

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 9/RP/2018
in Petition No.69/MP/2014
with I.A No. 9/2018**

**Coram:
Shri P.K.Pujari, Chairperson
Shri A. K. Singhal, Member
Shri A. S. Bakshi, Member**

Date of order: 23rd of July, 2018

In the matter of

Petition under Section 94 (1) (f) of the Electricity Act, 2003 Read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for seeking review of order dated 31.10.2017 in Petition No.69/MP/2014 in the matter of relinquishment of the Long term Open Access under the Bulk Power Transmission Agreement dated 29.7.2009 under Regulation 18 read with 32 of the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term Access and Medium Term Open Access in inter-State Transmission and related matters) Regulations, 2009.

**And
In the matter of**

Aryan MP Power Generation Pvt. Ltd.
129, Transport Centre,
Rohtak Road, Punjabi Bagh, New Delhi-110 035

...Petitioner

Vs.

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

...Respondent

Parties Present:

Shri Sajan Poovayya, Senior Advocate for the Review Petitioner
Shri Matru Gupta Mishra, Advocate for the review petitioner

ORDER

The Review Petitioner, Aryan MP Power Generation Private Limited (hereinafter referred to as "the Review Petitioner") has filed the present Review Petition under Section



94 of the Electricity Act, 2003 Read with Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for review of the order dated 31.10.2017 in Petition No.69/MP/2017 (hereinafter referred to as the 'impugned order') with the following prayers:

“(a) Allow review of the order dated 31.10.2017 passed by the Central Electricity Regulatory Commission in Petition No. 69/MP/2014 in terms of the present petition; and

(b) Pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the case.”

Background of the Case

2. The Review Petitioner proposed to set up a 1200 MW thermal power plant in the State of Madhya Pradesh. The Review Petitioner applied for 1200 MW LTOA to CTU which was granted vide CTU's letter dated 29.7.2009. The Review Petitioner entered into a BPTA dated 24.2.2010 with CTU and furnished Bank Guarantee (BG) of Rs. 56.10 crore. The Review Petitioner did not execute the generating station on account of non-grant of coal linkage and consequent non-grant of environmental linkage and intimated CTU about the same. The Review Petitioner filed Petition No. 69/MP/2014 with the following prayers:

“(a) Direct relinquishment of the long term open access under the Bulk Power Transmission Agreement dated 24.2.2010 without any liability on the Petitioner;

(b) Direct the Respondent No.1 to return the Bank Guarantee bearing No.00070100004994 for an amount of Rs.56.10 crore issued by the Axis Bank limited, on behalf of the Petitioner.”

3. Based on the pleadings and oral arguments, the Commission vide the impugned order dated 31.10.2017 held as under:



“20. In the light of the above discussion, we hold that the Petitioner cannot be granted any relief from its liability for payment of transmission charges under clause 9 of the BPTA.

18.....There is no embargo in the Connectivity Regulations for relinquishment of LTA but such relinquishment is subject to payment of relinquishment charges which will be decided in Petition No.92/MP/2015.

25. It has come to the notice of the Commission through the writ petition filed by the Petitioner before the Hon'ble High Court of Delhi that PGCIL had given instructions to the bank on 23.10.2017 to encash the bank guarantee. Further, the bank guarantee has been encashed by PGCIL on 25.10.2017. In view of the encashment of bank guarantee, the Petitioner has withdrawn the writ petition with liberty to take appropriate steps. In view of the above developments, no direction is required to be issued with regard to bank guarantee.”

4. The Review Petitioner in the review petition has submitted that PGCIL has invoked the bank guarantee in violation of the order dated 21.7.2015 passed by the Commission in Petition No.92/MP/2015 wherein the Commission directed all concerned LTA applicants to keep their BG alive till the decision about relinquishment charges are taken by the Commission. The Review Petitioner has submitted that the invocation was made by PGCIL when the Commission was not in session. The Review Petitioner has submitted that “the Review Petitioner in its bonafide belief did file an application averring the subsequent event of encashment of subject BG however the order under review was passed the next day.” The Review Petitioner has submitted that the impugned order was issued making mere observations about the invocation and encashment of the BG. The Review Petitioner has submitted that since the main relief regarding the BG was not adjudicated upon, an opportunity to amend the prayer ought to have been granted. Non-grant of opportunity to amend the petition is an error apparent on the face of record and on this ground review may



be allowed. The Review Petitioner has also filed an IA for condonation of delay of 36 days in filing the review petition.

Analysis and Decision

5. We have heard the learned Senior Counsel for the Review Petitioner on admissibility of the Review Petition. The Review Petition is being disposed of at the admission stage.

6. The only ground for review is that the Commission did not adjudicate the prayer of the Review Petitioner for directions to PGCIL to return its bank guarantee. The Review Petitioner has submitted that the Commission should have allowed amendment of the Petition No.69/MP/2014 on account of encashment of BG before the issue of impugned order in order to avoid multiplicity of litigations. In para 17 of the review petition, the Review Petitioner has submitted as under:

“17.....In the light of this, it is submitted that the original relief claimed by the Review Petitioner has become inappropriate due to the subsequent encashment of Bank Guarantee, an event beyond the control of the Review Petitioner. It is humbly submitted that the Court should take cognisance of the same and allow an opportunity for amendment of the pleadings in order to relieve the Petitioner of the disadvantaged position he is in. The opportunity to amend in the light of the changed circumstances would also serve to shorten the litigation and avoid multiplicity of proceedings so that the same issue does not crop up repeatedly thereby saving the time of the Court.”

From the above, it is evident that the Review petitioner wants review of the impugned order to allow for amendment of its prayer with regard to BG in Petition No.69/MP/2014.

7. One of the prayer of the Review Petitioner in Petition No.69/MP/2014 was to direct PGCIL to return the Bank Guarantee for an amount of Rs. 56.10 crore issued by Axis Bank Limited on behalf of the Petitioner. Before issue of the impugned order, it came to the notice



of the Commission through the writ petition and orders passed by the Hon'ble High Court on the writ petition that PGCIL invoked the BG on 25.10.2017 and thereafter, the Review Petitioner withdrew the writ petition which was disposed of as withdrawn. The order of the Hon'ble High Court is extracted as under:

“The Learned counsel for the respondents states that the bank guarantee in question was invoked and has been realised; the funds have been received by Respondent No.2.

In view of the aforesaid statement, the learned counsel for the petitioner seeks to withdraw the present petition with liberty to file appropriate proceedings.

The present petition is dismissed as withdrawn with the aforesaid liberty.”

Thus, the Review Petitioner did not pursue the writ petition before the High Court after encashment of bank guarantee and sought liberty to file appropriate proceedings for which liberty was granted by the High Court. After the order of the High Court came to the notice of the Commission, the Commission considered the fact of encashment of BG and in the light of the said development, the prayer of the Review Petitioner to direct PGCIL not to encash the BG no more survived and accordingly, the Commission decided that no direction was required to be issued with regard to the Bank Guarantee. This was a conscious decision of the Commission and is not an error apparent on the face of the record. Therefore, there is no ground of review for review of the impugned order.

7. It is pertinent to mention that the Review Petitioner after obtaining liberty from the Hon'ble High Court to file appropriate proceedings has made Petition No.242/MP/2017 on 23.9.2017 before this Commission challenging encashment of BG by PGCIL. The Review Petitioner, in para 33 of the said petition, has submitted as under:



“In view of the above, it is submitted that the Hon’ble Commission despite observing the latest development of illegal invocation and encashment of subject BG by the PGCIL, vide its order has refrained to conclusively adjudicate upon or provide any direction on the issue of return of subject BG to the Petitioner as prayed in the petition, since the prayer to that extent was rendered infructuous, in the light of the illegal invocation and encashment of BG by PGCIL. The Petitioner therefore aggrieved by the said encashment of BG by PGCIL has approached the Hon’ble Commission through the present petition seeking declaration for invocation and encashment of subject BG as illegal therefore the same encashed amount of Rs.56.1 crores are liable to be returned to the Petitioner with damages.”

The Petition No. 242/MP/2017 was taken up for admission on 20.12.2017 and notice was issued in the said petition for completion of pleadings. The petition was further listed on 30.1.2018, 19.4.2018, and 5.7.2018. The petition will be heard in due course.

8. The Review Petitioner has filed the present review petition on 6.2.2018 seeking review of the impugned order. In para 17 of the Review Petition (quoted in para 6 above), the Review Petitioner is seeking the relief to challenge the encashment of BG which has already been challenged in Petition No.242/MP/2017. Section 10 of the Code of Civil Procedure provides that “no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom or any of them claim litigating under same title where such suit is pending in the same or any other court.....”. Thus, there is a legal bar to file a case if the matter in issue is directly and substantially in issue in a previously instituted suit in the same court. In the present case, the Review Petitioner is claiming substantially the same relief as in Petition No.242/MP/2017. Therefore, the Review Petition is not maintainable in view of the bar under Section 10 of the CPC.



9. The Review Petitioner has filed an IA for condonation of delay in filing the Review Petition. Since, we have rejected the review petition, we have not taken any view on the IA for condonation of delay.

10. Review Petition No. No. 9/RP/2018 in Petition No. 69/MP/2014 with I.A No. 9/2018 is disposed of in terms of this order.

Sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(P.K.Pujari)
Chairperson

