

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**Case No. 120 of 2021**

**Case of M/s. Inox Wind Limited seeking a declaration that the Power Purchase Agreement dated 17 July, 2018 entered with Maharashtra State Electricity Distribution Corporation Limited stands frustrated on account of Force Majeure event and impossibility of performance and for consequent relief**

M/s. Inox Wind Limited (IWL) ..... Petitioner

Maharashtra State Electricity Distribution Company Limited (MSEDCL)..... Respondent No. 1

Yes Bank Ltd. .... Respondent No. 2

**Coram**

**Sanjay Kumar, Chairperson**  
**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**Appearance:**

For the Petitioner : Adv. Gopal Jain

For the Respondent No. 1. : Adv. Ravi Prakash

For the Respondent No. 2. : None

**ORDER**

**Date: 8 December, 2022**

1. M/s Inox Wind Limited (IWL) has filed this Petition on 2 September 2021 seeking a declaration that the Power Purchase Agreement dated 17 July, 2018 entered between IWL and MSEDCL stands frustrated on account of Force Majeure and impossibility of performance,

and for consequent relief. The Petitioner also filed the Miscellaneous Application (25 of 2021) on 2 September, 2021 seeking suspension/stay to the MSEDCL's letter dated 1 September, 2021 to Respondent No. 2/ Bank for invocation of the Performance Bank Guarantee (PBG) of Rs. Ten Crores dated 12 October, 2018 under the terms of the PPA.

2. **IWL's main prayers are as follows:**

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1. *Hold and declare that the PPA dated 17.07.2018 stands frustrated on account of Force Majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872;*
2. *Hold and declare that parties are discharged from their respective responsibilities, obligations and liabilities the the PPA dated 17.07.2018;*
3. *Set aside and quash the letter dated 01.09.2021 issued by the Respondent No. 1/ MSEDCL to Respondent No. 2/ Bank for invocation of the Performance Bank Guarantee of Rs. Ten Crores bearing No. 016GM0118 2850001 dated 12.10.2018 under the terms of the PPA;*
4. *Direct the Respondent No. 1/ MSEDCL to return the Performance Bank Guarantee bearing No. 016GM01182850001 dated 12.10.2018 and as amended on 29.07.2020 submitted by the Petitioner in terms of the PPA dated 17.07.2018;*
5. *Restrain the Respondent No. 1/ MSEDCL from taking any adverse or coercive steps/ actions against the Petitioner;*
6. *Grant ex-parte ad-interim relief against the Respondent No. 1/ MSEDCL by restraining it from taking any coercive steps against the Petitioner, including from invoking the Performance Bank Guarantee during the pendency of the present proceedings;*
7. *Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case. "*

3. **IWL's prayers in Miscellaneous Application are as below:**

1. *Suspend/ Stay the letter dated 01.09.2021 issued by the Respondent No. 1/ MSEDCL to Respondent No. 2/ Bank for invocation of the Performance Bank Guarantee of Rs. Ten Crores bearing No. 016GM0118 2850001 dated 12.10.2018 under the terms of the PPA;*
2. *Restrain the Respondent No. 1 from taking any coercive steps against the Petitioner;*
3. *Grant ex-parte ad-interim relief in terms of the prayer a and b above;*
4. *Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*

4. **Petitioner's submission is summarized as follows:**

- 4.1. Post submission of bid on 20 February 2018 in competitive bidding process under Section 63 of the Electricity Act, 2003, Petitioner signed PPA dated 17 July 2018 with MSEDCL for 50

MW wind project at tariff of Rs. 2.86 per unit.

- 4.2. The Petitioner was intending to develop the project on around 25 Hectares of land at Village Kotda Laxmipar, Bhadra nana, Muru, Nagviri & others, Tehsil- Lakhpat & Nakhatrana, in Kutch District of Gujarat, which was in legal possession of M/s. Inox Wind Infrastructure Services Ltd. (IWISL), a wholly-owned subsidiary of the Petitioner, on a lease basis from the Government of Gujarat. Same is in terms of Clause 3.7.4 of revised RfS which allowed sharing of connectivity arrangement.
- 4.3. As per the PPA, to achieve the financial closure within seven months from date of PPA, the Petitioner was required to furnish (i) a connectivity agreement with CTU/STU/DISCOM; and (ii) ownership/lease hold/right to use in the name of the Petitioner. In the event, the Petitioner fails to do so, MSEDCL was entitled to forfeit the PBG. Such forfeiture can be exempted only on account of Force Majeure event as per clause 4.2.2 of the PPA.
- 4.4. Despite all attempts from the Petitioner to meet the criteria required for achieving Financial Closure within seven (7) months from the date of signing of the PPA and subsequently commissioning the Project within eighteen (18) months i.e. Scheduled Commercial Operation Date (SCOD) of 17.01.2020, the Petitioner was unable to meet the same due to following Force Majeure events.
- 4.5. **Delay in acquiring land for setting up the Project in the State of Gujarat due to change in Policy for land allotment and Delay on part of MSEDCL in providing clarity and approval regarding shifting the project to the State of Maharashtra and extension of timelines for achieving financial closure, SCOD.**
- 4.5.1. The Petitioner had sub-leased the land for setting up the Project from its subsidiary IWISL, however, due to other projects having come up in the surrounding land, the location was deemed to be unsuitable for setting up the Project and exercising the Developer Permission.
- 4.5.2. There was a change in the policy of the State of Gujarat on 25 February, 2019, wherein it was provided that the Revenue Department should give land lease to the park developer, who is entitled to the recommendation of High-Power Committee (H.P.C.). Due to this restriction allotment of land even by way of further sub-lease in favour of the Petitioner was getting substantially delayed.
- 4.5.3. Due to change in land policy, there was ambiguity and the same restricted the Petitioner from procuring subsequent approvals/clearance like Developer Permission approval, Mining & Forest NOC etc.
- 4.5.4. Further, Revenue Department, State of Gujarat vide Resolution dated 8 March, 2019 directed that the government land shall be allotted on lease basis to the bid winners of GUVNL or

Solar Energy Corporation of India (SECI) or bid winners of government agency or wind turbine manufacturers only.

- 4.5.5. The Petitioner vide letter dated 6 February 2019, informed MSEDCL that the project was facing delay owing to various reasons including rescheduling in the charging of PGCIL 765kV line and grid station which is likely to take more time and thereby causing delay in the related Project activities and delay on part of the State of Gujarat as no allotment of land has been done since July 2018. Owing to the said constraints, the Petitioner is planning to relocate the Project to the State of Maharashtra and therefore, requested MSEDCL for extension of three (3) months to achieve the financial closure in view of fresh approvals and clearances to be applied for in Maharashtra and grant permission to set up the project in Maharashtra.
- 4.5.6. MSEDCL vide letter dated 13 February, 2019 extended the deadline of attaining Financial Closure only by thirty (30) days owing to the delay in issuance of the signed PPA, i.e. till 16 March, 2019, subject to the condition that the said extension shall not have any impact on the SCOD as per the PPA, completely ignoring any response to the queries raised by the Petitioner regarding supervening circumstances beyond its control.
- 4.5.7. Petitioner vide letter dated 11 March, 2019, requested MSEDCL for an extension of atleast three (3) months for achieving financial closure along with similar extension in SCOD on account of the various constraints due to relocation of the Project to State of Maharashtra. However, owing to the no response/confirmation forthcoming from MSEDCL, Petitioner had to re-locate back to the State of Gujarat.
- 4.5.8. Revenue Department, Government of Gujarat vide letter dated 27 November, 2019 provided that the instructions have been given vide Resolution of Revenue Department dated 8 March, 2019 to allot the government land on lease basis to the bid winners of GUVNL or Solar Energy Corporation of India (“SECI”) or bid winners of government agency or wind turbine manufacturers. Government land has to be allotted only to SECI-1,2,3,4 wind projects, on the lease basis, for the pre identified locations. And for the SECI-5 and other projects, only government land has to be allotted and only in proposed renewable energy park.
- 4.5.9. The availability of the interconnection facility at Bhuj PGCIL GSS is not useful owing to the change in the land allotment policy by the State of Gujarat.
- 4.5.10. Petitioner is impacted on account of the change in land allotment policy by the State of Gujarat and thereby unable to set up the Project within prescribed time period even after having appropriate infrastructure to deliver energy at the Delivery Point, i.e. Maharashtra STU/MSETCL periphery.

4.5.11. It has become impossible for the Petitioner to setup the Project under the timelines provided in the PPA and perform its obligations under the PPA and the PPA stands frustrated in terms of Section 56 of the Indian Contract Act, 1872.

4.5.12. The Petitioner's wholly owned subsidiary i.e., IWISL vide multiple letters dated 30 April, 2018, 25 May, 2018, 23 August, 2018, and 14 December, 2018 submitted the applications for Developer Permission before GEDA for 56 MW, 136 MW, 44 MW, and 46 MW wind farm projects, respectively. The Petitioner further followed up on multiple occasions, lastly so on 8 February, 2021, wherein the Petitioner vide letter sought clarification from GEDA regarding issuance of the Developer Permission to the projects other than the SECI projects and further sought confirmation on present status of DP application with respect to the mentioned WTG locations.

4.5.13. GEDA has failed in acknowledging and/or providing the Developer Permission to the Petitioner to date, making it infeasible for the Petitioner to carry out activities with respect to development of the Project.

4.5.14. Section 56 of Contract Act relates to performance of contracts and it deals with circumstances where performance of a contract is excused or dispensed with on the ground of the contract being void due to impossibility of performance. Hon'ble Supreme Court in series of judgments have recognised the concept of frustration and impossibility of performance under Section 56 of the Indian Contract Act. Some of these judgments relied upon are as follows:

- a. *Satyabrata Ghose v. Mugneeram Bangur & Co. and Anr* : AIR 1954 SC 44,
- b. *Mugneeram Bangur and Co. v. Gurbachan Singh*, (1965) 2 SCR 630,
- c. *Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. and Wvg. Mills Ltd.*, (2002) 5 SCC 54
- d. *Naihati Jute Mills Ltd Versus Khyaliram Jagannath*, AIR 1968 SC 522,

4.5.15. In terms of the aforesaid cases, the following legal principles emerge for consideration:

- a. Doctrine of frustration is an aspect of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility.
- b. The word "impossible" has to be taken in its practical and not literal sense. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose of the parties.

- c. The test to be applied is whether the changed circumstances altogether destroyed the fundamental basis of the agreement and its underlying object. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated. Insisting upon performance in such a situation will be impracticable and unjust.
- d. In a contract where time is of essence wherein construction has to be completed within a particular period, any delay therein can amount to a change in the fundamental basis of the contract.
- e. In case an act becomes impossible at a future date, and that exigency is not provided in the agreement. Further, which exigency was beyond the reasonable control of the party or could not have been prevented by the affected party, the contract becomes void as provided in section 56.

