

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 12/RP/2018
in Petition No.203/MP/2015**

Coram:

Shri P.K.Pujari, Chairperson

Shri A. K. Singhal, Member

Shri A. S. Bakshi, Member

Dr. M. K. Iyer, Member

Date of order: 12th of June, 2018

In the matter of

Petition under Section 94 of the Electricity Act, 2003 and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, read with order 47 Rule 1 of the Code of Civil Procedure, 1908 for Review of order dated 8.12.2017 in Petition No.203/MP/2015.

And

In the matter of

GMR Kamalanga Energy Limited
Building No. 302, New Shakti Bhawan,
Near Terminal 3, Indira Gandhi International Airport,
New Delhi-110 037

...Petitioner

Vs.

Power Grid Corporation of India Limited,
Saudamini, Plot No. 2,
Sector-29, New Delhi-110 037

...Respondent

Parties Present:

Shri AlokShanker, Advocate, GMR

Ms.SuparnaSrivastava, Advocate, PGCIL

Ms.Jyoti Prasad, PGCIL

ORDER

TheReview Petitioner, GMR Kamalanga Energy 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 seeking review of the order dated 8.12.2017 in Petition No.203/MP/2015(hereinafter referred to as the 'impugned order').

2. The Commission in a common order dated 8.12.2017 in Petition Nos. 203/MP/2015 and 41/MP/2016 issued the following directions:

“43. (a) As per the BPTA, PGCIL is under a contractual obligations to release the bank guarantee given under clause 6.0 of the PPA if the generating units and dedicated transmission lines are completed by the Project Developer. Linking the construction BG under clause 6 of the BPTA with the opening of LC under clause 2 of the BPTA read with clause 3.6.3 of the BCD Procedure is not in accordance with the provisions of the BPTA. Therefore, BG cannot be withheld on the ground that LC has not been opened by the Project Developer.

(b) The project developer is under statutory and contractual obligations to open the unconditional LC before operationalization of LTA. In the present case, the Petitioner has opened the LC for 647 MW in terms of the directions of the Commission. Subject to the satisfaction of PGCIL with regard to the LC, BG shall be returned to the Petitioner.

(c) The Petitioner was granted LTA of 800 MW in accordance with its application and the applicable regulations for which the Petitioner entered into BPTA dated 24.2.2010 with PGCIL. For change of region and revision of LTA capacity, the Petitioner is required to submit fresh application to CTU in terms of Regulation 12 of the Connectivity Regulations and directions contained in Para 116 of the order dated 16.2.2015 in Petition No. 92/MP/2014.

(d) The Petitioner vide its letter dated 21.6.2016 requested for grant of LTA of 387 MW for Northern Region and 260 MW for Eastern Region and for relinquishment of the capacity of 153 MW. Accordingly, PGCIL has granted LTA of 647 MW to the Petitioner.

(e) Revision of LTA quantum from 800 MW to 647 MW (387 MW to Northern Region and 200 MW to Southern Region) involves relinquishment of 200 MW capacity in Southern Region and 213 MW in Northern Region. The Petitioner is liable to pay the relinquishment charges for the relinquished capacities in terms of the decision and order to be issued in Petition No. 92/MP/2015.”

3. The Review Petitioner has submitted that pursuant to the Commission's order dated 8.12.2017, the Review Petitioner vide its letter dated 20.12.2017 requested PGCIL to return



the construction BG. PGCIL vide its letter dated 22.12.2017 refused to return the BG on the ground that BG would be required for settlement of the relinquishment charges in the light of the decision in Petition No. 92/MP/2015.

4. The Review Petitioner has submitted that the while the Commission in Para 43 (a) of the order has held that the release of construction BG should not be linked with the opening of LC in accordance with Clause 2 of BPTA read with Clause 3.6.3 of the BCD procedure, the Commission in Para 43 (b) of the impugned order has linked the release of construction BG subject to the satisfaction of the PGCIL with regard to the LC opened by the Review Petitioner. According to the Review Petitioner, directions of the Commission in para 43 (b) of the impugned order is not only contrary to the observations of the Commission in Para 43 (a) of the order but contrary to the legal principles as well. Accordingly, the Review Petitioner has sought review of the impugned order and directions to CTU to return the Bank Guarantee.

5. The Review Petition was taken up for admission. Learned counsel for the Review Petitioner submitted that since there is contradiction between the relief granted under para 43 (a) and para 43 (b) of the impugned order, there is an error apparent on the face of the records and needs to be rectified in review. Learned counsel relied upon the judgment of the Hon`ble Supreme Court in Netaji Subhas Chandra Bose Cricket Association Vs. BCCI and submitted that a mistake by the Court is a valid ground for review.

