

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

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

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

Date of Order: 23rd October, 2017

In the matter of

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

And

In the matter of

Power Grid Corporation of India Limited
B-9, Qutab Institutional Area,
Katwaria Sarai, New Delhi-110 016

..... **Applicant**

Versus

Essar Power Gujarat Limited
Salaya Administrative Building,
44 KM, Jamnagar-Okhla Highway Post Box No-7,
Post Khambhaliya, District Jamnagar-361 306, Gujarat

...**Respondent**

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

ORDER

The Applicant, Power Grid Corporation of India Limited (hereinafter referred to as “PGCIL”), has submitted that the present application has been filed 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 Essar Power Gujarat Limited (EPGL) and for seeking permission to deal with the said bank guarantee in terms of the Connectivity Regulations, Detailed Procedure made thereunder 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 Co-ordination Committee meetings.

2. The Applicant has submitted that the Commission, vide order dated 29.1.2016 in Petition No. 440/MP/2014 directed EPGL 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 LTA and PGCIL was directed not to encash the bank guarantee till the opening of payment security mechanism for operationalization of LTA. The Applicant has submitted that the order dated 29.1.2016 had been passed with the presumption based on the contentions made by EPGL 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, EPGL had maintained that it would commission the plant 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 the LTA of 250 MW granted to it for alleged force majeure grounds, though without implicating any financial liability towards

relinquishment of the same. The Applicant has submitted that the proposed generation project of the Petitioner has become uncertain and is unlikely to be commissioned. Therefore, the Commission`s order dated 29.1.2016 has become redundant since the establishment of payment security mechanism for operationalization of LTA of the Petitioner cannot be given effect to. Therefore, the present IA has been filed seeking permission to deal with the bank guarantee in terms of Connectivity Regulations and Detailed Procedure made thereunder upon adverse progress of generation project of EGPL as assessed during Joint Coordination Committee.

3. The Applicant has made the following prayers in the IA:

- “(a) Modification of Order dated 29.1.2016 in Petition No. 440/MP/2014 so as not to associate the treatment of Bank Guarantee contingent upon establishment of payment security mechanism and operationalization of LTA.
- (b) To permit the applicant to deal the Bank Guarantee in terms of the Regulations, Detailed Procedure and the BPTA/LTA Agreement specifically pertaining to encashment of bank guarantee upon adverse progress of generation project as assessed during Joint Coordination Committee meetings.
- (c) Any other relief as this Hon'ble Commission may deem fit and proper in the facts and circumstances of this case.”

4. EGPL, vide its reply dated 25.1.2017, has submitted that the present IA is not maintainable since the proceedings stand terminated by final disposal of the petition and therefore, it is not open to the court to re-open the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. PGCIL has filed the present IA seeking modification of the order dated 29.1.2016 considering the difficulty under Order 47 Rule 1 of the CPC to file a review petition. EGPL has submitted that it has filed an appeal challenging the

Commission's order dated 29.1.2016 before the Appellate Tribunal for Electricity (Appellate Tribunal) wherein the issues regarding bank guarantee has been raised. Therefore, the IA which is in nature of review which has been filed after filing of the appeal is not maintainable. EPGL has submitted that Regulation 27(d) of the 2009 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. Since the actual transmission allowed by PGCIL by way of grant of LTOA has been 250 MW, the capacity for which bank guarantee has to be established in favour of PGCIL cannot be more than the corresponding capacity of 250 MW. EPGL has further submitted that after receipt of the notice of force majeure, PGCIL ought to have slowed/deferred the construction of transmission lines. EPGL has submitted that it never once averred or submitted that the generation project would not be set up or commissioned and has always maintained its stand by stating that it would take the EPGL just 36 months from the date it receives all statutory clearances to commission the generation project. These submissions have been consistently made by EPGL in the Petition Nos. 187/MP/2015 and 64/TT/2015 also.

5. The Applicant, vide its rejoinder dated 1.5.2017, has submitted that the Commission's power of review and the procedure laid down in the Conduct of Business 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 reviewing its decision, directions and orders. Under its power of review, the Commission can review its own order 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 discovery of new facts. However, Regulation 103 and 103A 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. 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. Therefore, when there is no provision exhaustively covering a particular subject, then the inherent powers of the court are necessarily to be resorted to.

