

**BEFORE THE GUJARAT ELECTRICITY REGULATORY COMMISSION
GANDHINAGAR**

Petition No. 1880 of 2020.

In the Matter of:

Petition under Section 86 of the Electricity Act, 2003 for recovery of termination compensation under the Power Purchase Agreement (PPA) dated 29.05.2007.

Petitioner : Gujarat Urja Vikas Nigam Limited,
Represented By : Ld. Adv. Ms. Harsha Manav alongwith Ms. Girija
Dave and Mr. Kandarp Mistry
Respondent : M/s Era Landmarks (I) Limited
Represented By : Nobody was present

CORAM:

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

Date: 07/01/2022.

ORDER

1. The Petitioner, Gujarat Urja Vikas Nigam Limited (GUVNL) has filed this Petition under Section 86 of the Electricity Act, 2003 for recovery of termination compensation payment from Respondent Era Landmark (I) Ltd. under the Power Purchase Agreement dated 29.05.2007 and Supplemental PPA dated 13.01.2014, since there was no generation from March 2015 to May 2019 from the 1.65 MW Wind Project of the Respondent based on the SLDC letter dated 24.06.2020 praying as under:
 - (a) To hold that the Respondent is liable to pay an amount of Rs. 3.36 crores as termination compensation to GUVNL;

- (b) Direct the Respondent to pay termination compensation of Rs. 3.36 crores to GUVNL along with interest at the rate of $[(\text{SBAR} + 2\%) / 52]$ per week or part thereof basis from 25.12.2019 till the date of payment to GUVNL;
- (c) Direct the Respondent to pay the costs and expenses of the present proceedings to GUVNL

2. The brief facts mentioned in the petition are stated below:

- 2.1. The Petitioner is a licensee and is assigned with the function of Bulk Purchase and Bulk Sale of Power on behalf of State-owned distribution licensees in Gujarat and the Respondent is a company incorporated under the provisions of the Companies Act and is a Generating Company as defined under Section 2(28) of the Electricity Act, 2003. The Petitioner and the Respondent executed a Power Purchase Agreement (PPA) on 29.05.2007 for procurement and supply of power from the 1.65 MW Wind Project.
- 2.2. It was observed as per letter dated 24.06.2020 of SLDC-Gujarat that the Respondent did not generate any power from March-15 to May-19. Accordingly, in light of zero generation for more than 90 days period leading to O&M Default on part of the Respondent a Default Notice dated 15.06.2019 in terms of Article 9.2.1 read with Article 9.3.1 was issued by the Petitioner calling upon the Respondent to remedy the defect within 90 days by furnishing the necessary evidence, failing which the Petitioner shall terminate the PPA. However, no response was received by the Petitioner against the said Default Notice issued to the Respondent.
- 2.3. It is stated that in view of the Termination Notice issued by the Petitioner, the PPA stands terminated and the Petitioner GUVNL stands discharged of all of its obligations under the PPA. It is stated that as per Article 9.3.1 of the PPA, the amount of termination compensation works out to Rs. 3.36 crores being equivalent to three years billing based on tariff and normative PLF i.e. 23% as considered by the Commission for determination of tariff for Wind Projects vide Order No. 2 of 2006 dated 11.08.2006. Also, the Petitioner has referred relevant provisions of the PPA in this regard in the Petition.

- 2.4. It is stated that, there was no force majeure or unexpected or unforeseeable event which prevented the performance of the contract by the Respondent and it was the failure on part of the Respondent since there was no event which affected the performance of the contract.
- 2.5. It is submitted that in terms of the PPA, the Respondent was liable to pay termination compensation to the Petitioner GUVNL for event of default by the Respondent within 30 days from the Termination Notice. However, despite the demand raised by the Petitioner, the Respondent has failed to pay termination compensation amounting to Rs. 3.36 crores in terms of PPA. It is submitted that the quantum of termination compensation was agreed between the parties in the PPA and is a genuine pre-estimate of actual loss that would be suffered by GUVNL due to the default and delays of the Power Producer and the parties have agreed to the same to be taken to obviate the necessity to establish by evidence or prove actual loss.
- 2.6. Moreover, when the claim for termination compensation is in the field of regulatory regime such as Electricity Sector, the actual loss caused in monetary terms cannot be assessed and the termination compensation as agreed in the PPA would have to be considered. It is not possible to assess the loss as the electricity supply was enjoyed by many users and consumers. This is particularly when the project was a Wind project and would have been beneficial to the State. The purpose of entering into PPAs with the renewable projects is for sustainable growth and has a social and larger objective and purpose. It is not possible to prove actual damage or loss to society and therefore the requirement to prove actual loss is dispensed with and the compensation amount is provided in the PPA itself.
- 2.7. Accordingly, the compensation being claimed in the present case is by a public utility under a regulatory regime and in the interests of consumers at large. The works or project is in respect of public utility service and is of general public importance. The provision of such liquidated damages is a necessity in the case of regulated industry such as the power sector. It is stated that the Petitioner GUVNL has suffered legal injury and loss on account of the failure on part of the Respondent in fulfilling the obligations under the PPA.

- 2.8. The Respondent having failed to remedy its default and recommence generation within the 90 days' cure period as provided in the PPA, the Petitioner proceeded to terminate the PPA for breach on the part of the Respondent vide Termination Notice dated 25.11.2019 and also sought compensation as per Article 9.3.1 of the PPA.
3. When the matter was first listed for hearing on 15.06.2021, nobody appeared for the Respondent and the Commission passed Daily Order dated 17.06.2021 recording the submissions of the Petitioner that the copy of the Petition has been served to the Respondent through registered post and intimation regarding hearing of matter was communicated to the Respondent by the Petitioner through email and that the Petitioner to file an affidavit duly providing the relevant details regarding service of Petition, address for correspondence/ Email ID etc. alongwith commencement of any liquidation/winding-up proceedings before any Court or NCLT or Liquidator with details regarding status of the Company after verifying on the website of Ministry of Corporate Affairs, Government of India because the Petitioner has no formal information/knowledge about such proceedings against the Respondent company or any notice in that regard is received by the Petitioner from relevant authorities. Accordingly, the above hearing stood adjourned to 24.06.2021.
4. Thereafter, the Petitioner filed an affidavit dated 23.06.2021 *inter alia* providing the proof of service of Petition and intimating hearing date/link to the Respondent alongwith its registered address, email ID etc. submitting that the PPA dated 29.05.2007 was initially entered into between GUVNL and M/s Era Infrastructure (I) Limited but thereafter, vide letter dated 29.02.2008 it was communicated to GUVNL that the name of M/s Era Infrastructure (I) Limited has been changed to M/s Era Landmarks (I) Limited and hence, Supplemental PPA dated 13.01.2014 came to be executed.
- 4.1. It is also submitted that upon verification, it now appears that the name of M/s Era Landmarks (I) Limited has subsequently been changed to M/s Adel Landmarks Limited and as per the Company Master Data available on the Ministry of Corporate Affairs Website the CIN of M/s Adel Landmarks Limited is also the same as M/s Era Infrastructure (I) Limited and upon further enquiry, it appears that M/s Adel Landmarks Limited (erstwhile Era Landmarks (I) Limited/Era Infrastructure (I)

Limited) has been subjected to Corporate Insolvency Resolution Process by the National Company Law Tribunal, New Delhi vide Order dated 05.12.2018 under the provisions of the Insolvency and Bankruptcy Code, 2016 and copy of the Order dated 05.12.2018 of the National Company Law Tribunal, New Delhi in C.P. No. IB-1083(PB)/2018 in the matter of *Edelweiss Asset Reconstruction Company Limited vs. Adel Landmarks Limited* is also filed. Moreover, the Interim Resolution Professional is also appointed in this regard.

- 4.2. It is also submitted that in terms of Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016, there is a moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor and accordingly, GUVNL requests for suspension of the proceedings filed against the Respondent with liberty to GUVNL to take appropriate steps in law.
5. Pursuant to earlier adjournment deciding to hear the matter on 24.06.2021 on that day nobody appeared for the Respondent and the Petitioner while reiterating its submissions filed vide above affidavit and requesting to suspend the present proceedings filed against the Respondent *sine die* till the matter is decided by NCLT with liberty to the Petitioner to take appropriate steps in law or adjourn the matter and list the same so that the Petitioner can update the Commission regarding the status of above proceeding before NCLT. Accordingly, the Commission passed Daily Order dated 05.07.2021 deciding to adjourn the matter to enable the Petitioner to provide updated status regarding Corporate Insolvency Resolution Process and to list the matter after three months for seeking status of above proceedings with notice of hearing to the Petitioner only.
6. Subsequently, two affidavits dated 25.10.2021 and 09.11.2021 came to be filed by the Petitioner making further submissions that resolution proceedings before the NCLT Delhi are still pending and GUVNL has filed a claim with the Resolution Professional in respect of the claim of liquidated damages and also filed copy of said claim. It is submitted that the Petitioner has sent various emails to the Resolution Professional but has not received any response from the Resolution Professional. However, in response to email dated 01.11.2021 of the Petitioner, the Resolution Professional has responded vide email dated 02.11.2021 as under:

“.....

We acknowledge the receipt of the trail email and shall revert you shortly. Further, the claim submitted by you shall be dealt in accordance with the provisions of the Code and Regulations made thereunder.