4.5.16. In view of the aforesaid principles, the impossibility in the present case operates at the following levels, viz:

- a. There is physical impossibility to perform obligations under the PPA as the Petitioner cannot construct the Project without availability of land.
- b. The Government of Gujarat is only allocating land to projects of SECI and GUVNL bids.
- c. Fundamental premise of the PPA is that project is to be completed within 18 months. This has been rendered impossible due to unavailability of land which is still continuing.

4.5.17. Evidently, there has been a cumulative delay of about 32 months due to delay in land and getting Developer Permission from GEDA which continues till date. Further, there is no clarity as to when and whether the requisite land would be allotted to the Petitioner. In such a scenario not only will the Petitioner be unable to meet the completion deadline of 18 months, but even the cumulative period of 27 months as provided under Article 3.3.ii.b will not be sufficient to complete the Project.

4.5.18. Hon'ble Supreme Court in *Smt. Sushila Devi and Anr v. Hari Singh and Ors.* : (1971) 2 SCC 288 has held that when the fundamental basis of a contract is eroded, the same need not be performed.

4.5.19. Evidently, in the instant case, the underlying fundamental basis of the PPA has been eroded since there has been an unreasonable delay in construction and commissioning of the Project on account of non allocation of revenue land despite sincere efforts of the Petitioner. The same has rendered the entire commissioning schedule uncertain.

4.5.20. In light of the foregoing, the PPA stands frustrated in terms of Section 56 of the Contract Act. Accordingly, the Petitioner is relieved of its obligations under the PPA.

**4.6. Delay on part of MSEDCL in providing extension of timelines for achieving financial closure, SCOD.**

4.6.1. Despite the Petitioner having submitted all the necessary documents on 15 March, 2019 i.e., within the extension provided by MSEDCL, MSEDCL declared the Petitioner to have achieved Financial Closure only on 1 November 2019.

4.6.2. MSEDCL chose to request for further documents to satisfy itself of the Petitioner's compliance with the Financial Closure, which exercise continued till November, 2019. Therefore, the delay from March 2019 – November 2019 for confirmation of achievement of Financial Closure cannot be attributed to the Petitioner.

4.6.3. Hence, the Petitioner's request for extension of time for Financial Closure and consequently SCOD ought to have been granted by MSEDCL.

**4.7. Assignment of PPA to include WAFT Energy Private Limited:**

4.7.1. As per Clause 3.5.3 of the Revised RfS, a successful bidder is allowed to execute the Project through a special purpose vehicle (SPV) which would be a fully owned subsidiary of the successful bidder. Accordingly, Waft Energy Private Limited (WAFT) was incorporated to execute the Project for and on behalf of the Petitioner. Since the PPA had already been executed between the Petitioner and MSEDCL, necessary amendments would be required to include Waft in place of the Petitioner.

4.7.2. The Petitioner vide letter dated 21 January 2019 informed MSEDCL of its intention to execute the Project through Waft and requested for amendment of the PPA to include Waft for the purpose of the Project. Petitioner vide letter dated 1 August 2019, 14 October 2019 and 20 March 2020 provided additional documents to MSEDCL and requested for assignment of PPA in favour of Waft. However, MSEDCL has till date not responded to the same.

4.7.3. The clearances and approvals were to be taken in the name of Waft and owing to the failure to amend the PPA to include the said SPV by MSEDCL caused unnecessary delay in achieving the financial closure on time and consequently hampered the execution of the Project. Thus, resulting in further delay to commission the Project by the Petitioner.

4.7.4. Despite the aforesaid, the Petitioner was still inclined to continue with the Project, as is evident vide its letter dated 12 February, 2020 wherein the Petitioner requested MSEDCL to extend achievement of SCOD by eleven (11) months due to Force Majeure Events.

4.7.5. However, MSEDCL vide letter dated 2 March, 2020 responded that SCOD for the Project was to be achieved by 17.01.2020, failing which MSEDCL would initiate action for encashment of the PBG as per the PPA clauses.

#### 4.8. **Delays on account of declaration of National Lockdown due to COVID-19**

4.8.1. On 30 January, 2020, the World Health Organization (“WHO”) declared that the outbreak of novel coronavirus (“Covid-19”) constituted a Public Health Emergency of International Concern as per the International Health Regulations Emergency Committee. Cases on account of Covid-19 were being reported in India since January 2020.

4.8.2. On 11 March, 2020, WHO declared Covid-19 outbreak as a pandemic and the Government of India while invoking powers under the Epidemic Diseases Act, 1897, declared Covid-19 as a notified disaster under the Disaster Management Act, 2005.

4.8.3. By 22 March, 2020, most of the States had issued orders allowing only essential services to operate until 31 March, 2020 and a Janata Curfew had been called for on 22 March, 2020. Further, w.e.f 25 March, 2020, the Government of India in exercise of powers under Section 6(2)(i) of the Disaster Management Act, 2005, issued an order for all the States prescribing a lockdown for containment of Covid-19 for a period of 21 days.

4.8.4. The Petitioner issued a letter dated 30 March, 2020 and brought to the notice of MSEDCL the various issues, trouble in importing essential parts of WTG from China and Europe, financial liquidity crunch owing to lockdown, shortage of material and manpower at the site and so on, being faced by it due to the national lockdown imposed in view of COVID – 19.

4.8.5. The Petitioner vide email dated 10 April, 2020 again requested MSEDCL for extension of SCOD on account of Force Majeure event and mentioned that as per the directions of Government of India, all activities related to the Project are suspended.

4.8.6. MSEDCL vide letter dated 21 April, 2020 replied to the Petitioner’s email dated 10 April, 2020 and mentioned that as per the Ministry of Home Affairs (“MHA”) and GoM directions dated 15 April, 2020 and 17 April, 2020, respectively, construction of renewable energy projects can operate.

4.8.7. On account of outbreak of Covid-19, the Department of Expenditure Procurement Policy, Ministry of Finance on 19 February, 2020 had clarified that disruption of the supply chains due to spread of Covid-19 in China or any other country should be considered a case of natural calamity and Force Majeure clause may be invoked wherever considered appropriate following the due procedure.

4.8.8. In terms of the MHA Guidelines dated 24 March, 2020, a nation-wide lockdown was imposed in the country and all Government, commercial and private establishments were



directed to be closed till 14 April, 2020 except for those providing essential services. MHA vide subsequent Orders have extended the lockdown till 31 May, 2020.

- 4.8.9. Petitioner vide letter dated 22 April, 2020 responded to MSEDCL's letter dated 21 April, 2020 and requested MSEDCL to grant the Petitioner a blanket extension equivalent to the period of lockdown and additional 30 (thirty) days along with the extension requested vide the Petitioner's letter dated 12 February, 2020.
- 4.8.10. MSEDCL vide letter dated 15 June, 2020 refused to consider the request of the Petitioner and mentioned that as per clause no. 3.3 of PPA, it is obligatory for the Petitioner to pay liquidity damages on account of delay in commissioning of the project beyond SCOD. However, MSEDCL mentioned that the Petitioner's request to allow delay in SCOD may be considered if the Petitioner commits to pay compensation for any penalties imposed by MERC for shortfall in fulfillment of RPO target to MSEDCL because of delay in commissioning of the Project.
- 4.8.11. The Petitioner vide letter dated 22 June, 2020 requested MSEDCL not to impose any such compensation against shortfall of RPO fulfilment on account of delay which was completely beyond the control of the Petitioner. Regardless of delay in commencement of power supply, RPO benefit would still be available to MSEDCL for entire 25 years from SCOD under the PPA.
- 4.8.12. In absence of any alternative, the Petitioner vide email dated 14 July, 2020 accepted the said condition of MSEDCL, however, requested MSEDCL to provide extension of eleven (11) months from the date of achievement of financial closure.
- 4.8.13. MSEDCL vide email dated 26 July, 2020 informed that the Petitioner may submit extended validity to their already submitted PBG and in case of failure to submit the extension, MSEDCL will act according to the terms and conditions of the PPA. The Petitioner vide email dated 29 July, 2020 provided the extended PBG.
- 4.9. It is clear from Clause 8.1 of the PPA that Force Majeure has been defined very widely in the PPA and it includes failure to meet milestones due to any event or circumstance which is beyond the reasonable control of the party experiencing such delay or failure. Therefore, the Petitioner is entitled to relief in terms of 'Force Majeure' Clause of the PPA, particularly in view of the abovementioned events affecting the performance of the obligations under the PPA.
- 4.10. The delay in achieving financial closure and commissioning of the Project as per the SCOD i.e., 17 January, 2020 is completely beyond the control of the Petitioner. Impossibility of performance has arisen on account of continued Force Majeure Event beyond the reasonable control of the Petitioner, and for reasons not attributable to the Petitioner. Therefore, it is submitted that the parties are liable to be discharged from their respective responsibilities,

obligations and liabilities under the PPA dated 17 July 2018; and that MSEDCL is obligated to return the Performance Bank Guarantee submitted by the Petitioner.

5. **The Petitioner in its Miscellaneous Application No. 25 of 2021 submitted as below:**

- 5.1. The Petitioner has filed this Application in order to injunct/ restrain MSEDCL from arbitrarily invoking or encashing the Performance Bank Guarantee.
- 5.2. Despite all efforts of the Petitioner to perform its obligations under the PPA including the timely extension of the Performance Bank Guarantee, MSEDCL issued a Notice dated 23 August, 2021 for encashment of the Performance Bank Guarantee in terms of clause 3.3 of the PPA for alleged failure of the Petitioner to commission the Project within SCOD, i.e., by 17 January, 2020.
- 5.3. The Petitioner made all prudent efforts to ensure completion of the Project at the earliest occasion despite being hit by Force Majeure events like COVID-19. Petitioner also twice extended the PBG beyond SCOD on 29 July, 2020 and 7 June, 2021, respectively.
- 5.4. Date of the SCOD has no significance as time is no longer of essence in the present matter. The Petitioner regularly informed MSEDCL about the supervening events that led to the delay in commissioning of the Project and these events were beyond the reasonable control of the Petitioner and for reasons not attributable to the Petitioner.

6. **MSEDCL's Reply to the Petition dated 21 October 2021**

- 6.1. The Petitioner has failed to achieve financial closure in terms of the PPA within a period of 7 (seven) months, and in fact, has even failed to commission their Project within the stipulated timeframe of 18 months from the date of signing the PPA.
- 6.2. **The Petitioner cannot seek reliance on the PPA's force majeure clause to resile from its obligations thereunder; and has made out no ground to suggest that the performance of the PPA has become an impossibility:**
  - 6.3.1. Petitioner was required to attain financial closure by 16 February 2019. The first time that the Petitioner sought an extension (by three months) was by its letter dated 6 February, 2019, under which the Petitioner cited various reasons such as the rescheduling in the charging of PGCIL 756kV line and grid station etc. This ostensibly had nothing to do with a change in Government policy to attain financial closure under the PPA. Even so, MSEDCL granted this extension by its letter dated 13 February, 2019. i.e. till 16 March, 2019 with the condition that the scheduled commissioning date of the Project under the PPA should not be delayed.

- 6.3.2. Thereafter, a mere 5 (five) days before the date on which the aforesaid extension was to end, the Petitioner, by its letter dated 11 March 2019 requested for a further extension on account of continued issues being faced qua connectivity approvals, and fresh issues being faced due to land procurement. Admittedly, the Petitioner was aware of the change of land policy on 25 February 2019, despite which the Petitioner sought to inform MSEDCL only on 11 March 2019.
- 6.3.3. Neither of the factors i.e. (i) the change in Gujarat's land policy and/or (ii) grid connectivity issues, were factors that could be cited as a force majeure event requiring MSEDCL to grant any extension, as requested.
- 6.3.4. No previous correspondence was made with MSEDCL informing the occurrence of Force Majeure event on account of Change in land policy. The PPA has a clear provision of informing the Force Majeure event within 7 days. Thus, raising the issue of the occurrence of Force Majeure due to said factors is an afterthought and needs no consideration.
- 6.3.5. The Petitioner has not made out any case that the land was not available in Maharashtra, Gujarat or any other part of India for setting up the power plant. In fact, many power plants are set up in Maharashtra and Gujarat during the said period. Petitioner has not disclosed in the Petition as to what steps they have taken to perform its obligation under the PPA. Therefore, in view of the Article related to Force majeure of the PPA, it is clear that unavailability of land alleged by the Petitioner does not fall within the ambit of Force Majeure and on this ground alone the said contention deserves to be rejected.
- 6.3.6. The Petitioner was required to attain financial closure by 16 February 2019 (which came to be extended to 16 March 2019). The revised land policy in the State of Gujarat was only notified on 25 February 2019, and accordingly, could never have been cited by the Petitioner as a cogent reason to extend the date on which financial closure was to be achieved under the PPA.
- 6.3.7. It is trite law that Courts cannot generally absolve parties from their obligations set out in a contract merely due to a change in circumstances. MSEDCL has relied on the Hon'ble Supreme Court of India in *Alopi Parshad and Sons v. Union of India* [Civil Appeal No. 693 of 1957] wherein it analysed Section 56 of the Contract Act itself. Succinctly, the Hon'ble Supreme Court observed that a contract does not stand frustrated merely because certain clauses of the contract have now become onerous. The law laid down in *Alopi Parshad* (Supra) have even been followed up by the Hon'ble Supreme Court in *Naihati Jute Mills Ltd. v. Hyaliram Jagannath* [1968 (i) SCR 821] and *Satyabrata Ghose v. Mugneeram Bangur & Co.*
- 6.3.8. The Hon'ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission* [Judgment dated 11 April 2017 in Civil Appeal Nos. 5399-5400 of 2016] went

a step further and stated that even a force majeure event is not ground enough to frustrate a contract.

6.3.9. The facts and circumstances of the aforesaid case are similar to those that have arisen in the present Petition. Similar to judgment passed in Energy Watchdog (Supra), nowhere does the Petitioner's PPA requires the Petitioner to procure land only in Gujarat and/or to carry out the transaction contemplated thereunder in any particular manner. The Petitioner cannot contend that merely because some of their internal assumptions, basis which their bid was submitted with the MSEDCL, had not materialized, the resultant contract, being the PPA, stands frustrated.

6.3.10. The law laid down by the Hon'ble Supreme Court of India makes it ostensible that:

- a. Courts don't generally have the power to absolve parties from their obligations contained in a contract.
- b. A change in circumstance qua performance of a contract must be untoward that upsets the very foundation of the contract for the same to tantamount to frustration. In the present case, mere non-availability of land due to a change in the State of Gujarat's land policy does not disturb the basic subject matter of the PPA in any manner, whatsoever. It is open to the Petitioner to carry out the PPA through different means, and merely because the performance of this PPA has become more onerous, does not give enough ground to the Petitioner to claim frustration of contract.
- c. Section 56 of the Contract Act does not enable a party to a contract to ignore the express covenants thereof and to claim payment of consideration, for performance of the contract at rates different from the stipulated rates, on a vague plea of equity. Parties to an executable contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, for example, a wholly abnormal rise or fall in prices which is an unexpected obstacle to execution. This does not in itself get rid of the bargain they have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. Since the Petitioner has failed in making out any case that the PPA fundamentally stands altered, no relief under Section 56 of the Contract Act ought to be granted to the Petitioner.
- d. The doctrine of frustration of contract must be applied within narrow limits. Where performance is otherwise possible, it is clear that a mere rise in price would not allow one of the parties to say that the contract was discharged by impossibility of performance.

6.3.11. Thus, the Petitioner has neither made out a case of the occurrence of a force majeure event, nor has it satisfactorily made out a case that the PPA stands frustrated in terms of Section 56 of the Contract Act. Pertinently, it is not the case of the Petitioner that during the period between 2018-2019 no wind generation plant has been established in Gujrat (on a Government land) or Maharashtra. Further, the Petitioner failed to show any steps taken by him to even try an alternative land in Maharashtra except bald assertions in the Petition.

6.3.12. In terms of the aforesaid, the reliefs as prayed for in the Petition are entirely misconceived and untenable, and ought not to be granted by this Commission.

**6.4. No delay could be attributable to the MSEDCL qua the Petitioner achieving financial closure under the PPA; and the Petitioner was not entitled to any extension of the scheduled commissioning date of the Project:**

6.4.1. The seriatim of facts against the allegation regarding delay by MSEDCL for verifying documents is as under:

- a. As per the RFS, the bidder had to achieve FC within 7 months from the date of signing of PPA i.e. in the present case it was 16 February, 2019, by submitting the following relevant documents
  - i. Financial Tie-up.
  - ii. Grid Connectivity.
  - iii. Clear possession of required land for the project.
- b. The Petitioner has not submitted the complete set of documents required for attainment of financial closure within the timeframe mentioned in the RfS. The documents more particularly related to land work were incomplete.
- c. MSEDCL vide its letter dated 21 May, 2019, issued notice to the Petitioner informing them regarding the incomplete documents and also stating that if the said letter/notice is not replied within 7 days, the PBG will be encashed.
- d. Thereafter, some documents were submitted by the Petitioner, during the verification of which it was observed that as per Collector order dated 6 June, 2018 the lease agreement in respect of project land is not as per RfS.
- e. Since, the Petitioners had failed to submit all the required documents for attaining financial closure. The Respondent issued another notice on 10 October, 2019 to the Petitioner, requesting balance required documents in compliance of the RFS provisions and also to achieve financial closure within Seven (7) days from the date of receipt of notice failing which MSEDCL would go for encashment of PBGs.

- f. Petitioner vide its letter dated 15 October, 2019 submitted few required documents w.r.t land possessions i.e. District collector's Order for land allotment, etc. alongwith the Financials of the company. Further, on same day, the Petitioner was asked to submit some additional documents related to land possession i.e. Mutation entries and 7/12 extract in English languages (rather than Gujrati) alongwith few other financial statements. Further, following observations were made in regards to land documents, which were also communicated to the Petitioner:
- i. Allotment of land in name of subsidiary company.
  - ii. Lease Agreement of land is less than the term of PPA.
- g. Perusal of the Order, issued by the Collector (Kutch, revenue branch, Bhuj), for allotment of lands for the project to the M/s. Inox Wind Infrastructure services Limited (IWISL) (subsidiary of the Petitioner) suggested that the said Order mandates a developer company of wind farm (i.e. IWISL in the present case) would get the land on lease basis and after the development it can be sub-leased to the Petitioner and after the sublease there should be endorsement upon the same by the Dist. Collector within 30 days.
- h. Petitioner in clarification of the same had submitted that, it would register the sub-lease after erection of WTG on lands, as the land allotment policy allowed to make register sub-lease only after land development and as registered sub-lease can only be done once. Accordingly, Petitioner would be doing the same just before commissioning of Wind Farm.

It was also pointed out to the Petitioner that the said lease agreement will fail to comply with the clause 3.13 (b) of RFS, as the lease period as per allotment Order will be of 20 years, whereas the PPA is for a period of 25 years.

- i. Petitioner, in response to the above query had submitted that as per the policy, government allots the land on lease for 20 years. However, the developer has to apply for extension of the same, 6 months before the expiry of the lease period. In view of the same, an undertaking was submitted by the Petitioner on 1 November 2019, for the purpose of accepting the financial closure stating that the registered sub-lease for the project lands will be submitted before the Scheduled Commercial Operation Date.
  - j. Considering the said undertaking, Financial Closure was granted to the petitioner on 20 December, 2019 w.e.f. 1 November, 2019.
- 6.4.2. Perusal of the above sequence of events clarifies that it was solely due to the delay in submitting the required documents by the Petitioner that the grant of financial closure was delayed i.e. granted on 20 December, 2019 w.e.f 1 November, 2019.

6.4.3. Further, the time taken by MSEDCL in ascertaining whether the Petitioner has attained financial closure cannot be a factor on which basis the Petitioner can claim frustration of the terms of the PPA.

6.4.4. The Petitioner was required to ensure that the documents submitted to MSEDCL were in accordance with the RFS and PPA. MSEDCL was entitled to verify the documents submitted by the Petitioner. Pertinently, it is not the Petitioner's contention that MSEDCL dishonestly took more time to verify these documents in order to delay the date on which the Petitioner achieves financial closure under the PPA.

6.4.5. In terms thereof, no delay can be made attributable to the MSEDCL, and the Petitioner cannot be permitted to take recourse to the Force Majeure clause under the PPA.

**6.5. The onset of the Covid-19 pandemic cannot be cited as a Force Majeure event:**

6.5.1. Covid-19 pandemic only impacted India in March 2020, by which time, the Petitioner was required to achieve both, financial closure as also the SCOD, in terms of the PPA. The Petitioner failed to do both. Keeping in mind that the timeline to complete the Project itself pre-dated the imposition of the nationwide lockdown, which was only declared on 25 March 2020, no recourse to the circumstances that arose during the Covid-19 pandemic could be taken by the Petitioner to claim frustration of the PPA.

6.5.2. By citing the onset of Covid-19 pandemic as a ground to avoid performance of the PPA, the Petitioner is merely making excuses to resile from their obligations, which ought not to be permitted. Should any relief be / granted by this Commission to the Petitioner as prayed for, the same would tantamount to rewriting the PPA as executed between the parties, which is impermissible.

6.6. Present Petition is fundamentally misconceived, and accordingly, untenable, therefore, the Commission ought to dismiss this Petition.

**7. MSEDCL's reply to the Miscellaneous Application dated 21 October, 2021 is as below:**

7.1. It is trite law that the invocation of a bank guarantee can only be thwarted on two grounds viz, (i) allegations of fraud, and (ii) where irretrievable injury or harm could be caused.

7.2. In the present Misc. Application, the Petitioner has made out no case for the grant of either of the aforesaid exemptions, basis which this Commission ought to stay the invocation.

7.3. The bank guarantee provided by the Petitioner is unconditional, specific in nature and limited in amount. The terms of the performance bank guarantee are categorical to the extent that this Respondent has the express right to enforce the same should the Petitioner fail to meet the

scheduled date of commissioning the Project.

**8. At the hearing held on 22 October 2021**

- 8.1. Advocate of the Petitioner requested additional time to file rejoinder on MSEDCL's reply to the Petition. She further stated that Petitioner was willing to commission the project and had also submitted a proposal to MSEDCL for amicable settlement. MSEDCL was yet to formally respond to such proposal and hence she requested the Commission to give one more chance to explore possibility of an amicable settlement between the parties.
- 8.2. Advocate of MSEDCL submitted that MSEDCL Officers had already discussed such proposal of Petitioner and apprised their competent authority about the same.
- 8.3. The Commission allowed 15 days' time to the Petitioner for submission of rejoinder and advised both the parties to explore the possibility of resolving contentious issues amicably.

**9. Petitioner's Rejoinder dated 13 April, 2022:**

- 9.1. With respect to the submission of MSEDCL that the Petitioner did not inform them about the change in policy in the state of Gujarat before 11 March, 2019, it is reiterated that the Petitioner vide its letter dated 6 February, 2019 had already highlighted the issue in respect of the allotment of land in the state of Gujarat owing to the change in the policy.
- 9.2. With regard to the MSEDCL's contention that Petitioner has not disclosed in the petition as to what steps they have taken to perform its obligation under the PPA, the Petitioner vide various correspondences, such as letter dated 6 February, 2019 and 11 March, 2019, informed MSEDCL about the steps taken by the Petitioner in order to successfully set up the wind power project.
- 9.3. Under Clause 5.2 of the Revised RfS dated 14.02.2018, issued by MSEDCL, State Nodal Agency, will provide necessary support to facilitate the required approvals and sanctions in a time bound manner so as to achieve commissioning of the Projects within the scheduled timeline. GEDA has failed in acknowledging and/or providing the Developer Permission to the Petitioner to date, causing it infeasible for the Petitioner to carry out activities with respect to development of the Project. Thus, making it impossible for the Petitioner to set up the Project.
- 9.4. Petitioner had acted prudently to ensure achievement of Financial Closure as per the terms of the Revised RfS and PPA. Further, the delay from March 2019 – November 2019 for confirmation of achievement of Financial Closure cannot be attributed to the Petitioner herein as it was MSEDCL who had substantially delayed the proceedings by requesting/perusing additional documents from the Petitioner and there has been a substantial delay from MSEDCL in providing its approval on Financial Closure. Even this delay caused by MSEDCL, also being



non-contractual in nature, ought not be condoned by this Commission. In fact being a public utility, it naturally flows that MSEDCL should showcase the highest prudence in its actions.

- 9.5. Definition of the Force Majeure event provided under Article 8.1 (a) of the PPA is an ‘inclusive’ definition and provides for fulfilment of only two conditions i.e., the Force Majeure event should have affected the performance of obligations under the PPA; and the same should not be under the reasonable control of the Affected Party. Thus, the conduct of MSEDCL substantially delaying the achievement of Financial Closure by the Petitioner, even after sincere and prudent efforts of the Petitioner, is covered under the definition of Force Majeure event under the PPA signed between the parties.
- 9.6. The SCOD timeline got delayed owing to the various constraints and Force Majeure events faced by the Petitioner. The national lockdown on account of COVID-19 had put further constraints on the Petitioner to execute the Project. MSEDCL failed to appreciate any guideline issued by the Government in regard to the lockdown imposed due to COVID-19 and also ignored the challenges faced by the Petitioner on account of the lockdown.
10. The Petitioner vide letter dated 27 July, 2022 submitted to the Commission that the parties made several attempts to resolve the disputes amicably. However, the settlement talks have failed, and the parties are willing to proceed with the matter for arguments.
11. **The Petitioner’s Application dated 9 August, 2022 (IA No. 16 of 2022) is summarized as under:**
  - 11.1. The Petitioner has filed this application to bring the subsequent developments on the record and for additional prayers.
  - 11.2. On 29 July 2022, MSEDCL has invoked PBG of Rs. 10 Crore.
  - 11.3. In the absence of Developer permission to be issued by GEDA, the Petitioner is in no position to set up the Project in Gujarat, which is a fundamental condition of the underlying transaction. The Applicant/Petitioner has been constantly following up with GEDA with respect to Developer Permission, and on multiple occasions the Petitioner sought clarification from GEDA regarding issuance of the Developer Permission to the projects other than the SECI projects and further sought confirmation on present status of DP application with respect to the mentioned WTG locations.
  - 11.4. In this regard, GEDA has recently vide its letter dated 28.07.2022 informed the Petitioner that the proposals for wind power projects to be set up under connectivity with Central Transmission Utility were referred to the Energy and Petrochemical Department (E&PD), Government of Gujarat and that GEDA will take up this matter only in accordance with the guidelines received by E&PD, GoG.

11.5. The additional prayers added by the Petitioner is as under:

*"(g) Hold and declare that invocation/encashment of Performance Bank Guarantee bearing No. 016G011825850001 dated 12.10.2018 by the Respondent No. 1 /MSEDCL is illegal, mala fide and bad in law;*

*(h) Direct the Respondent No. 1 /MSEDCL to refund the amount of Rs. 10 Crores encashed by invoking the Performance Bank Guarantee on 27. 07.2022 to the Petitioner along with interest from the date of encashment until payment and/or realization. "*

**12. At the e-hearing through video conferencing held on 12 August 2022.**

12.1. Advocates of the Petitioner reiterated the submission made in Petition and stated that the Petitioner intended to set up the project in the State of Gujrat and accordingly locations were mentioned in the bid and the PPA dated 17 July, 2018 was signed. The Government of Gujrat vide Letter dated 8 March, 2019 instructed the Collectors to allot the government lands for Bid Winners of GUVNL, SECI or Government Agency or wind turbine Manufacturer. Therefore, the Petitioner is unable to acquire land in the State of Gujarat leading to a situation where it is impossible for the Petitioner to execute the Project. Also, the GEDA did not respond to the Petitioner and its subsidiary on the request for developer permissions. Thus, the fundamental basis of the PPA has been eroded since there has been an unreasonable delay in construction and commissioning of the Project on account of non allocation of land despite sincere efforts of the Petitioner and the same has rendered the entire commissioning schedule uncertain. Therefore, she requested the Commission to declare that the PPA stands frustrated in terms of Section 56 of the Contract Act and the Petitioner is relieved from its obligations under the PPA.

12.2. Advocates of the MSEDCL stated that the Petitioner had served the Notice under Force Majeure clause only on the event of disruption due to spread of COVID-2019 pandemic. In fact, the Petitioner's SCOD was before the onset of pandemic, therefore, the Petitioner cannot ask for any relief on account of the force majeure event of COVID-2019. With regard to the Petitioner's claim for frustration of PPA under Section 56 of the Indian Contract Act, Advocate of MSEDCL referred the energy watchdog judgement and submitted that the section 56 of the Indian Contract Act, 1872 had no applicability to the present case as the PPA provides the mechanism of Force Majeure. He further argued that the Petitioner had once tried to shift project to Maharashtra and then again intended to construct the Project in Gujrat. The Petitioner has not shared the Policy of Gujarat Government and nor made submission whether the policy was effective retrospectively. The Petitioner has not worked out the availability of land at any other place. Therefore, it cannot be treated a fundamental basis for frustration of PPA on account of change in land allocation policy.

**13. Petitioner's additional submission dated 18 August, 2022 is summarized below:**

- 13.1. The location for wind power project was required to be disclosed by the bidders at the time of bid submission. Also, it was required to be submitted in the bid format provided in Format 6.1 of the Revised RfS.
- 13.2. MSEDCL vide its pre-bid clarification dated 17 February, 2018 made it unequivocally clear that 'No change is required and the change of project location will be allowed once till financial closure'.
- 13.3. Hence, post the project achieving financial closure (within 7 months of PPA date), the contract did not permit change in location of the project, and in consequence the fate of the contract got inextricably tied to location of project as it existed on the date of financial closure. No alternative mode of performance under the contract by re-locating the project was possible subsequent to financial closure of the project.
- 13.4. In its bid submission, as part of Format 6.1, the Petitioner clearly specified the location of 50 MW wind power project that it intended to set up in the State of Gujarat. Petitioner had placed its bid and was able to offer the winning bid of Rs. 2.86/kWh because the Petitioner, through its wholly owned subsidiary, already had acquired land in possession for the project in Gujarat and it also had connectivity to PGCIL grid at the Bhuj substation.
- 13.5. Thus PPA between the parties in the instant case was premised on the location of the wind power project being in the State of Gujarat. Location of the project was the fundamental basis of the PPA, that acquired an unalterable and absolute character as soon as the financial closure for the project was achieved because after that it was not permissible under the PPA to change the project location. Hence, the location of the project goes to the root of the contract inasmuch as the PPA brooks no deviation in relation thereto.
- 13.6. Furthermore, the location of the project is inextricably intertwined with other material terms of the PPA, that is, tariff and connectivity. Petitioner was able to bid competitively and offer the quoted tariff of Rs. 2.86/kWh due to the proposed siting of project in Gujarat where Petitioner has its wind turbine manufacturing units and other supporting businesses thereby affording it 'home advantage'. Similarly, the location for the project identified by the Petitioner had the benefit of having a PGCIL substation in the vicinity that ensured unimpeded grid connectivity for the proposed wind power project. Hence, in substance, location was the fundamental pre-condition for the successful implementation and operation of the project.
- 13.7. It may also be significant to reiterate here that prior to entering into the PPA with MSEDCL, the Petitioner had sufficient land at its disposal required to set up the 50 MW wind power project at the agreed location. Petitioner entered into sub-lease agreements with IWISL for these land parcels for setting up wind power project under the PPA.
- 13.8. Admittedly, mere availability of land is not sufficient for the development of the project.

Subsequent to obtaining possession of required land, it is necessary to obtain Developer Permission from the concerned State Nodal Agency i.e. Gujarat Energy Development Agency in this case, for utilizing said land for setting up wind project. A land parcel without concomitant DP is of no practical utility for project development inasmuch as the developer cannot legally undertake any development activity on the said land in absence of DP. DP is the legal sanction for utilization of land for the intended use of setting up wind power project.

- 13.9. Accordingly, in furtherance of fulfilment of the above requirement, the Petitioner had applied for necessary Developer Permission from GEDA for the land parcels at the subject location vide its applications made on 30 April, 2018, 25 May, 2018, 23 August, 2018 and 14 December, 2018. These applications find mention in subsequent reminder letter issued by the Petitioner to GEDA on 8 February, 2021.
- 13.10. While the Petitioner's application for DP was pending consideration before the GEDA, the Government of Gujarat, through its Revenue Dept., issued a Resolution on 27 November, 2019 in respect of allotment of government land for wind projects. This Resolution clarified the earlier communique of the Revenue Dept. dated 8 March, 2019 vide which it was declared that government land shall be allotted on lease basis to the bid winners of (i) GUVNL, (ii) SECI, (iv) central government agency, or (v) wind turbine manufacturers only. While explaining the scope of the earlier directive of 8 March, 2019, the Government Resolution of 27 November, 2019 made it clear that apart from GUVNL projects, government land at pre-identified sites would only be allotted on lease basis to Tranche 1 to 4 of SECI projects, and for SECI Tranche 5 onwards government land would be allotted in renewable energy park proposed to be developed by private developers. All the district collectors were directed to strictly implement this decision of the State Government.
- 13.11. In view of the above Resolution of the State Government, since 27 November, 2019 GEDA stopped issuing project approval or DP to wind power projects where power is to be supplied outside the State, including to those inter-state projects that are to be undertaken on private land in the State. Hence, in the instant case, the Government of Gujarat Resolution of 27 November, 2019 is the supervening event that has completely altered the fundamental basis of the contract and has made the PPA impossible to be performed inasmuch as it has rendered it impossible for the Petitioner to set up of its wind power project at the locations agreed under the PPA.
- 13.12. In order to fund the cost of project, the Petitioner had tied up finances and achieved financial closure as well, which was also accepted by the MSEDCL. Petitioner had therefore on its part complied with all legal and contractual requirements. However, for want of Developer Permission from GEDA due to change in Govt. of Gujarat land policy on 27 November, 2019, the location agreed under the PPA did not fructify and thereby made the entire project a "non-starter".
- 13.13. Owing to the delay on GEDA's part in granting the DP, the Petitioner vide its letter dated

06.02.2019 apprised MSEDCL of the delays faced in the execution of the project on account of delay by the State of Gujarat/GEDA, and requested for extension of time by three months to achieve the financial closure as Petitioner was planning to relocate the project to the State of Maharashtra

- 13.14. However, MSEDCL did not consider and, therefore, did not respond to Petitioner's request for re-locating the project from Gujarat to Maharashtra so as to overcome the land related challenges in the State of Gujarat. As a result, the Petitioner vide its letter dated 12.02.2020 informed MSEDCL that although they were keen to execute the project in Maharashtra, through Developer's connectivity, since MSEDCL had not clearly set out its intention towards allowing project execution on Developers connectivity till the date of revised schedule of Financial Closure, the Petitioner was left with no alternative but to once again execute the project in Gujarat
- 13.15. The above facts show that bona fide attempts were made by the Petitioner to have the Project shifted to Maharashtra. It is pertinent to mention that shifting of the Project from Gujarat to Maharashtra would have significantly raised the project cost for the Petitioner. The Petitioner was ready to bear the burden of such increase in cost which would accrue as a result of re-location of the project site since it was desirous and eager to implement the Project in terms of the PPA. However, owing to the inaction and lack of support by MSEDCL, this option was rendered useless and the Petitioner was left with no option but to continue to pursue authorities in Gujarat for seeking Developer Permissions albeit without any success.
- 13.16. During the course of the arguments, it was submitted on behalf of MSEDCL that there is no restriction in terms of the Government of Gujarat Resolution since the Petitioner would be covered under "other agencies of the Government of India". This argument is factually inaccurate as the Resolution permits land for inter-state projects of other agencies of only the Central Government like SECI etc. The present project being one sponsored by MSEDCL / State of Maharashtra does not qualify as eligible projects under the Gujarat Govt. land policy of 27 November, 2019. GEDA has been routinely issuing DP to wind power projects of GUVNL, SECI and those set up by private entities for captive use of power within the State of Gujarat. Hence, the effect of the supervening event of Govt. Resolution dated 27 November, 2019 is real and clearly visible on ground.
- 13.17. In light of the fact that the Developer Permission for setting up of the project has not been provided by GEDA till date in view of State Government Resolution dated 27 November, 2019, despite multiple requests and regular follow ups from the Petitioner, the PPA is hit by impossibility and rendered incapable of performance and the PPA dated 17 July, 2018 stands frustrated in terms of Section 56 of the Indian Contract Act, 1872.
- 13.18. Since the frustration of the contract is not on account of any faults of the Petitioner, any liability imposed upon the Petitioner owing to liquidated damages would be onerous and illegal. It is a

well-settled position in law that the remedy in cases of frustration of contract is restitution, as envisaged under section 65 of the Indian Contract Act, 1872 which seeks to disgorge the parties of all the benefits that they have obtained under the contract which has been rendered subsequently void.

- 13.19. Further, in the course of the hearing a point was put forth by this Commission as to why no challenge was initiated by the Petitioner against the said Govt. Resolution of 27 November, 2019. In this regard, the Petitioner would like to draw this Commission's attention to the fact that changes in the policy of a state are the prerogative of the executive and there is little to no interference by the judiciary in such decisions unless the same is constitutionally invalid.
- 13.20. In the present case, the PPA signed between the parties allowed a maximum period of 27 months for the Petitioner to commission the project. This period of 27 months long expired on 17 October, 2020 but thereafter also the parties in good faith attempted to find a solution and the Petitioner in all earnest continued pursuing the GEDA for DP. However, the fact of the matter remains that in absence of DP, the project is impossible to be implemented and PPA stands frustrated.
- 13.21. The Petitioner prayed to the commission to grant the reliefs as prayed for in the Petition read with the I.A. No.16 of 2022 and hold and declare that the PPA dated 17 July, 2018 stands frustrated. Consequently, direct MSEDCL to refund the amount of Rs. 10 crores encashed and appropriated by MSEDCL on account of Performance Bank Guarantee with interest till the date of actual refund.

14. **MSEDCL's submission dated 01 September, 2022 is summarized as under:**

- 14.1. Though the Petitioner has sought the relief of declaring the PPA to be frustrated on account of Force Majeure and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872; however, at the time of argument, the Petitioner has restricted itself to the ground of PPA being frustrated on account of impossibility to perform.
- 14.2. While making the submission with regard to the impossibility to perform the contract; the main thrust of the argument was placed upon the delay in procuring the land due to change in land policy by Government of Gujarat.
- 14.3. Petitioner claimed that the land for the project was in possession at the time of participating in the bid. There is no justification and demonstration as to how the said land become unsuitable for the project and why the project could not have been set-up on the said land. Further, the said changed policy dated 25 February, 2019 has not been placed on record to demonstrate what was the effect of such change in policy by the Government of Gujarat on the land allotted in favour of IWISL prior to July 2018.

- 14.4. Petitioner is obligated for taking all the permissions required for setting up the project under clause 3.1 of the PPA. Petitioner could have changed the location within seven months; however, there was no such request made to the MSEDCL within the said stipulated period.
- 14.5. There is absolutely no pleading in the petition to demonstrate the steps taken by the Petitioner to set up the project from 17 July, 2018 to 06 February 2019.
- 14.6. The Petitioner has placed reliance on Government of Gujarat's Resolution dated 27 November, 2019. However, the said resolution states "... the instructions have been given to allot the government land on lease base to the bid winners of GUVNL or Solar Energy Corporation of India (SECI) or bid winners of government agency or wind turbine manufactures." The said policy clearly includes the bid winners of the government agency like the Petitioner who won the bid from the MSEDCL (a government agency). The said resolution dated 27 November, 2019 does not mention anything about the land allotted to the Petitioner in 2018.
- 14.7. Vide letter dated 11 March, 2019, the Petitioner sought to change the location from Kutch Gujarat to Maharashtra. However, there is no mention in the petition as to what steps were taken by them to procure the land at Maharashtra.
- 14.8. Interestingly, the Petition has admitted to have submitted the documents for achieving Financial Closure on 15 March, 2019. It is noteworthy that Clause 3.13 of the RFS stipulates that the successful bidder has to furnish evidence of the clear possession of land for the purpose of the financial closure. Accordingly, the Petitioner has submitted the documents related to the possession of land at Kutch Gujarat.
- 14.9. Present Petition has been filed on 2 September, 2021 i.e., after two years of the change in policy by Government of Gujarat. Nothing has been placed on record to demonstrate the steps taken by the Petitioner to complete the project since 2018 to till date except making bald submissions. Even to claim impossibility to perform, the Petitioner must clearly make out a case that despite making all the efforts, it could not perform. The land was not an issue for which present PPA can be declared as frustrated.
- 14.10. The clause 8 of the PPA defines the Force Majeure clause. Clause 8.1 (C) provides the mechanism to invoke the Force Majeure clause. It mandates a notice to be given for invoking Force Majeure within seven (7) days from the date of occurrence of Force Majeure event. In the present case, no such notice has ever been issued.
- 14.11. The only notice invoking Force Majeure was issued on 30 March, 2020 on account of COVID-19. In the said notice, there is no mention about delay in acquiring land. On this ground alone, the present petition deserves to be dismissed. The reliance is placed on:

a. Himachal Sorang Power Limited vs CERC and Ors. (2015 SCC online Aptel 148) para

21,26 and 33.

- b. Maruti Clean Coal and Power Limited Vs Grid Corporation of India Ltd. and Ors. (2017 SCC online APTEL 70) para 12 to 15.

- 14.12. The Petitioner has invoked section 56 of the Indian Contract Act, 1872 to claim the frustration of contract on account of impossibility to perform. In this regard, it is submitted that section 56 of the Indian Contract Act, 1872 has no applicability to the present case as the PPA provides the mechanism of Force Majeure. Reliance is placed upon “Energy Watchdog vs CERC” [(2017) 14 SCC80]. The relevant para is reproduced as under:

*“47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the Respondents. Dr. Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration Under Section 56 will apply so as to give the Respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in the Satyabrata Ghose case, when a contract contains a force majeure Clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.”*

- 14.13. The Commission may dismiss the present petition being devoid of merits.

### **Commission’s Analysis and Rulings**

15. The present case is filed by IWL seeking declaration that the PPA dated 17 July, 2018 signed with MSEDCL stands frustrated on account of continuing Force Majeure events and impossibility of performance in terms of Section 56 of the Indian Contract Act, 1872 and seeking direction to MSEDCL for refund of amount towards encashed Performance Bank Guarantee.
16. The Commission notes that in response to the RfS document issued by MSEDCL for procurement of 500 MW wind project, offers from following parties have been accepted as successful bids:

Name of Bidder	Project Location	Project Capacity	Tariff (Rs/kWh)
Adani Green Energy (MP) Ltd.	Kutch, Gujarat	75	2.85



KCT Renewable Energy Pvt. Ltd.	Osmanabad, Maharashtra	75	2.85
Inox Wind Ltd.	Kutch, Gujrat	50	2.86
Mytrah Energy (India) Pvt. Ltd.	Osmanabad, Maharashtra	100	2.86
Hero Wind Energy Pvt. Ltd.	Aurangabad, Maharashtra	75.6	2.86
Torrent Power Ltd.	Osmanabad, Maharashtra	124.4	2.87
<b>Total Capacity</b>		<b>500</b>	

As can be seen from above table, IWL was declared as one of the successful bidders for development of 50 MW wind project to be located at Kutch, Gujrat at tariff of Rs. 2.86 per unit.

