

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 70/MP/2016

Coram:

Shri Gireesh B.Pradhan, Chairperson

Shri A.K.Singhal, Member

Shri A.S.Bakshi, Member

Dr. M.K.Iyer, Member

Date of Hearing: 19.5.2016

Date of order: 15.7.2016

In the matter of

Petition for approval under Section 17 (3) and (4) of the Electricity Act, 2003 for creation of security interest over all the movable and immovable assets of the Petitioner in favour of Security Trustee/Lenders and for any subsequent transferees, assign, novatees thereof and any refinancing lenders to the Project, acting on behalf of and for the benefit of the Lenders pursuant to Indenture of Mortgage Agreement and other security creating documents/Financial Agreements and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of Mortgaged Properties and Project Assets, for the transmission lines, i.e. (i) Dharmajaygarh-Jabalpur pool 765 kV 1x D/C line and (ii) Jabalpur Pool-Bina 765 kV S/C line.

And

In the matter of

1. Jabalpur Transmission Company Limited
F-1, The Mira Corporate Suite,
1 & 2, Ishwar Nagar,
New Delhi – 110065

2. SBICAP Trustee Company Limited
202, Maker Tower 'E', Cuffe Parade,
Mumbai – 400021

..Petitioners

Vs.

1. Adhunik Power and Natural Resources
Cresscent Towers, 3rd Floor, 229,
AJV Bose Road,
Kolkata-700 020

2. Corporate Power Limited
8th and 9th Floor, Mahabir Towers,
Main Toad, Ranchi, Jharkhand-834 001

3. Essar Power (Jharkhand) Limited,

Essar House, 11 K.K.Road, Mahalaxmi,
Mumbai-400 034

4. West Bengal State Electricity Distribution Company Limited
Bidyut Bhawan, 7th Floor, DJ Block, Sector-II,
Kolkata-700 091

5. M.B Power(Madhya Pradesh) Limited
213 B, Okhla Industrial Area, Phase-III,
New Delhi-110 020.

....Respondents

The following were present:

1. Shri Pulkit Sharma, JTCL
2. Shri T N Reddy, JTCL

ORDER

The first petitioner herein, Jabalpur Transmission Company Limited, has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act") to transmit electricity as a transmission licensee and for that purpose to undertake the business of establishing of the project under 'transmission system for connectivity lines for System Strengthening scheme common for WR and NR" (hereinafter referred to as "Transmission System")' on 'Build, Own, Operate and Maintain' (BOOM) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 12.10.2011.

2. The petitioners had approached the Commission in Petition No. 168/MP/2012 for approval under Section 17 (3) and (4) of the Act to create security of Rs. 876 crore in favour of SBICAP Trustee Company Limited. The Commission vide order dated 12.9.2012 accorded in-principle approval allowing the second petitioner to create security in favour of SBICAP Trustee Ltd. as Security Trustee.

3. Jabalpur Transmission Company Limited and SBICAP Trustee Company Limited have filed the present petition for creation of security in favour of SBICAP Trustee Company Limited as Security Trustee pursuant to the Security Trustee Agreement and other relevant financing documents by way of mortgage/hypothecation/assignment of project assets for benefit of the lenders to the project. The petitioners have made the following prayers:

“(a) Approve the creation of security Interest, over all the movable and immovable assets of Petitioner No. 1 and to the extent as mentioned in paras 4 and 5 above, in favour of Security Trustee/Lenders, acting on behalf of and for the benefit of the Lenders pursuant to Indenture of Mortgage Agreement and other security creating documents/Financial Agreements and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of Mortgaged Properties and Project Assets through execution of Indenture of Mortgage Agreement and other Financial and Refinancing documents in future for the project.

(c) Pass such other order/orders, as may be deemed fit and proper in the facts and circumstances of the case;”

4. According to the first petitioner, for the purpose of refinancing and raising fresh finance for the project, the first petitioner requested the lenders for which lenders have agreed to make available financial assistance amounting to Rs. 1300 crore as fresh rupee term loan for the project. In this regard, State Bank of India has agreed to act as lead bank for the consortium of lenders. For this purpose, the first petitioner and State Bank of India have appointed the second petitioner, namely SBICAP Trustee Company Limited as Security Trustee (hereinafter referred to as ‘Security Trustee’) who has agreed to act as Security Trustee for the lenders and has entered into Security Trustee Agreement on 9.12.2015.

