pending before this Commission.

7. Therefore, in the facts & circumstances, we are not inclined to grant relief sought by the Applicant. We reject the IA No. 16 of 2024 in Petition No. 2341 of 2024 and accordingly, it stands disposed.

8. We also note the submission of the counsel of the Applicant/Petitioner that he wants to file its rejoinder reply to the reply filed by the Respondent GUVNL and requested the Commission to grant time for filing the rejoinder reply in the matter and post the matter for hearing on any date subject to the convenience of the Commission. Accordingly, the Applicant/Petitioner is at liberty to file

rejoinder reply, if any, within weeks' time from the date of this Order with copy to the Respondent.

9. We further note submissions of counsel of the Respondent that the Respondent was served upon the copy of additional affidavit from the Applicant/Petitioner just yesterday and accordingly, requested the Commission to grant liberty to them to file submissions to aforesaid additional affidavit of the Applicant/Petitioner. Accordingly, the Respondent is directed to file its submissions, if any, within weeks' time from the date of this Order with copy to the Petitioner.
10. Next date of hearing in the main Petition will be intimated separately.
11. Order accordingly.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 28/05/2024.