.....”

7. In order to enable the Petitioner to provide the status of Corporate Insolvency Resolution Process with regard to the Respondent before NCLT opportunity was afforded to the Petitioner by listing the matter on 26.10.2021, 10.11.2021 and lastly on 02.12.2021. Ld. Adv. Harsha The present matter was listed for hearing on 10.11.2021 only for purpose of seeking status from the Petitioner regarding.
- 7.1. Heard Ld. Adv. Ms. Harsha Manav appearing for the Petitioner GUVNL submitted that although GUVNL has already filed its claim with the Resolution Professional but vide email dated 02.11.2021, the Resolution Professional while acknowledging receipt of emails including claims of the Petitioner GUVNL it is stated that claims of GUVNL shall be dealt with in accordance with the provisions of the Code and regulations made thereunder. Further, during the hearing on 02.12.2021, Ld. counsel for the Petitioner submitted that there is no further development regarding status of pending NCLT proceeding and requested the Commission to adjourn the proceedings *sine die* till the matter is decided by NCLT with a liberty to the Petitioner to thereafter, mention the present Petition to be taken up for hearing after resolution proceedings under Insolvency and Bankruptcy Code, 2016 before NCLT is decided. However, the Commission may appropriately decide the same.
- 7.2. We note that the Petitioner after filing of present Petition vide its affidavit dated 23.06.2021 disclosed that vide an Order dated 05.12.2018 of the National Company Law Tribunal, New Delhi in C.P. No. IB-1083(PB)/2018, M/s Adel Landmarks Limited (erstwhile Era Landmarks (I) Limited/Era Infrastructure (I) Limited) has been subjected to Corporate Insolvency Resolution Process in the matter of *Edelweiss Asset Reconstruction Company Limited vs. Adel Landmarks Limited* under the provisions of the Insolvency and Bankruptcy Code, 2016 and the Interim Resolution Professional is also appointed in this regard by NCLT. It is further submitted that in

terms of Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016, there is a moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor and accordingly, requesting for suspension of the proceedings filed against the Respondent with liberty to GUVNL to take appropriate steps in law. Even, the claim filed by the Petitioner with the Resolution Professional is acknowledged by the Resolution Professional stating that claims of GUVNL shall be dealt with in accordance with the provisions of the Code and regulations made thereunder.

7.3. We note that the Commission also afforded adequate opportunities to the Petitioner for enabling to provide the status of Corporate Insolvency Resolution Process with regard to the Respondent before NCLT by listing the matter. However, even on 02.12.2021, Ld. counsel for the Petitioner submitted that there is no further progress regarding the status of the NCLT proceedings.

7.4. We also note that the Petitioner vide affidavit dated 23.06.2021 while disclosing that M/s Adel Landmarks Limited (erstwhile Era Landmarks (I) Limited/Era Infrastructure (I) Limited) has been subjected to Corporate Insolvency Resolution Process in the matter of *Edelweiss Asset Reconstruction Company Limited vs. Adel Landmarks Limited* under the provisions of the Insolvency and Bankruptcy Code, 2016 wherein the Interim Resolution Professional is also appointed and has further submitted that in terms of Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016, there is a moratorium prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor and accordingly, requesting for suspension of the proceedings filed against the Respondent with liberty to GUVNL to take appropriate steps in law. Similar request of suspending the proceeding *sine die* is also made by the Petitioner in its subsequent submissions. Hence, it is necessary to refer Section 14(1)(a) of the Insolvency and Bankruptcy Code, 2016, which reads as under:

“.....

14. Moratorium

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
.....”

7.5. Clause 5 of Section 60 of the Insolvency and Bankruptcy Code, 2016 reads as under:

“Section 60: Adjudicating Authority for corporate persons.

.....

(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of—

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

.....”

7.6. Section 63 of the Insolvency and Bankruptcy Code, 2016, reads as under:

“.....

63. No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code. Civil court not to have jurisdiction.

.....”

7.7. In view of above, without going in to the merits of the present case, we decide that the present Petition is not admissible at present and accordingly, dispose the present

Petition with liberty to file appropriate Petition/Application in this regard before the Commission in accordance with law. Accordingly, the present Petition stands disposed of.

7.8. Before parting we consider it appropriate to bring to the notice of the Petitioner that prior to filing any such Petition/Application it needs to verify regarding status of pendency of any proceedings before appropriate forum including any Corporate Insolvency Resolution Process under the provision of the Insolvency and Bankruptcy Code, 2016 to avoid such situation.

8. We order accordingly.

Sd/-
[S. R. Pandey]
Member

Sd/-
[Mehul M. Gandhi]
Member

Place: Gandhinagar.
Date: 07/01/2022.