Analysis and Decision:

6. We have considered the submissions of the parties. EPGL had filed Petition No.440/MP/2014 seeking the following directions:

(a) The notice proposing to encash the bank guarantee is illegal and quash the same;

(b) The petitioner is liable to furnish guarantee to the extent of connectivity actually available;

(c) PGCIL not to take any steps towards encashment of the bank guarantee furnished by the petitioner.

7. The Commission after consideration of the pleadings in the petition and submission of the parties issued the following directions in order dated 29.1.2016 in Petition No.440/MP/2014:

“25. In view of the above decision, the prayers of the petitioner are disposed of as under:

(a) The petitioner shall 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 LTA.

(b) PGCIL shall not encash the bank guarantee till the opening of payment security mechanism for operationalization of LTA.”

8. The Commission in para 19 of the said order had taken note of the pendency of Petition No.187/MP/2015. The said para is extracted as under:

“19. It is noted that PGCIL has filed Petition No. 64/TT/2015 on 30.1.2015 for approval of transmission tariff in respect of Essar Gujarat TPS-Bachau 400 kV D/C (Triple) line and extension of Bachau sub-station with anticipated COD as 1.4.2015. In the above petition, the petitioner has contended that its generating station has been delayed due to non-availability of environmental clearance from Govt. of India, Ministry of Environment and Forest and has expressed difficulty to evacuate power in accordance with scheduled timeline. The petitioner has also filed Petition No. 187/MP/2015 for adjudication of dispute arising under the Transmission Agreement entered into between the petitioner and PGCIL on 3.1.2011 and has requested to kept abeyance of connectivity in respect of the Essar Gujarat TPS-Bachau 400 kV D/C (Triple)line and extension of Bachau sub-station. The petitioner in this petition has also prayed to restrain PGCIL from making any claims for the transmission charges for the instant transmission assets. These petitions are under consideration of the Commission.”

9. In Petition No.187/MP/2015, the Petitioner EPGL has made the following prayers:

“(a) Declare that Petitioner is entitled to claim force majeure in terms of Clause 8 of the Transmission Agreement in the facts and circumstances of the case and declare the act of rejection of the force majeure circumstances of the Petitioner by the Respondent as bad in law;

(b) Pass appropriate direction for keeping in abeyance of connectivity till the revised date of commissioning of the generating project is intimated/communicated by generators to the Respondent;

(c) Restrain the Respondent from making any claims for transmission charges for the connectivity in respect of connectivity of line till commissioning of the project;

(d) In interim, grant a stay on the Respondent from raising any invoice for Order in transmission charges pending disposal of the present petition.”

10. The Commission in its order dated 11.10.2017 in Petition No.187/MP/2015 held that the Petitioner EPGL is not affected by force majeure and its case is not covered under Clause 8.0 of the Transmission Service Agreement. The Commission further held that the Petitioner EPGL is liable to pay the transmission charges unless it relinquished connectivity on payment of relinquishment charges for the connectivity line. The Commission also held that PGCIL has discharged its responsibility under the Act, Connectivity Regulations and the Transmission Agreement dated 3.1.2011 in this case while implementing the connectivity line and it is the Petitioner EPGL who failed to give a clear indication that the transmission lines were not required and kept on shifting the milestones of commercial operation of its generating station. As regards the prayer for keeping the connectivity and LTA in abeyance, the Commission held that there was no provision for keeping the connectivity and LTA of the transmission line in abeyance which would result in non-recovery of the investment made. The Commission also indicated a roadmap for utilisation of the connectivity line in para 45 of the said order and directed the EPGL to pay the transmission charges till alternative arrangement for utilisation of the connectivity line is made. The Commission permitted PGCIL to encash the bank guarantee on account of the adverse progress of the generating station in terms of the Transmission Service Agreement which on its recovery would be adjusted against the capital cost of the subject transmission lines.

11. The directions in Petition No. 440/MP/2014 were made after taking note of the fact that the Petition No.187/MP/2015 pertaining to the same transmission system was under consideration of the Commission. In the light of the direction in order dated 11.10.2017 in Petition No.187/MP/2015 with regard to the encashment of bank guarantee, the directions in para 25 (b) of the order dated 29.1.2016 shall stand modified accordingly.

12. In view of the above, IA No. 47/2016 in Petition No.440/MP/2014 filed by PGCIL has been rendered infructuous. We, therefore, do not consider it necessary to deal with the pleas of the Applicant, PGCIL and Respondent, EPGL in the IA.

13. IA No.47 of 2016 in Petition No.440/MP/2014 is disposed of in terms of the above.

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

sd/-
(A.S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson