BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

Date of Hearing : 10.08.2022

Date of order : 24.08.2022

Case No. HERC / Petition No. 06 of 2022

In the matter of

Petition under Section 86(1(f) of the Electricity Act, 2003 read with Article 10.6 of the Energy Banking Agreement dated 29.04.2019 and other enabling provisions.

Petitioner

M/s Orbit Resorts Limited

Respondents

1. Haryana Vidyut Prasaran Nigam Limited (HVPNL)
2. Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL)

Present on behalf of the Petitioner

1. Mr. Naveen S. Bhardwaj, Advocate

Present On behalf of the Respondents

1. Mr. Sahil Sood, Advocate

Quorum

Shri R.K. Pachnanda **Chairman**
Shri Naresh Sardana **Member**

ORDER

Background

1. The present petition has been filed by M/s. Orbit Resorts Limited, seeking to set aside/ quash the letter dated 23.08.2021, vide which captive status for the FY 2020-21 was denied and demand of Rs. 1,80,85,253/- was raised, restore the captive status for FY 2020-21, confirm the captive status for FY 2021-22 and allow carry forward/roll-over the excess units pertaining of FY 2019-20 and FY 2020-2021 to FY 2021-22, on the grounds of force majeure event caused by Covid-19 pandemic

2. **Petitioner's submissions are set out as under**:-

1.1 That the petitioner is engaged in the business of hospitality / running of hotels and is currently operating two hotels namely 'The Oberoi Gurgaon' and 'The Trident Gurgaon' located in Gurgaon (Now Gurugram), Haryana. The petitioner has also set up a 7.5 MW

Captive Solar Power Plant at Sirsa. In this regard the petitioner executed connectivity agreement dated 12.03.2018, and was granted the intra-state long-term open access on 29.03.2019 and banking agreement was executed on 19.08.2019 (with effect from 29.04.2019).

1.2 That on 08.03.2019 the HAREDA granted approval to the petitioner for setting up of Ground Mounted Solar Power Project of 7.5 MW capacity for captive consumption at Village Balasar, Sirsa, Haryana under the 2016 Solar Power Policy for availing waivers of wheeling & transmission charges.

1.3 That on 19.08.2019 the petitioner entered into a Tripartite Banking Agreement for Renewable Energy Based Power Plant with respondent No.1 and respondent No. 2 (through Haryana Power Purchase Centre). As per Article 3.8 of the Energy Banking Agreement dated 29.04.2019, the petitioner is required to establish its status as a captive generating plant at the end of each financial year.

1.4 That the conditions for establishing status as a captive generating plant are as under:

(i) Submission of requisite documents/information regarding the ownership details of company along with equity shareholding with voting rights; and

(ii) Compliance with the condition to consume not less than 51% of energy generated on annual basis.

1.5 That in the event of failure to comply with Article 3.8 the petitioner is liable to pay all applicable charges for the said year from which it was exempt on account of having claimed its captive consumption status along with interest at 18% p.a. from the date of losing its status of captive.

1.6 That Article 3.8 of the Energy Banking Agreement dated 29.04.2019 is reproduced below:

"3.8 *The company shall submit the requisite documents/ information regarding ownership details of company along with equity share holding with voting rights and compliance of condition to consume not less than 51% of energy generated on annual basis by the captive user(s) as per Electricity Rules, 2005 and its amendment, duly authenticated/certified by Statutory Auditor to establish that it complies with the requirement to qualify for the status of Captive Generating Plant for each financial year by 15th of April, Besides this, the company shall be required to submit any additional documents/information which may be required by UHBVN/DHBVN/HPPC to satisfy itself regarding captive status of the plant. In case, the company fails to comply with the requirement to qualify the Status of Captive Generating Plant during any contract year/financial year, the Company shall be liable to pay all applicable charges for the said year, from which it was having exemption on account of its claimed CPP status, along with interest @ 18% per annum applicable from the date of losing the status of captive. Further, Banked units, if any, shall stand lapsed and no compensation shall be provided."*

1.7 That Rule 3 of the Electricity Rules 2005 provides as under:-

"3. Requirements of captive generating plant—*(1) No power plant shall qualify as a "Captive generating plant" under section 9 read with Clause (8) of Section 2 of the Act unless-*

(a) in case of a power plant-

(i) not less than twenty six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:XXX

1.8 That in the FY 2019-2020 the petitioner made captive-use of 60.11% of the actual units produced.

1.9 That Article 6 of the Energy Banking Agreement dated 29.04.2019 provides for Force Majeure conditions and its effect thereof is reproduced below:

"ARTICLE -6
FORCE MAJEURE

6.1 In the event of Force Majeure conditions like war, mutiny, riot, earthquake, hurricane, strike, tempest, accident to machinery, curtailment by SLDC for maintaining Grid Security/stability, affecting the wheeling and/or banking of power, the HVPNL/ Discoms shall have no obligation to Bank and Wheel the energy as per this agreement. However, they shall make all reasonable efforts to restore normally within 30 (thirty) days and if the same is not possible, this agreement is to be treated as temporarily suspended for the period in which Force Majeure conditions continue and in such case the DISCOM shall also make efforts to supply power to 'Captive User(s)' from its own source subject to availability and payment of charges as applicable to the power supplied to the relevant category of consumers.