5. The first petitioner has submitted that pursuant to the terms of the Common Loan Agreement and Indenture of Mortgage Agreement, the security is created by,

- (a) (i) First charge on all the borrower`s immovable assets (including transmission system) pertaining to the project both present and future, (ii) A first charge on all the borrower`s tangible movable assets (including but not limited to towers, conductors and insulators, etc.) including movable plants and machinery, machinery spares, tools and accessories, furniture, fixtures, vehicle and all other movable assets and current assets, both present and future; (iii) A first charge over all the accounts of borrower, including but not limited to the accounts and sub-accounts (including the DSRA-Facility) (or any account in substitution thereof) that may be opened in accordance with the transaction documents, and in all funds from time to time deposited therein (including the reserves) and the permitted investment or other securities representing all amounts credited to the account and a first charge on the receivables.
- (b) A first charge on all the intangible assets of the borrower including but not limited to operating cash flows, commission, revenue, goodwill, rights and undertakings and intellectual property rights, and on uncalled capital, both present and future;
- (c) Assignment of way of security of :
- (i) All the rights, title, interest, benefits, claims and demands whatsoever of the borrower in, to and under all the projects agreements, duly acknowledged and consented to by the counter parties to the project agreements by executing the consent to assignment if such project agreements require consent of such other parties before creating of security as within mentioned, all as amended, varied and supplemented from time to time.

- (ii) All the rights, title, interest, benefits of the borrower in, to and under all the clearances pertaining to the project (including the transmission licence) to the extent the same are assignable;
- (iii) All the rights, title, interest, benefits, claims and demands whatsoever of the borrower in, to and under any letter of credit, guarantee including contractor guarantee and liquidated damages consent agreements, side letters and Performance bond provided by any party to the project agreement (including any security that may be available to the borrower pursuant to the Transmission Service Agreement); and
- (iv) All the right, title, interest, benefits, claims and demands whatsoever of the borrower in, to and under all Insurance Contracts and Insurance proceeds pertaining to the project ;

6. The first petitioner has submitted that it has agreed to create security interest in favour of Security Trustee pursuant to Indenture of Mortgage Agreement and Financial Agreements, by way of mortgage/hypothecation/assignment in accordance with the provisions of the Indenture of Mortgage Agreement and the Financial Agreements, and has agreed that it shall be lawful for the Security Trustee to enter into and take possession of mortgaged properties along with all movables, intangibles and any future assets under the project in financial agreement and thenceforth, the first petitioner shall take no action inconsistent with or prejudicial to the right of Security Trustee acting on behalf of the Lenders/Security Trustee quietly to possess, use and enjoy the same and to receive the income, profits and benefits thereon without interruption or hindrance by it or any person or persons whosoever.

7. The first petitioner has submitted that under the financial agreements and on enforcement of the security interest, it shall be lawful for the Security Trustee, acting on behalf of and for the benefit of the Lenders/Security Trustee, to enter into and take possession of the assets/properties mortgaged/charged/assigned for their benefits and substitute themselves or any of the them or its nominees for the first petitioner under any or all of the projects document(s).

8. The first petitioner has further stated that Article 15.2.2 of the Transmission Service Agreement entered into between the first petitioner and the beneficiaries of the project provide that the first petitioner is free to create any encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the representative of the lenders as security for amount payable under the Financing Agreements and any other amounts agreed by the parties. Provided that:

- (i) The lenders or the representatives of the lenders on their behalf shall have entered into the Financing Agreements and agreed in writing to the provisions of this Agreement; and
- (ii) Any encumbrance granted by the first petitioner shall contain provisions pursuant to which the lenders or the representative of the lenders on their behalf agrees unconditionally with the first petitioner to release such encumbrances upon payment by the first petitioner to the lenders, of all amounts due under the Financing Agreements.

9. The first petitioner has submitted that in terms of Article 15.2.4 of the TSA, the petitioner is required to take permission from this Commission prior to assignment of

its rights, benefits, interests and obligations in the TSA. The first petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Electricity Act, 2003, the first petitioner, being as a licensee, prior approval of the Commission is essential for creation of security interest over all the movable and immovable assets of the first petitioner in favour of Security Trustee/Lenders pursuant to Indenture of Mortgage Agreement and other security creating documents/financial Agreements and for future refinancing transactions, by way of mortgage/hypothecation/assignment of project assets for benefit of the Lenders/Security Trustee/Lenders to the Project. Accordingly, the petitioners have filed the present petition seeking prior approval of the Commission for creation of security in favour of Security Trustee/lenders by way of mortgage/hypothecation/assignment of mortgaged properties and projects assets through execution of Security Trustee Agreement and other financial and refinancing documents in future for the project.

10. The petition was heard on 19.5.2016 after notice to the petitioner and the respondents. No reply has been filed by the respondents. None was present on behalf of the respondents despite notice. The first petitioner, vide Record of the Proceedings for the hearing dated 19.5.2016, was directed to submit the benefits of the refinancing the loan and other savings.

11. The first petitioner, vide its affidavit dated 25.5.2016, has submitted that since the project construction is completed and the project completion risk is taken out, the project is eligible for debt financing at reduced interest rates from banks approximately by 0.80%.

12. We have considered the submissions made by the petitioners. Perusal of the Security Trustee Agreement dated 9.12.2015 reveals that the first petitioner had approached the lenders for financial assistance for construction and development of the project. The original lenders had agreed to make available financial assistance for an aggregate principal amount of Rs. 876 crore to the first petitioner and a Security Trustee Agreement was entered into between the first petitioner and the lenders on 11.6.2012. The Commission vide order dated 12.9.2012 in Petition No. 168/MP/2012 accorded in-principle approval for creating security in favour of SBICAP Trustee Company Ltd. On account of delay in execution of the project resulting in cost over-run, the original lenders vide First Amendment to the Facility Agreement dated 1.6.2015 agreed to take into account the cost over-run. Further, the lenders comprising of SBI, ICICI, L&T Infra, L&T Finance Corporation and IDFC have agreed to extend to the borrower a fresh rupee terms loan of Rs. 1300 crore comprising (i) Rs. 1120 crore to be extended by all the lenders, and (ii) Rs. 180 crore to fully refinance the existing amount outstanding under the original facility to the extent required and to reimburse/repay in part the unsecured loan availed from the promoter and to make payment of capital creditors including repayment of capex already incurred to an extent of Rs. 424 crore on the terms and conditions set out in the Common Loan Agreement. In this regard, State Bank of India has agreed to act as lead bank for the consortium of lenders. For this purpose, the first petitioner and consortium of lenders lead by State Bank of India have appointed the second petitioner, namely SBICAP Trustee Company Limited as Security Trustee for creation of security over all the movable and immovable assets of the project. Accordingly, Security Trustee Agreement and Common Loan Agreement dated 9.12.2015 have been executed for loan of Rs. 1300 crore.

13. Section 17 (3) and (4) of the Electricity Act, 2003 provides as under:

“17.(3) No licensee shall be any time assign his licence or transfer his utility, or any part thereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission.

(4) Any agreement relating to any transaction specified in sub-section (1) or sub-section (3), unless made with the prior approval of the Appropriate Commission, shall be void.”

14. As per the above provision, a licensee is required to obtain approval of the Commission for assigning his licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise and to enter into an agreement relating to any of these transactions. We are satisfied that SBICAP Trustee Company Limited as Security Trustee needs to be given comfort for creation of security for the benefit of banks/financial institutions/non-banking financial companies as security for the financial assistance provided by the lenders. We, therefore, accord in principle approval allowing the first petitioner to create security in favour of SBICAP Trustee Company Limited, presently acting as Security Trustee pursuant to Security Trustee Agreement by way of mortgage on project assets by execution of indenture of mortgage for the project. The earlier approval granted vide order dated 12.9.2012 in Petition No. 168/MP/2012 shall stand withdrawn from the date of issue of this order. It is, however, clarified that approval for securing loan for the additional cost incurred on account of cost over-run of the project shall not be construed as approval to the petitioner to seek tariff adjustment. The petitioner shall be entitled to claim the tariff strictly as per the TSA. It is further made clear that the transmission licence granted by the Commission to the first petitioner and the underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee.

Before agreeing to transfer of the licence and the assets of the first petitioner to the nominee of Security Trustee, the Commission shall evaluate such a nominee's experience in development, design, construction, operation and maintenance of transmission lines, and to be able to execute the project and undertake transmission of electricity. The licensee, lenders, security trustee and the nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself of the circumstances necessitating such transfer. This decision of ours is in accordance with Regulation 12 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 which reads as under:

“12. Assignment of Licence

In case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to a nominee of the lenders.”

Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lenders, Security Trustee and the nominee, approve the assignment of the licence to a nominee of the lenders subject to proper due diligence of the process. Therefore, specific prior approval of the Commission for assigning the licence to the nominee of Security Trustee or transfer of any assets to them shall always be needed. Lastly, finance documents and statements may be filed by the first petitioner as and when required by the Commission for any specific purpose

15. With the above, Petition No. 70/MP/2016 stands disposed of.

**Sd/-
(Dr. M.K.Iyer)
Member**

**sd/-
(A.S. Bakshi)
Member**

**sd/-
(A. K. Singhal)
Member**

**sd/-
(Gireesh B. Pradhan)
Chairperson**