

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 242/MP/2017
Alongwith I.A. No. 80/2017**

Subject : Petition for declaring the letter of invocation of Bank Guarantee dated 23.10.2017 and thereafter the encashment of the Bank Guarantee dated 23.2.2010 of an amount of Rs. 56.10 crore issued by Axis Bank Ltd. as illegal and for return of the said encashment amount along with damages.

Date of Hearing : 9.10.2018

Coram : Shri P. K. Pujari, Chairperson
Dr. M. K. Iyer, Member

Petitioner : M/s Aryan M.P. Power Generation Pvt. Limited

Respondent : Power Grid Corporation of India Limited

Parties Present : Shri Matrugupta Mishra, Advocate, AMPPGPL
Shri Nishant Kumar, Advocate, AMPPGPL
Ms. Ankita Bafna, Advocate, AMPPGPL
Ms. Suparna Srivastava, Advocate, PGCIL
Shri Tushar Mathur, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Shri Praveen Kumar, AMPPGPL

Record of Proceedings

Learned counsel for the Petitioner submitted that the present petition has been filed seeking declaration that the letter of invocation of Bank Guarantee (BG) dated 23.10.2017 issued by PGCIL and thereafter the encashment of the BG dated 23.2.2010 for Rs. 56.10 crore is illegal and for direction to return the encashed BG to the Petitioner along with damages. Learned counsel further submitted as under:

- a) The project of the Petitioner had got delayed due to non-availability of coal linkage by Ministry of Coal and deferment in the grant of environmental clearances which were beyond the control of the Petitioner and are in the nature of force measure events under Article 9 of the Bulk Power Transmission Agreement (BPTA) entered into between the parties. Article 9 of the BPTA provides that no party shall be liable to any claim for any loss or damage whatsoever arising out of failure to carry out the terms of BPTA to the extent that such failure is due to force majeure event.

- b) The Petitioner had filed Petition No. 69/MP/2014 seeking the relinquishment of the Long Term Open Access (LTA) and seeking direction to PGCIL to return BG accordingly.
- c) The issue of relinquishment of LTA is pending adjudication in Petition No. 92/MP/2015. The Petition No. 69/MP/2014 which also had the substantial prayer of return of BG was pending and the order was reserved on 23.9.2014. Even then, PGCIL arbitrarily invoked the BG vide letter dated 23.10.2017.
- d) The Commission vide RoP dated 2.5.2017 in Petition No. 92/MP/2015 directed that all individual petitions pertaining to adjudication of claims of force majeure and determination of relinquishment charges shall be heard after issue of order in Petition No. 92/MP/2015. The Commission vide RoP dated 21.7.2015 in Petition No. 92/MP/2015 directed all the concerned LTA applicants to keep their BGs valid till the decision with regard to relinquishment charges is taken by the Commission. Accordingly, the Petitioner had kept its BG alive.
- e) The BG can be encashed only upon the failure in performance of obligations under the BPTA. However, if there is no default in performance of obligation, the BG cannot be invoked arbitrarily. The Commission in its order dated 31.10.2017 in Petition No. 69/MP/2014 has recognized the fact that delay or non- performance by the Petitioner under BPTA is caused due to the force majeure events and not because of any reasons attributable to the Petitioner.
- f) The Petitioner has furnished BG as a guarantee to perform its obligations and has approached the Commission to adjudicate upon the issue of its failure to perform under BPTA due to force majeure events. PGCIL has prejudged the matter in its favour by invoking the BG before the order is passed by the Commission in Petition Nos. 69/MP/2014 and 92/MP/2015.

2. Learned counsel for the respondent submitted as under :

- a) At the time of grant of LTA, the Petitioner had provided adequate payment security mechanism in the form of BG. The terms of the BG furnished by the Petitioner itself indicates that its encashment could be made if the Petitioner abandoned the project or in the event of undue delay.
- b) During the pendency of Petition No. 69/MP/2014, the Petitioner did not make any progress in the project. The Petitioner has already decided to relinquish the LTA. In the 8th JCC meeting held on 9.1.2015, the Petitioner had stated that its plant is not progressing. The non- progress of the project by the Petitioner has given right to PGCIL to encash BG.
- c) The Commission in its order dated 31.10.2017 in Petition No. 69/MP/2014 has held that the force majeure provisions under the BPTA cannot be available for relinquishing the LTA and a generator cannot be discharged from his liability to

pay transmission charges for the common transmission system covered under the BPTA.

d) The Commission in its RoP dated 21.7.2015 in Petition No. 92/MP/2015 has only directed the LTA applicants to keep their BGs valid till the decision with regard to relinquishment charge is taken by the Commission. The Commission nowhere restrained PGCIL from encashing the BG in case of failure in performance of obligation by any of the LTA applicants.

e) The Contract of Guarantee is an independent contract between the bank and the beneficiary. The existence of any disputes between the parties is not a ground to restrain the enforcement of BG.

3. After hearing the learned counsel for the Petitioner and the Respondent, the Commission reserved the order in the petition.

By order of the Commission

**Sd/-
(T. D. Pant)
Deputy Chief (Law)**