6.2 During the period in which Force Majeure conditions prevail, HVPNL/Discoms shall not be liable to pay any compensation or damage or any claims whatsoever for any direct or indirect loss that may be suffered by the Captive User(s)/company on account of wheeling and/or Banking of Electricity not being performed during the period.

6.3 In case HVPNL/Discoms/HPPC, on account of any force majeure conditions or breakdown of Grid/ transmission/ distribution lines are not in a position to evacuate/ wheel the power, then HVPNL/Discoms/HPPC shall not be liable to pay any compensation or damage or any other claims whatsoever for any direct or indirect loss to the Company. HVPNL/ DISCOMs shall not also be liable to pay any compensation for any damage caused to any part of the Project resulting on account of parallel operation of the grid."

1.10 That in March 2020, the spread of COVID-19 was declared pandemic and the Government of India, in exercise of the power conferred under Section 10 of the Disaster Management Act, 2005 had issued order no. 40-3/2020-D dated 24.3.2020. As a result of the aforesaid order, a complete national lockdown was ordered and all industrial activities (particularly Hospitality Services) were shut down from the said date in order to prevent the spread of

the Pandemic Disease. were to remain suspended. As such, the Hotels being run by the petitioner were covered thereunder.

1.11 That the lockdown imposed vide order dated 24.03.2020 was further extended till 03.05.2020 vide order dated 14.04.2020/15.04.2020 issued by the Ministry of Home Affairs, Government India, which suspended/prohibited hospitality services.

1.12 That the lockdown was further extended for a period of two weeks w.e.f. 04.05.2020 vide order dated 01.05.2020 issued by the Ministry of Home Affairs, Government of India and once again hospitality services continued to remain prohibited.

1.13 That the Hotels in Gurugram were not allowed to operate even during first unlock guidelines which remained in force till 30.06.2020. Thereafter even when the hotels were finally allowed to operate w.e.f July, 2020 provided they were outside the "Containment Zones", several restrictions continued to remain in place virtually throughout the FY 2020-21. The road to recovery was further marred by repeated surge and restrictions being reinforced due to onset of second wave and is still at a cross-road under the looming darkness of uncertainty and successive waves of pandemic.

1.14 That the petitioner's two hotels i.e. 'The Trident Gurgaon' and 'The Oberoi Gurgaon' which rely on a heavy traffic of foreign guests staying with them came to a standstill for a period of three months and continued to suffer such standstill even after lifting of lockdown. Thus, the petitioner continued to run its operations at its lowest and consequently its demand of electricity stands reduced and hence from April 2020 to March 2021 for the FY 2020-2021 the petitioner was able to make captive use of only 32.55% of the units produced. In this regard letter dated 30.03.2021 was issued to the Principal Secretary, Haryana requesting for relaxation of the conditions pertaining to captive consumption.

1.15 That a similar issue had arisen in the states of Andhra Pradesh, Karnataka and Tamil Nadu pertaining to Captive Consumption Solar Power Generating Plants. Upon seeking advisory from the Ministry of New & Renewable Energy, these States were directed to consider permitting Rollover of the banked electricity from FY 2019-20 and FY 2020-2021 to FY 2021-22.

1.16 That the respondent No.2 vide its letter dated 23.08.2021 denied captive status to the petitioner. As a result, in terms of Article 3.8 of the Energy Banking Agreement dated 29.04.2019, the respondents have claimed back all the applicable charges which the petitioner was exempted as having being "reversed" due to failure to establish captive status. Consequently, a demand of Rs.1,80,85,253/- has been raised on the petitioner as amount to be reverse-charged for FY 2020-2021.

1.17 That the petitioner issued letter dated 31.08.2021 re-iterating its difficulty in maintaining its captive status due to COVID-19. However, the respondent No.2 reiterated its demand vide its letter dated 06.09.2021, with the suggestion that if any relaxation is granted by the Competent Authority on the request of the petitioner it would implement the same.

