

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 47 of 2016 in
Petition No. 440/MP/2014**

Subject : Interlocutory Application for modification of order dated 29.1.2016 in Petition No. 440/MP/2014.

Applicant : Power Grid Corporation of India Limited

Respondent : Essar Power Gujarat Limited (EPGL).

Date of hearing : 16.5.2017

Coram : Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Parties present : Shri Sanjay Sen, Senior Advocate, EPGL
Shri Mazag Andrabi, Advocate, EPGL
Shri Varun Kapur, Advocate, EPGL
Ms. Shruti Verma, EPGL
Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Manju Gupta, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Dilip Rozekar, PGCIL
Shri A.M. PAvgi, PGCIL
Shri Swapnil Verma, PGCIL

Record of Proceedings

Learned counsel for PGCIL submitted that PGCIL has filed the present Interlocutory Application seeking modification of the order dated 29.1.2016 in Petition No. 440/MP/2014 to the extent of not associating the treatment of subject bank guarantee contingent upon establishment of payment security mechanism and of operationalization of LTA granted in favour of the petitioner and for seeking permission to deal with the said bank guarantee in terms of the Connectivity Regulations, Detailed Procedure and the Bulk Power Transmission Agreement/Long-term Access Agreement specifically pertaining to encashment of bank guarantee upon adverse progress of generation project as assessed during the Joint Coordination Committee meetings. Learned counsel further submitted as under :

a). The Commission in its order dated 29.1.2016, observed that during all the meetings of regional constituents where the petitioner's application for grant of

connectivity was discussed, the petitioner had never raised the issue of inadequacy of the connectivity lines. After issuing directions with respect to injection of power into the grid during testing and the steps required to be taken for operationalization of the LTA granted to the petitioner, the Commission directed the petitioner to extend the bank guarantee of Rs. 112 crore for 2240 MW corresponding to the capacity of the connectivity line till opening of payment security mechanism and operationalization of the LTA.

b). In the event that the petitioner was aggrieved with the findings of the Commission on the issue of adequacy/technical capability of the transmission line for carrying 2240 MW power from its project, the appropriate remedy for the same, if at all, lay before the APTEL.

c). The order dated 29.1.2016 had been passed with the presumption based on the contentions made by the petitioner that the connectivity and LTA availed by it would get operationalized in due course. During the 9th, 10th, and 11th Joint Coordination Committee (JCC) Meetings of the Western Region held from time to time, the petitioner had maintained that it would commission the generating station within 36 months after financial closure upon receipt of environmental clearance. By the time the 12th JCC meeting was held on 9.6.2016, the petitioner had already relinquished 250 MW LTA granted to it due to alleged force majeure events without relinquishment charges

d). From the above, it is reasonably clear that the petitioner is no longer proposing to evacuate power from its project. That being so, there is no longer any requirement for establishing a payment security mechanism for operationalization of LTA as envisaged under the order dated 29.1.2016 so that the order restraining PGCIL from encashing the bank guarantee in the context of payment security mechanism for LTA operationalization has been redundant and of no consequence. Accordingly, PGCIL is invoking the inherent jurisdiction of the Commission seeking modification of order dated 29.1.2016 and permission to encash the bank guarantee as per the applicable Regulations upon adverse progress of the petitioner's generation project as assessed during the JCC meetings.

e). Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations (COB Regulations), provides for the review of the orders passed by the Commission. Therefore, in the event there is any arithmetical error or accidental slip or omission in an order passed by the Commission, the same may be rectified by amending the order as per Regulation 103 A of the COB Regulations.

f). The above power of review and the procedure laid down in the COB Regulations for exercising the same, is in furtherance of the power of review vested in the Commission under Section 94(1)(f) of the Electricity Act, 2003 which vests the Commission with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (CPC) in respect of viewing its decision, directions and orders. The scope of power of the review is envisaged in Section 114 and under Order 47 Rule 1 of the CPC which empower a court to review its own order.

g). Whenever there is an error apparent in the order, decision or direction of the Commission or there is discovery of new facts after the passing of an order, decision or direction by the Commission, then party may seek review of such order, decision or direction by invoking the review jurisdiction of the Commission under Section 94(1)(f) of the Electricity Act read with Regulation 103 of the COB Regulations. In the present case, there is neither an error apparent on the face of record of order dated 29.1.2016 nor there is discovery of new facts.

h). Regulation 103A is similar to Section 152 of the CPC in terms of its operation. While the COB Regulations make provision for review/modification of orders to the extent and in the manner laid down in Regulations 103 and 103 A, they are silent on occurrences such as of subsequent events which have a material bearing on the order passed and which make the operation of the order impossible or nugatory.

i). In situations which are not covered under the provisions of Regulations 103 and 103 A of the COB Regulations, the provisions of Regulation 111 read with Section 21 of the General Clauses Act, 1897 becomes applicable.

j). Regulation 111 vests an inherent power in the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of process of the Commission. The provisions of Regulation 111 are similar to those of Section 151 of the CPC and are premised on the fact that no procedural code can be exhaustive as the legislature is incapable of contemplating all possible circumstances which may arise in future proceedings and consequently for providing the procedure for them. The provisions of Regulation 111 are not limited or affected by any of the provisions made in Regulations 103 and 103 A.

k). If there is an express provision exhaustively covering a particular subject, it gives rise to a necessary implication that no power is to be exercised in respect of the said subject otherwise in the manner as prescribed by the said provisions. It follows as a natural corollary that when there is no provision exhaustively covering a particular subject, then the inherent powers of the court are necessarily to be resorted to.

2. In its rebuttal, learned senior counsel for EPGL submitted as under:

a). The present IA is not maintainable in the legal framework as the inherent powers cannot be invoked contrary to the express provisions laid down under Regulation 103 and 103A of the CoB Regulations. These provisions may be exercised to remove difficulty in execution of the provisions but not vests powers which have not been originally intended to be vested. Since, the power to amend or vary order will be to the extent as provided under Regulation 103 A, i.e. clerical or arithmetical mistakes in the orders or errors arising therein from any accidental slip or omission.

b). When proceedings stand terminated by final disposal of writ petition it is not open to the court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not

followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning.

c). The end product at the end of a review petition by review petitioner will be modification of the earlier order only. In the review, the order that would be passed will be a new order whereas while seeking a modification of the previous order, it will be a change in the old order itself.

d). On 26.4.2016, EPGL filed an appeal challenging the Commission's order dated 29.1.2016 before the Hon'ble APTEL wherein the issues involving financial implications have been raised. PGCIL has filed the present IA seeking modification of the order dated 29.1.2016 considering the difficulty Order 47 Rule 1 of the CPC to file a review petition.

e). The crucial date for determining whether or not the terms of Order 47 Rule 1 of the CPC are satisfied is the date when the application for review is filed. If on that date, no appeal has been filed, it is competent for the court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end. In support of his contentions, learned senior counsel placed his reliance upon the following judgments of the Hon'ble Supreme Court:

- i. Padma Sen Vs. Sate of U.P. (1961) 1 SCR 884
- ii. K.K. Velusamy Vs. Palanisamy (2011) 11 SCC 275
- iii. State of U.P. Vs. Brahm Datt Sharma and Anr.; (1987) 2 SCC 179
- iv. Tungabhadra Industries Ltd. Vs. Government of Andhra Pradesh; AIR 1964 SC 1372

f). Regulation 27(d) of the Connectivity Regulations provides for furnishing of bank guarantee having regard to the total power to be transmitted by the applicant through inter-State transmission system. The actual transmission allowed by PGCIL by way of grant of LTA has been 250 MW. Therefore, at any given point of time, the capacity for which bank guarantee has to established in favour of PGCIL cannot be more than to the corresponding capacity of 250 MW.

g). EPGL has been directed to keep bank guarantee alive for the entire transmission capacity of 2240 MW for which connectivity was required by EPGL as per the Transmission Agreement dated 3.1.2011 executed between the parties. PGCIL mandated EPGL to install System Protection Scheme to restrict export of power to only 250 MW. Therefore, there was no occasion for PGCIL to claim a bank guarantee in excess of 250 MW.

h). EPGL has relinquished its LTA rights to the extent of 250 MW upon the subject transmission lines.

i). PGCIL claims that the status of EPGL's generation project has been indicated to be sometimes certain and sometimes to be uncertain. EPGL has never averred that the

generation project is not being established by EPGL. EPGL has only stated in the JCC meetings as well as before the Commission that it would take 36 months from the date EPGL receives all statutory clearances to commission the generation project

3. In response, learned counsel for PGCIL submitted that while an order passed by the Commission may be reviewed/amended in accordance with the provisions of Regulations 103 and 103A of the COB Regulations read with the provisions of Section 114 and Order 47 Rule 1 of the CPC, the said orders may also be modified through exercise of inherent powers vested under Regulation 111 read with Section 21 of the General Clause Act to meet the ends of justice or to prevent the abuse of the process of the Commission.

4. Learned counsel for PGCIL sought permission to place on record, the orders of the Commission wherein the interim relief for modification of the earlier order was granted in a specific prayer in an IA. PGCIL was permitted to file the Commission's orders.

5 After hearing the learned senior counsel for EPGL and learned counsel for PGCIL at length, the Commission directed the parties to file their written submissions by 16.6.2017 with an advance copy to each other failing which the order shall be passed based on the documents available on record.

6. Subject to the above, the Commission reserved the order in the IA.

By order of the Commission

**Sd/-
(T. Rout)
Chief (Legal)**