17. After adoption of competitively discovered rate by the Commission vide Order dated 14 June 2018 in Case No. 129 of 2018, PPA between IWL and MSEDCL was signed on 17 July 2018. Subsequently, on 12 October 2018, IWL submitted the Bank Guarantee issued by Respondent No. 2, i.e. YES Bank of Rs. 10 Crore. Validity of said Bank guarantee was extended from time to time.
18. The PPA has stipulated timelines for various milestones such as Financial Closure, Schedule Commercial Operation Date (SCOD) etc. As per the timelines in the PPA, IWL was required to achieve Financial Closure and submit evidence of clear possession of land required along with other documents within 7 months from the date of PPA i.e. by 16 February, 2019 and to achieve SCOD within 18 months of the effective date i.e. by 17 January, 2020.
19. IWL in the present Case has sought relief mainly on the following issues:
  - i. Declaration of imposition of national Lockdown on account of COVID -2019 as a force majeure event.
  - ii. Declaring delay in acquiring land for setting up of the project on account of change in land allotment policy in state of Gujarat and pending developer permission from Gujarat electricity Development agency as a force majeure event.
  - iii. Delay in declaring financial closure by MSEDCL even after submitting documents.
  - iv. Failure by MSEDCL for Assignment of PPA to include waft energy private limited, as a SPV
  - v. Declaring that PPA stands frustrated in terms of Section 56 of the Contract Act, because it is impossible for IWL to perform its obligations as a direct consequence of Force Majeure.

MSEDCL has opposed above reliefs and has argued that PPA cannot be terminated on account of alleged Force Majeure.

20. In view of submissions made by parties, the Commission frames following issues which need to be decided for addressing dispute in present Petition:
- Whether IWL is affected by events of Force Majeure?
  - Whether PPA can be considered as frustrated? if yes, whether encashed amount of PBG be returned to IWL?
21. Before addressing above issues, the Commission deems it appropriate to tabulate chronology of event in present matter as follows:

<b>Date</b>	<b>Event</b>
21.12.2017	MSEDCL issued Request for Selection (RfS) to procure 500 MW Wind Power through competitive bidding process.
08.01.2018	Pre-bid meeting was held
14.02.2018	Based on discussion and deliberations in pre-bid meeting, MSEDCL issued revised RfS.
17.02.2018	MSEDCL clarified that a change of project location will be allowed once till financial closure.
20.02.2018	Petitioner submitted its bid for 50 MW inter-state project to be developed in Kutch, Gujarat
14.06.2018	The Commission adopted the Tariff
18.06.2018	Letter of Award (LoA) issued to the Petitioner.
17.07.2018	PPA is signed.
12.10.2018	The Petitioner furnished a Performance Bank Guarantee (PBG) of Rs. 10 Crores to MSEDCL at the rate of Rs. 20 lacs per MW.
16.02.2019	Date of Financial Closure
13.02.2019	MSEDCL extended FC deadline by 30 days. i.e. up to 16.03.2019
25.02.2019	Change in State Policy (Gujrat) – land lease after HPC recommendation
08.03.2019	GR, Gujrat Government – land allotment to projects under SECI Bid, Govt Agencies' Bid or Wind Turbine manufacturer's
11.03.2019	IWL requested MSEDCL for 3 months extension for FC
15.03.2019	IWL submitted documents for FC
21.05.2019	MSEDCL conveyed that IWL failed to meet FC on account of incomplete documents and extension to FC could be considered on submission of fresh BG as per terms of PPA.
25.05.2019	IWL submitted additional sets of documents for FC
01.08.2019, 14.10.2019	IWL requested MSEDCL for PPA assignment to its subsidiary
01.11.2019	Attainment of Financial Closure
17.01.2020	Date of SCOD as per PPA.
30.01.2020	WHO declared outbreak of novel corona virus
12.02.2020	IWL requested for extension to SCOD by 11 months
02.03.2020	MSEDCL informed IWL that BG will be encashed if project is not commissioned by SCOD as per PPA
06.03.2020	IWL requested to withdraw letter dated 2 March, 2020 and again requested for extension of PPA

<b>Date</b>	<b>Event</b>
11.03.2020	WHO declared covid-2019 outbreak as a pandemic
30.03.2020	IWL informed MSEDCL that it is facing various issues due to the lockdown
10.04.2020	IWL requested extension to SCOD on account of force majeure
21.04.2020	MSEDCL informed IWL that MHA and GoM has allowed construction activities of renewable projects.
22.04.2020	IWL requested MSEDCL for additional one month extension than 11 months requested earlier (before lockdown)
15.06.2020	MSEDCL informed IWL that it will encash BG as per terms of PPA and request for extension will only be allowed, if IWL commits to pay compensation to MSEDCL on account of MERC's penalties for shortfall in RPO fulfilment.
22.06.2020	IWL requested to not to impose such compensation against shortfall of RPO
14.07.2020	IWL accepted the said condition and requested for extension to SCOD by 11 months
26.07.2020	MSEDCL asked IWL to submitted extension to expiry date of BG and if not submitted, it will act as per PPA for encashment
29.07.2020	IWL submitted BG with an extended expiry date from 31 July, 2020 to 31 July, 2021 and claim date extended to 31 July, 2022.
08.02.2021	IWL reminded GEDA for developer permission
01.09.2021	MSEDCL Letter for invocation of PBG of Rs. 10 Crore
02.09.2021	IWL filed the present Petition
22.10.2021	The Commission vide Daily Order provided chance to parties for amicable settlement
27.07.2022	IWL informed the Commission amicable settlement talks have failed and willing to argue the matter.
27.07.2022	MSEDCL encashed PBG of amount Rs. 10 Crore.

Based on chronology of events tabulated above, the Commission is addressing the issues framed above in subsequent paragraphs.

## 22. **ISSUE A: Whether IWL is affected by events of Force Majeure?**

22.1. IWL has contended that it was unable to meet the timelines of financial closure and SCOD stipulated under PPA due to following supervening force majeure events.

- I. Delay in acquiring land for setting up of the project on account of change in land allotment policy in state of Gujarat and pending developer permission from Gujarat electricity Development agency.
- II. Delay on the part of MSEDCL
- III. Imposition of national Lockdown on account of COVID -2019

Before going into merits of claims, the Commission notes that PPA dated 17 July 2018 has following provisions related to Force Majeure Events:

### *“8.1 Force Majeure Events:*

- A. *Neither Party shall be responsible or liable for or deemed in breach hereof because of any delay or failure in performance of its obligations hereunder (except for obligations to pay money due prior to occurrence of Force Majeure events under this Agreement) or failure to meet milestone dates due to any event or circumstances ( a 'Force Majeure Event') beyond the reasonable control of the Party experiencing such delay or failure, including occurrence of any of the following:*
- i) *acts of God;*
  - ii) *typhoons, floods, lightning, cyclone, hurricane, drought, famine, epidemic, plague or other natural calamities;*
  - iii) *acts of war (whether declared or undeclared), invasion or civil unrest;*
  - iv) *any requirement, action or omission to act pursuant to any judgment or order of any court or judicial authority in India (provided such requirement, action or omission to act is not due to the breach by the Power Producer or MSEDCL of any Law or any of their respective obligations under this Agreement);*
  - v) *inability despite complying with all legal requirements to obtain, renew or maintain required licenses or Legal Approvals;*
  - vi) *earthquakes, explosions, accidents, landslides, fire;*
  - vii) *expropriation and/or compulsory acquisition of the Project in whole or in part by Government Instrumentality;*
  - viii) *chemical or radioactivity contamination or ionizing radiation; or*
  - ix) *damage to or breakdown of transmission facilities of CTU/STU/DISCOM;*
  - x) *Exceptionally adverse weather condition which are in excess of the statistical measure of the last hundred (100) years.*
- B. *Force Majeure Exclusions:*  
.....
- C. *The affected party shall give notice to other party of any event of Force Majeure as soon as reasonably practicable, but not later than 7 days after the date on which such Party knew or should reasonably have known of the commencement of Force Majeure event.*  
.....
- D. *The affected Party shall give notice to the other Party of (1) the cessation of the relevant event of Force Majeure; and (2) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this agreement, as soon as practicable after becoming aware of each of these cessations.*
- E. *To the extent not prevented by a Force Majeure event, the affected party shall continue to perform its obligations pursuant to this agreement. The affected party shall use its reasonable efforts to mitigate the effect of any event of Force Majeure as soon as practicable.*

*8.2 Available Relief for a Force Majeure Event: No party shall be in breach of its obligations pursuant to this agreement to the extent that the performance of its obligation was prevented, hindered or delayed due to a Force Majeure event. However, adjustments in tariff shall not be allowed on account of Force Majeure Event.*

*For avoidance of doubt, neither Party's obligation to make payments of money due and payable prior to occurrence of Force Majeure events under this Agreement shall be suspended or excused due to the occurrence of a Force Majeure Event in respect of such Party."*

Thus, in addition to indicative list of events which can be considered as Force Majeure events, PPA provides that any event which is beyond the reasonable control of affected party can be considered as Force Majeure event. Party affected by such Force Majeure event is exempted from obligations under the PPA for such period. However, notice of Force Majeure event is mandatory for claiming relief on account of Force Majeure event. Also, affected party shall take all reasonable efforts to mitigate effect of Force Majeure Events.

22.2. IWL has contended that delay in land transfer on account of change in policy of the Government of Gujarat and delay in issuance of project development permission by GEDA has delayed the project execution which is beyond the reasonable control of IWL. Further delays by MSEDCL in declaring Financial Closure and transfer of PPA to Waft Energy Pvt Ltd (subsidiary of IWL), which is beyond the reasonable control of IWL, has also delayed the project. In addition to these, IWL has also claimed that COVID-19 pandemic has further delayed its project implementation. IWL has contended that all these are Force Majeure Events and hence it should not be held responsible for delay in execution of the project. MSEDCL has opposed such contention. The Commission is addressing each of this issue in following paragraphs.

**22.3. Delay in acquiring land for setting up of the project on account of change in land allotment policy in state of Gujarat and pending developer permission from Gujarat electricity Development agency:**

22.3.1. Petitioner has stated that prior to entering PPA with MSEDCL, IWISL i.e. subsidiary of IWL had sufficient land allotted by Collector, Kutch for setting up 50 MW wind power project at the agreed location and IWL entered into sub-lease agreements with IWISL for the same land parcels. However, the Government of Gujarat vide notification dated 25 February 2019 has change the policy for allotment of government waste / non-perpetual land lease to raise Renewable Energy Generation Park. Due to change in land policy, there was ambiguity and the same restricted IWL from procuring subsequent approvals/clearance like Developer Permission approval, Mining & Forest NOC, etc. Further, vide letter dated 27 November 2019, Revenue Department, Government of Gujrat issued instructions for allotment of government land on lease base to the bid

winners of GUVNL or Solar Energy Corporation of India (SECI) or bid winners of government agency or wind turbine manufacturers.

- 22.3.2. IWL has also stated that its subsidiary, IWISL vide multiple letters dated 30 April, 25 May, 23 August and 14 December, 2018 submitted the applications for Developer Permission before GEDA for 56 MW, 136 MW, 44 MW, and 46 MW windfarm projects, respectively and followed up with GEDA on multiple occasions. GEDA has failed in acknowledging and/or providing the Developer Permission to IWL.
- 22.3.3. IWL has contended that due to above mentioned change in Land allotment Policy of the Government of Gujarat and non-issuance of Developer Permission by GEDA, IWL is unable to setup the project.
- 22.3.4. While opposing such contentions, MSEDCL has pointed out that IWL was required to attain financial closure by 16 February 2019, but vide its letter dated 6 February 2019, IWL sought extension of 3 months for achieving Financial Closure by citing several reasons such as the rescheduling in the charging of PGCIL 756kV line and grid station etc. But IWL did not mention anything about change in Government of Gujarat policy. MSEDCL had extended Financial Closure date to 16 March 2019 subject to no change in SCOD. Thereafter, a mere five days before the extended date, IWL requested for a further extension on account of continued issues being faced qua connectivity approvals, and fresh issues being faced due to land procurement. IWL was aware of the change of land policy on 25 February 2019 but informed MSEDCL only on 11 March 2019. Neither change in policy and/or grid connectivity issues could be cited as a force majeure event. No correspondence was made by IWL informing the occurrence of Force Majeure event on account of Change in land policy of Gujrat/ Grid Connectivity, within 7 days of the event, as per Article 8.1 (c) of the PPA.
- 22.3.5. In this regard, the Commission notes that it is admitted fact that IWL had requisite land (in the name of its subsidiary IWISL) in Kutch District for installation of 50 MW Wind project and hence financial closure was allowed by MSEDCL on 1 November 2019. However, IWL has contended that change in land allotment policy by the Government of Gujarat and delay in development permission by GEDA has delayed the project and these are to be treated as Force Majeure events beyond its reasonable control. The Commission notes that PPA was signed on 17 July 2018 and original date of financial closure was 16 February 2019 (which was latter extended to 16 March 2019) by which IWL had to submit documentary evidence of possession of land. Changed Policy of Government of Gujarat was notified only on 25 February 2019 i.e. post original date of Financial Closure. Thus, IWL had sufficient time to act before such change in policy was notified. Further, even after such changed policy, on 15 March 2019 (extended date for financial closure), IWL submitted documents demonstrating possession of land. Hence, IWL's contention that change in land allotment policy has affected land allotment for 50 MW project under

the PPA is not factually correct.

- 22.3.6. Beside the above, the Commission notes that although IWL contended that Policy change notified on 25 February 2019 related to land allotment has impacted its project, but IWL has failed to provide copy of the said Policy document to MSEDCL and not filed with this Petition also. Therefore, it cannot be verified whether such policy has any retrospective impact on land already allotted to IWL's parent company i.e. IWISL. Further, as per letter dated 29 November 2019 issued by Revenue Department of Govt of Gujarat, land on lease is to be allocated to the bid winners of GUVNL or SECI or bid winners of government agency or wind turbine manufacturers. As IWL/IWISL is turbine manufacturer, it is covered by above said letter dated 29 November 2019 and becomes eligible for land allotment.
- 22.3.7. Regarding delay in obtaining Developer Permission, the Commission notes that IWL has contended that its parent company IWISL has filed various applications with GEDA in the year 2018 for Developer Permission. Out of four letters cited, none of the letter mentioned that Developer Permission is being sought for the Wind Project pertaining to MSEDCL. Infact these letters do not mention name of any buyer of Wind Power. Further, out of four letters, 2 letters are prior to signing of the PPA and 2 letters i.e. 23 August and 14 December 2018 for capacity of 44 MW and 46 MW, respectively, were post signing of PPA. IWL and its parent company (IWISL) must have been developing Wind Projects for multiple buyers. Therefore, from above referred 4 applications/letters of 2018, it cannot be conclusively demonstrated that IWL had applied for Developer Permission for Wind Project under MSEDCL's PPA. Only reference to MSEDCL can be seen in GEDA's letter dated 28 July 2022 which is reproduced below:

*“Subject: Regarding Developer Permission application of 22 MW Capacity Wind farm project for MSEDCL*

*Reference: 1. Your Application dated 12/011/2021  
2. Your letter dated 28/07/2022.*

*With reference to your application for setting up of 22 MW Capacity Wind Farm project for MSEDCL to be connected to Central Transmission Utility, it is to state that, the proposal for wind power projects to be set up under connectivity of Central Transmission Utility have been referred to Energy and Petrochemical Department (E&PD), GOG for further guidance in the matter.*

*GEDA may take up the matter in accordance with the guidance received from E&PD, GOG. ”*

As can be seen from above, in the reference of above letter, application date is mentioned as 12 November 2021, which means that IWISL applied for Developer Permission of 22 MW Wind Farm for MSEDCL in November 2021. This is not consistent with IWL's claim that application for Developer Permission was applied in the year 2018.

22.3.8. The Commission also notes that IWL had also contended that Government of Gujarat has stopped allotment of land since July 2018. Therefore, while signing the PPA on 17 July 2018, IWL was aware that it would be facing issues relating to land allotment and development permission. Under such circumstances, Bid Document / PPA allowed IWL to change the location of the project before Financial Closure. Choosing such option could have avoided such difficulties in land allotment and development permissions in Gujarat. Accordingly, vide its letter dated 6 February 2019 IWL has conveyed to MSEDCL that it is shifting its project in Maharashtra. Therefore, difficulties in land allotment due to change in Policy of the Government of Gujarat and delay from GEDA in issuance of Development Permission cannot be considered a Force Majeure Event as shifting the project to other alternate location was within the control of the IWL and permissible under the PPA.

22.3.9. The Commission notes that IWL has contended that because of MSEDCL's delay in providing clarification on use of developer's grid connectivity and non grant of additional time, it has cancelled its proposal of installing project in Maharashtra and went back to original location of Kutch in Gujarat. The Commission has dealt with this IWL's contention in subsequent paragraph, but is of the opinion that if IWL was aware of difficulties of land allotment and developer permission in Gujarat, it could have shifted the project to other location. Option to shift the location of the project was with IWL and hence the Commission rules that change in policy of Government of Gujarat and GEDA's delay in issuing Development Permission cannot be treated as Force Majeure event in present facts of the matter.

#### **22.4. Delays on part of MSEDCL:**

22.4.1. IWL has contended that it has submitted all the necessary documents for financial closure on 15 March 2019, but MSEDCL declared the attainment of Financial Closure by IWL only on 1 November 2019 i.e. after delay of 8 months, but MSEDCL did not grant consequent extension in SCOD. Further, vide letter dated 21 January 2019, IWL informed MSEDCL about formation of subsidiary and requested for amendment of PPA in the name of Subsidiary i.e. Waft Energy Pvt. Ltd. Even after several reminders, MSEDCL did not allow amendment of PPA in name of Waft Energy which has caused unnecessary delay in achieving the financial closure on time and consequently hampered the execution of the Project. IWL has also contended that when it was envisaging shifting of project to Maharashtra, MSEDCL has delayed providing clarity on the aspect of use



of grid connectivity of developer.

- 22.4.2. While opposing these contentions MSEDCL stated that as IWL did not submit complete documents required for financial closure, MSEDCL sought additional documents and only after receipt of required document, Financial Closure was declared with effect from 1 November 2019. MSEDCL has not specifically replied to the delay in amendment in PPA in the name of Waft Energy Pvt. Ltd.
- 22.4.3. In this regard, the Commission notes that after submission of documents by IWL on 15 March 2019, post scrutiny of documents, MSEDCL sought clarification / documents and accordingly, IWL has provided the following:
- a. Vide letter dated 15 October 2019 submitted District Collector's Order for land allotment to demonstrate possession of land. Along with that IWL submitted financials of the company.
  - b. Thereafter, on query from MSEDCL, IWL clarified that land was in the name of its parent company and as per prevailing practice in Gujarat, sub-lease agreement would be signed before commissioning of the project.
  - c. Further, on the issue of 20 years of lease agreement vis-à-vis 25 years of the PPA period, IWL clarified that as per Govt of Gujarat policy, lease agreement is signed for 20 years only and will be extended subsequently. Undertaking to that effect was submitted on 1 November 2019

After satisfying itself with such replies, MSEDCL vide letter dated 20 December 2019 declared financial closure with effect from 1 November 2019. The Commission notes that queries raised by MSEDCL were required so as to satisfy itself in terms of the condition of Financial Closure i.e. 'clear possession of land' and these queries therefore, cannot be considered as arbitrary. IWL in present petition has also not contended that seeking such clarifications was unnecessary. If IWL would have submitted these documents at first instances only, then substantial time would have been saved and Financial Closure could have been declared earlier.

- 22.4.4. Regarding delay in amendment of PPA for adding name of Waft Energy Pvt. Ltd., the Commission notes the clause 3.5 (3) of the RfS regarding qualification requirement, provides that:

*"....3. A bidder which has been selected as successful Bidder based on this RfS can also execute the Project through a Special Purpose Vehicle (SPV) i.e. a Project company especially incorporated as a fully owned subsidiary Company (100% subsidiary) of the successful bidder for setting up of the Project which has*

*to be registered under the Indian Companies Act, 2013, before signing of PPA.....”*

The Commission observes that as per said provision, successful bidder can execute PPA through SPV (fully subsidiary company). After signing of PPA, there is no provision in RfS for amendment of PPA for changing executing party. In present case PPA is signed on 17 July 2018. As per information available on website of Ministry of corporate affairs, the said SPV has been incorporated on 10 April 2018 which reveals that IWL could have signed PPA in the name of Waft Energy Pvt. Ltd itself instead of applying on 21 January 2019 for amendment of PPA. Under such circumstances, it is incorrect to blame MSEDCL for not allowing amendment of PPA in the name of Waft Energy Pvt. Ltd.

22.4.5. Regarding delay on clarifying grid connectivity aspect, the Commission notes that IWL first time in its letter dated 6 February 2019 addressed to MSEDCL indicated its plan to shift the project from Gujarat to Maharashtra. Issue regarding grid connectivity and clarity on whether grid connectivity of developer can be used is raised by IWL in its letter dated 11 March 2019. Thereafter on 15 March 2019, IWL submitted document for demonstrating Financial Closure wherein documents related to land in Gujarat is submitted for demonstrating possession of land. Thus, in a period of a month, IWL has again shifted its project to original location i.e. Gujarat. As indicated above, clarification regarding grid connectivity was sought vide letter dated 11 March 2019 and on 15 March 2019, location of project was shifted back to Gujarat. Thus, hardly any time was given to MSEDCL for clarifying this aspect. Hence, it is incorrect to blame MSEDCL about delay in clarifying issue of grid connectivity. IWL has also not provided any documentary proof to demonstrate efforts taken by it to finalize land in Maharashtra or purchase of such land. Therefore, contention of delay on behalf of MSEDCL is not justified.

22.4.6. The Commission is also of the opinion that in case IWL was seriously aggrieved or its ability to perform obligation is hampered due to delays of MSEDCL, it could have approached this Commission for intervention, earlier. But, IWL has approached this Commission only in September 2021 (after 38 months from execution of PPA) that too when MSEDCL issued notice for invocation of Performance Bank Guarantee.

22.5. In addition to above, it is also important to note that IWL is contending that Change in Land allotment policy of Government of Gujarat, delay in development permission by GEDA and delay on behalf of MSEDCL as Force Majeure Events, but IWL has not issued any Force Majeure notice in these regards which as per article 8.1(c) of PPA is mandatory condition for claiming benefit under Force Majeure Event. Therefore, these events cannot be considered as Force Majeure under the present facts of this matter.

22.6. **Imposition of national Lockdown on account of COVID -2019**

22.6.1. IWL vide email dated 30 March 2020 has served the Force Majeure Notice to MSEDCL and mentioned that it temporarily suspended all the operation and services with immediate effect on account of outbreak of Covid-19, which is beyond their control or anticipation, and further requested for extension of timelines for SCOD. MSEDCL vide its reply dated 21 April 2020, has rejected IWL's claim for Force Majeure stating that construction activities of Renewable Generation projects are allowed under lockdown period also.

22.6.2. In this regard, the Commission notes that in its various recent Orders relating to renewable energy projects, it has declared COVID-19 as Force Majeure Event and accordingly granted extension in date for achieving Financial Closure and SCOD. In all those cases, SCOD or revised SCOD was on the date after imposition of lock down in India. But in present case, original SCOD was 17 January 2020 which was neither extended by parties through mutual consent nor IWL has approached earlier before this Commission for extension of SCOD. Therefore, SCOD remains as 17 January 2020. Said SCOD is prior to imposition of lock down in March 2020 on account of COVID-19. Therefore, in the present fact of the case, COVID-19 cannot be considered as Force Majeure Event affecting performance of IWL.

**23. ISSUE B: Whether PPA can be considered as frustrated? if yes, whether encashed amount of PBG be returned to IWL?**

23.1. IWL has contended that supervening events of change in land allocation policy by Government of Gujrat, and consequent halting of project approval or grant of Developer permission since 27 November, 2019 to wind project supplying power outside of the State, and non-response from MSEDCL to IWL's request for relocating the project to Maharashtra, have completely altered the fundamental basis of the contract and has made the PPA impossible to be performed. By relying on various Judgment of the Supreme Court and High Court, IWL has contended that present contract needs to be treated as frustrated under Section 56 of the India Contract Act, 1872. IWL has also prayed for return of encashed PBG amount of Rs 10 Crore as frustration of contract is not on account of any fault of IWL.

23.2. While opposing such contentions, MSEDCL has submitted that IWL is obligated to get various permission, approvals for setting up of the project. IWL could have changed the location within seven months of the PPA. IWL at one point claimed that land of 25 hectares was in possession at the time of bid submission, whereas at other point claimed that the procurement of land delayed on account of change in policy. There is absolutely no pleading in the petition to demonstrate the steps taken by the Petitioner to set up the project from signing of PPA i.e. 17 July, 2018 to 6 February, 2019. Further, the Policy on which IWL has itself relied allows the land allotment to the bid winners of Government Agency and policy also did not mention anything about retrospective applicability i.e. land allotted in year 2018. IWL arguing

impossibility to perform based on the non-availability of the land especially when the Petitioner obtained Financial Closure in November, 2019 after submitting the evidence of possession of the land at Kutch, Gujarat, however, has not pleaded the steps taken to achieve SCOD. Even to claim impossibility to perform, IWL must clearly make out a case that despite making all the efforts, it could not perform. For rebutting claim of petitioner under Section 56 of the Contract Act, MSEDCL has relied upon Supreme Court Judgment in Energy Watchdog matter which rules that if Contract has specific provisions, then Section 56 cannot be relied upon.

- 23.3. In this regard, the Commission notes that IWL has claimed prolonged Force Majeure events as justification for its contention for frustration of contract. However, the Commission in earlier part of this Order has already rejected IWL's claim of Force Majeure events. Hence, PPA cannot be termed as frustrated on account of such events.
- 23.4. The Commission further notes that IWL has contended that fundamental basis of the contract has been altered and hence it becomes impossible to perform. IWL is considering as fundamental basis of contract, land as stipulated in the PPA and located at Kutch Gujarat, which cannot be used because of non-issuance of developer permission by GEDA. In this regard, the Commission notes that RfS floated by MSEDCL does not restrict bidders to locate its Wind project at any specific location. Location of project is bidder's choice. Based on such RfS, IWL had submitted Bid with proposed location of project as Kutch Gujarat. Further, in the PPA, same place is mentioned as location of the project. PPA also provided option to the project developer to change location of the project before Financial Closure. Therefore, it is very clear that location of the project is to be decided by the bidder and MSEDCL as a buyer did not restrict IWL to specific location. Therefore, location of the project mentioned in the PPA, can be changed if developer wishes to do that for any reason. The Developer continuing with the site location inspite of it creating difficulty in executing the project on account of non-availability of Development Permission, needs to be considered a conscious decision of project developer and it cannot be exempted from its consequences. Further, as explained in earlier part of the Order, even after knowing difficulties in getting developer permission at selected location, IWL decided to continue with same location. Therefore, now it cannot shift the blame on the procurer. The failure to complete the project in time is due to its inability to develop project under the PPA. It could have shifted the project to other location and fulfilled its obligations under the PPA, but IWL has failed to do that.
- 23.5. IWL in its submission has also stated that it could quote a tariff of Rs 2.86 per unit because of land availability at Kutch, Gujarat and its Wind Turbine manufacturing facility in the Gujarat. Through such submission, IWL trying to suggest that shifting the project to other location would make such tariff unviable. In this regard, the Commission notes that increase in cost for performing the contract cannot be reasons for non-performance of the Contract. Hon'ble Supreme Court in Energy Watchdog matter has clarified this aspect as follows:

***“47. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by Clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither Clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the Respondents. Dr. Singhvi, however, argued that even if Clause 12 is held inapplicable, the law laid down on frustration Under Section 56 will apply so as to give the Respondents the necessary relief on the ground of force majeure. Having once held that Clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in the Satyabrata Ghose case, when a contract contains a force majeure Clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of.”***

Thus, if performance of the contract is possible at higher cost, it cannot be considered as frustrated. Therefore, IWL’s claim of frustration of contract just because of possibility of increasing expenses if project is shifted outside the Gujarat cannot be allowed.

- 14.1. Above quoted Supreme Court Judgment has also ruled that Section 56 of the Contract Act cannot be made applicable when contract has Force Majeure clause. In the present PPA, clauses related to Force Majeure do exist, hence IWL cannot rely on Section 56 of the Contract Act for claiming frustration of the PPA.
- 14.2. Having ruled that PPA cannot be considered as frustrated and also that reasons for delay stated by IWL cannot be considered as Force Majeure events, consequence of delay in execution of project is to be dealt with as per Article 3.3 of the PPA which reads as follows:

*“..3.3 Liquidated damages for delay in Commissioning the Project / Power Producer beyond Scheduled Commercial Operation date*

*i) The Project / WTGs shall be commissioned within SCOD. The Power Producer shall have to submit Commissioning Certificate as verified, inspected and certified by RLDC/SLDC/DISCOM*

*ii) In case of failure to achieve this milestone, MSEDCL shall forfeit the Performance Bank Guarantee (PBG) in the following manner:*

*a. Delay upto six (6) months from SCOD - MSEDCL will forfeit total Performance Bank Guarantee on per day basis and proportionate to the balance Capacity not commissioned*

*b. In case the commissioning of the project / WTG is delayed beyond Six (6) months from SCOD, the tariff discovered after e-Reverse Auction shall be reduced at the rate of 0.50 paise/kWh per day of delay for the delay in such remaining capacity which is not commissioned for entire term of PPA. The maximum time period allowed for commissioning of the full Contracted capacity with encashment of Performance Bank Guarantee and reduction in the fixed tariff shall be limited to 27 months from the date of execution of PPA or till the Tariff becomes zero, whichever is earlier.*

*c. In case, the Commissioning of the Project / WTG is delayed beyond this period as mentioned in Article b above, the contracted capacity shall stand reduced / amended to the Capacity Commissioned and the PPA for the balance Capacity will stand terminated and shall be reduced from the Contracted Capacity...”*

Thus, as per above provisions of the PPA, if project gets delayed beyond 27 months form date of signing of PPA, contract capacity stands terminated and entire PBG shall be encashed.

14.3. In the present case, PPA has been signed on 17 July 2018 and MSEDCL has encashed PBG on 27 July 2022 i.e. after 48 months. Hence sufficient time has been granted by MSEDCL to IWL for execution of the project. If period of last extension requested by IWL i.e. 11 months is added in 27 months stipulated in the PPA, still it would be lower than 48 months. Hence, MSEDCL’s action of encashment of PBG is consistent as per the provision of PPA and the Commission rejects IWL’s prayer for refund of encashed PBG amount.

14.4. It is also pertinent to note that one of the successful bidders from the MSEDCL’s same competitive bidding process of 500 Wind Power, i.e. Adani Green Energy (MP) Limited, has commissioned its 75 MW wind project situated in District Kutch, Gujrat, within the SCOD. This illustrates that within same timelines and same governing rules and conditions, Wind Projects have been commissioned in Gujarat. IWL could have achieved the same if proper and timely efforts had been made.

14.5. Accordingly, the Commission rules that the PPA between IWL and MSEDCL cannot be treated as frustrated under section 56 of the Indian Contract Act, 1872. The commission declares that IWL has not performed its obligation under the PPA within the timelines and therefore, it is not entitled to get refund of the performance bank guarantee invoked by MSEDCL under Article 3.3 of the PPA.

24. **Hence, the following Order.**

### **ORDER**

1. Case No. 120 of 2021 is rejected. Connected Miscellaneous Applications are disposed of accordingly.
2. IWL is not entitled to get refund of the performance bank guarantee invoked by MSEDCL under Article 3.3 of the PPA.

**Sd/-**  
**(Mukesh Khullar)**  
**Member**

**Sd/-**  
**(I.M. Bohari)**  
**Member**

**Sd/-**  
**(Sanjay Kumar)**  
**Chairperson**