1.18 That the petitioner approached the Additional Chief Secretary Power, Government of Haryana highlighting its grievance regarding loss of its captive status and illegal demand raised Rs.1,80,85,253/- on the petitioner without considering fact that the hospitality industry was ordered to be shut for a period of three months and thereafter was allowed to operate in a restricted manner due to the COVID-19 Pandemic.

1.19 That the respondents have now included the aforesaid amount of Rs. 1.80 Crores (approx.) as sundry charges in the energy Bill for Account No. 6491660000 issued on 03.01.2022. Owing to its inability to pay the aforesaid exorbitant illegal demand, the petitioner is apprehending disconnection/disruption of supply of electricity.

1.20 That the state agencies are themselves claiming exemption from payment of various charges to the suppliers by citing the reason of the pandemic and claiming the same to be a force majeure event. The Haryana Power Purchase Centre has served notices to various suppliers under the Power Purchase Agreements invoking Force Majeure event of the respective clauses about not being able to evacuate the contracted power due to the consequences of the lockdown. Hence, the distribution licensee of the State acknowledged existence of the Force Majeure event to claim benefit and exemption for itself but is not accepting and acknowledging the same for its consumers. A copy of one of the letters written by the Haryana Power Purchase Centre dated 31.3.2020 to M/s. Siwana Solar Power Project Private Ltd. is being attached as Annexure P-26. By virtue of invoking the force majeure clause, the state agencies are claiming the exemption from having to buy power in terms of the PPA and to plead exemption from backed down power and to pay charges for the same.

1.21 That the principle of common business sense would dictate that once the obligation of the petitioner to establish its captive consumptive status by consuming at least 51% of energy/units produced in terms of Article 3.8 could not be performed on account of the COVID-19 pandemic mandated lockdown leading to almost a nil occupancy rate for a period of three months, the performance of such obligation stood frustrated. It is settled that interpretation of a contract should be done in accordance with sound commercial principles and good business sense so much so that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense (Central Warehousing Corporation v. Aqdas Maritime Agency Pvt. Ltd. 2019 SCC Online Bom 1004). In Antaios Cia Navieras SA v. Salen Rederierna AB (1984) 3 All ER 229 it was held as under:

"This passage in the award anticipates the approach to questions of construction of commercial documents that was voiced by this House in the very recent case, Miramar Maritime Corporation V. Holborn Oil Trading Ltd. [1984] A.C. 676, which dealt with a bill of lading issued under a charter party in Exxonvoy 1969 form. There, after referring to various situations which might arise if the construction for which the ship-owners in that

case contended were correct, I added, at p. 682, in a speech concurred in by my fellow Law Lords:

"There must be ascribed to the words a meaning that would make good commercial sense if the Exxonvoy bill of lading were issued in any of these situations, and not some meaning that imposed upon a transferee to whom the bill of lading for goods afloat was negotiated, a financial liability of unknown extent that no business man in his senses would be willing to incur."

While deprecating the extension of the use of the expression "Purposive construction" from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrations' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense it must be made to yield to business commonsense."

1.22 That if the wording of a clause is ambiguous, and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract. Thus, given that Article 6 of the Energy Banking Agreement dated 29.04.2019 provides for Force Majeure events, the principle of common and good business sense would dictate that COVID-19 Pandemic recognized as a Force Majeure event even by the Government of India, would also lead to a frustration of performance of obligation of establishing captive status under Article 3.8 and the petitioner could be reasonably discharged from such obligation. The present case thus calls for a liberal interpretation of Article 3.8 and Article 6 of the Energy Banking Agreement dated 29.04.2019.

1.23 That various State instrumentalities recognized COVID-19 Pandemic as a Force Majeure event and came to the aid of distressed business as can be seen from the stand taken by the Union of India in WRIT PETITION (C) NO. 476 OF 2020 titled as *Small Scale Industrial Manufactures Association (Regd.) Vs Union of India and others* before Hon'ble Supreme court; the Union of India in its reply which find mention in Para 7 of the judgment dated 23.03.2021, submitted that the banks are fully empowered to resolve COVID related stress and customize relief to the borrowers by rescheduling the payments or extending residual tenure or any other manner.

1.24 That it is settled law that if performance of an act becomes impossible or unlawful, after a contract has been executed, and such impossibility is due to an event which the party undertaking the performance could not prevent, then such contract itself becomes void or 'frustrated' under Section 56 of Indian contract act which read as under:-

Section 56. Agreement to do impossible act*.- An agreement to do an act impossible in itself is void.*

Contract to do act afterwards becoming impossible or unlawful.- *A contract to do an act which, after the contract is made, becomes impossible, or, by reasons of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

1.25 That while dealing with the issue expounding the frustration as contemplated under Section 56 of the Contract Act, 1872, the Hon'ble Supreme Court observed in the matter of ***'Energy Watchdog versus CERC reported as (2017) 14 SCC 80'*** that the scope of Section 56 of the Contract Act is exhaustive. The word" impossible" has not been used in the said Section in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it maybe impracticable and useless from the point of view of the object and purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered into agreement, it can be said that a promisor/promisee finds it impossible to do the act which he had promised to do. It was further observed where the contract discharges as per its own term upon occurrence of some circumstance, the dissolution is considered to have taken place under the ambit of the Contract Act, 1872, however, where the frustration has occurred de-hors the contract, then Section 56 of the Contract Act is to be invoked. It was further clarified by the Hon'ble Supreme Court in the aforesaid judgment that frustration is not mere incidence of expense, or delay or onerousness and has to be as if it were a break in identity between the contracts as provided for and as contemplated and its performance in the new circumstance.

1.26 That Article 10.6 of the Energy Banking Agreement dated 29.04.2019 permits this Commission to modify/alter the conditions of the Energy Banking Agreement dated 29.04.2019 at the instance of either parties or suo motto after giving an opportunity of hearing to all the parties.

1.27 The further adverse ripple down effect of losing the captive status for FY 2020-2021 has been that the adjustment from the bills of the petitioner has not been made since April 2021 despite fulfillment of all other conditions of Article 3.8. Resultantly the petitioner is saddled with the burden to pay all the applicable charges for ground mounted power plant, from which it was otherwise exempted on account enjoying captive status. It is submitted that the petitioner is already running at only 50% occupancy rate compared to pre-COVID 19, it would be financially difficult rather impossible to rise up to the task of paying all such charges when the revenue generation of the petitioner has reduced by more than 50%.

1.28 That the petitioner invested nearly Rs 30 crores in its Solar Power Plant located in Sirsa, for which a term loan of Rs. 25.50 crores was availed from Punjab National Bank. In addition to this the petitioner took 25.50 acres of land on lease in Sirsa. A perusal of the Energy Banking Agreement dated 29.04.2019 shows that initially there was no charge on production and 5% of units banked was to be paid to electricity Department for availing Banking Facilities.

1.29 That as per Section 39 of the Disaster Management Act 2005, it is the duty of the State to take not only the preventive Steps rather it is also bound to take mitigating, capacity building and preparedness measures to minimize the effect of such disaster. The relevant provision is extracted below for quick reference:-

"39. Responsibilities of departments of the State Government.- It shall be the responsibility of every department of the Government of a State to- take measures necessary for prevention of disasters, mitigation, preparedness and capacity building in accordance with the guidelines laid down by the National Authority and the State Authority;

a) integrate into its development plans and projects, the measures for prevention of disaster and mitigation;

b) allocate funds for prevention of disaster, mitigation, capacity-building and preparedness;

c) xxxx

d) Review the enactments administered by it, its policies, rules and regulations with a view to incorporate therein the provisions necessary for prevention of disasters, mitigation or preparedness;

e) provide assistance, as required, by the National Executive Committee, the State Executive Committee and District Authorities, for-

f) drawing up mitigation, preparedness and response plans, capacity-building, data collection and identification and training of personnel in relation to disaster management;

g) assessing the damage from any disaster;

h) carrying out rehabilitation and reconstruction;

i) make provision for resources in consultation with the State Authority for the implementation of the District Plan by its authorities at the district level;

k) xxxxx"

1.30 That Section 61 of the Disaster Management Act, 2005, further prohibits discrimination between the victims and the petitioner cannot be denied the exemptions and benefits of the notified force majeure event by some arbitrary classification on the part of the respondent Chief Engineer. The rights which accrue in favour of a party by operation of law and upon occurrence of the force majeure event cannot be restricted by an administrative order and the same cannot be curtailed.

1.31 The following prayers have been made:-

a) Direct respondents to restore the Captive Consumptive status of the petitioner Solar Power Plant from FY 2020-2021 onwards considering the force majeure event of COVID-19 Pandemic (including the complete Lockdown of 3 months and restrictions which

continued to remain in force even thereafter and even till now) resulting into reduction of captive consumption below 51% of the energy generated by the captive power plant of the petitioner, as the same is not on account of any act attributable to the petitioner but was due to the acts beyond the control of the petitioner and for which no liability could be fastened to the petitioner;

b) Direct the respondents to confirm the captive status of the petitioner for FY 2021-2022 and grant credit of Solar Power Units in electricity bills of the two hotels of the petitioner from April 2021 onwards; and

c) Direct the respondents to carry forward/roll-over the access units pertaining of FY 2019-20 and FY 2020-2021 to FY 2021-22 in terms of office memorandum dated 16.04.2020 issued by Ministry of New & Renewable Energy, Government of India (Annexure P-18); and

d) Quash/set-aside the impugned order/demand letter dated 23.08.2021 (Annexure P-19) and all allied letters/ communications in this regard including the letters dated 06.09.21 (Annexure P-21) and 21.01.22 (Annexure P-24) whereby illegal arbitrary and unjustified demand of Rs. 1,80,85,253/- along with 18% interest has been saddled/raised against the petitioner as reverse charge for FY 2020-21; and/or

e) Direct the respondent to allow the prayers made in the detailed representation dated 09.10.2021 made by the petitioner (Annexure P-22); and

f) In the interim direct the respondents to not disconnect the electricity connection of the two hotels run by the petitioner located at (i) Orbit Resorts Limited Plot No. 443, Udyog Vihar, Phase-5 Gurgaon through 11KV independent feeder (A/c No. 2557560000) and (ii)Orbit Resorts Limited Plot No. 443, Udyog Vihar, Phase-5 Gurgaon through 11KV independent feeder (A/c No. 6491660000); and/or

g) Pass any other order(s) and/or direction(s) as may be deemed fit and proper by the Hon'ble Commission in the facts and circumstances of the present case.

Proceedings in the Case

3. The case was first heard on 18.05.2022. The Commission, vide its interim order of even date, directed the respondents to file their reply on the issues raised by the petitioner while claiming relief.

4. In response to the Interim order of the Commission, the respondents filed their reply on an affidavit dated 01.06.2022, as under:-

4.1 That as per Rule 3 of Electricity Rules 2005 ("Rules"), the following conditions needs to be fulfilled by a generating plant for qualifying the captive status:-

(i) Captive user(s) hold not less than twenty-six (26%) percent of the ownership of the plant in aggregate.

(ii) Captive user(s) consume minimum fifty one percent (51%) of the electricity generated, determined on annual basis,

Rule 3(a) (ii) is reproduced below:-

"3. No power plant shall qualify as a 'captive generating plant' under section 9 read with clause 8 of section 2 of the Act unless: -

(i) not less than twenty six percent of the ownership, as defined in clause (c) of explanation to sub rule (2) of rule 3, is held by the captive users and,

(ii) (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:.."

4.2 That the captive status of the petitioner for FY 2020-21 was reviewed by the respondents, whereby it was found that the petitioner consumed less than 51% (i.e. approx. 33%) of total generated units and thus did not qualify the 2nd condition of captive status pertaining to consumption as required in Rule 3(a)(ii). Accordingly, the respondent, vide memo dated 23.08.2021, intimated that the petitioner has failed to qualify the captive status for FY 2020-21 in terms of Rule 3(a)(ii) read with clause 3.8 of the Banking Agreement. Clause 3.8 of the Banking Agreement is reproduced as under:-

"*In case company fails to comply with the requirement to qualify the status of captive generating plant during any contract year/FY, the company shall be liable to pay all applicable charges for the said year, from which it was having exempted on account of its claimed CPP.*"

4.3 That the petitioner, vide memo dated 21.01.2022, was called upon to pay all applicable charges for FY 2020-21 from which it was earlier exempted on account of the claim to be a captive power plant. The petitioner was requested to deposit an amount of Rs. 1,80,85,253/- along with 18% interest i.e. Rs. 13,37,813 up to 21.01.2022 amounting to Rs. 1,94,23,066/-.

4.4 That the Rules are notified by Central Government under section 176 of the Electricity Act, 2003. By way of this petition, the petitioner is trying to seek an order amending Rule 3 of the Electricity Rules, 2005, by stepping onto the legislative domain, under the garb of a judicial order, which is not permitted under law.

4.5 Judgements cited:-

a) Appeal No. 131 of 2020 titled as ***"Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors.":***

"This Appellate Tribunal in its judgment dated 18.02.2013, in Appeal No. 33 of 2012, in the matter of "M/s. Godawari Power & Ispat Ltd. Vs. The Chhattisgarh State Electricity Regulatory Commission & Ors." while dealing with the question of providing relaxation in the norms of captive consumption of at least 51% for being qualified as captive power plant/CGP on account of force majeure conditions namely, on account of collapse of the shed of its steel melting plant leading to shut down for repair and maintenance work for a few months enabling or disabling the CGP to achieve the prescribed requirement of minimum 51% consumption of