6. Learned counsel for PGCIL submitted that the Review Petitioner filed Appeal No. 266/2015 against the interim order dated 3.9.2015 in Petition No. 203/MP/2015. However,



after issue of the impugned order, the Review Petitioner withdrew the appeal as having become infructuous stating that the interim order had merged with the final order and said withdrawal was recorded in the order of the Appellate Tribunal dated 18.1.2018. Learned counsel submitted that the appeal was withdrawn without seeking any liberty to agitate the same at a later stage before the appropriate forum. Having raised the same questions of law before the Appellate Tribunal as in the present Review Petition and having withdrawn the appeal without liberty, the Review Petitioner cannot be permitted to raise the same issues before the Commission by invoking its review jurisdiction. Learned counsel for PGCIL submitted that the Review Petitioner has also filed an Appeal before the Appellate Tribunal against the impugned order. As per the provisions of Order 47 Rule 1 of the Code of Civil Procedure, any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, can prefer a Review Petition by exercising its right to apply for review under Section 114 of the Code of Civil Procedure. Since, the Review Petitioner has filed an appeal against the impugned order, the Review Petition is not maintainable.

7. Learned counsel for the Review Petitioner submitted that issues raised in the appeal before the Appellate Tribunal are totally different from the issues raised in the present Review Petition. Learned counsel submitted that the Review Petitioner had filed two Petitions bearing Nos. 203/MP/2015 and 41/MP/2016 which were disposed of by the Commission through a common order dated 8.12.2017. While the Review Petitioner has preferred an appeal against the findings given with regard to Petition No. 41/MP/2016, the Review



Petition has been filed against the directions issued in Petition No. 203/MP/2016 and therefore, the Review Petition is maintainable.

Analysis and Decision:

8. We have heard the learned counsels for the Review Petitioner and the Respondent with regard to the maintainability of the Review Petition at the admission stage.

9. The Review Petitioner has filed Appeal No. 48 of 2018 against the impugned order on 23.1.2018. The Review Petition has been filed on 29.1.2018 which is the date after filing the appeal. As per Order 47 Rule 1 of the CPC, a review petition can be filed in the court which passed the order, if no appeal against the said order has been filed. In the present case, the Review Petitioner has claimed to have challenged in appeal the impugned order pertaining to the issues in Petition No. 41/MP/2016 and filed the Review Petition pertaining to the directions issued in Petition No. 203/MP/2015. The question for consideration is whether the direction in para 43 (b) of the impugned order was issued in relation to the issues raised in Petition No. 203/MP/2015 or Petition No. 41/MP/2016. If the direction in Para 43 (b) has been issued with reference to Petition No. 41/MP/2016, then the Review Petition shall not be maintainable since the Review Petitioner has filed the appeal before the filing of the Review Petition.

10. The brief background of the case is that the Review Petitioner entered into the Bulk Power Transmission Agreement dated 24.2.2010 with PGCIL for availing 800 MW LTA from its generating station located at Village Kamalanga in district Dhenkanal, Odisha. The Review Petitioner achieved COD of its three units of the generating station on April, 2013,



November, 2013 and March, 2014 respectively and dedicated transmission line on 21.12.2014. The Review Petitioner approached PGCIL for refund of the Contract Performance Guarantee in terms of Clause 6 of BPTA. Since, PGCIL did not return the BG and vide its letter dated 17.2.2015 to IDBI Bank sought extension of the BG. The Review Petitioner filed the Petition No. 203/MP/2015 with the following prayers:

- “(a) Admit the present petition;
- (b) Declare the demand letters issued by PGCIL dated 17.2.2015, 19.5.2015 and 5.8.2015 as illegal and de hors the agreed terms of the BPTA and accordingly quash the same;
- (c) Direct the Respondent to return of the original bank guarantee bearing No. 2010377IBGP0089 dated 18.2.2010 (for Rs. 225,000,000) and 2010377IBGP0126 dated 10.3.2010 (for Rs. 175, 000,000) furnished by the Petitioner in accordance with the terms of the BPTA;
- (d) Direct PGCIL to make payment of a sum of Rs. 22.67 lakh towards bank charges for extension of the BGs;
- (e) In the interim and during pendency of the present petition direct PGCIL not to take any steps towards encashment of the bank guarantees furnished by the Petitioner; and
- (f) Pass any other appropriate order/directions.”

11. During the hearing of the Petition No.203/MP/2015 on 3.9.2015, PGCIL submitted that the transmission systems for operationalization of LTA have been commissioned and LTA of the Review Petitioner can be operationalized subject to opening of LC of approximately of ₹22.50 crore by the Review Petitioner. The Commission vide RoP dated 3.9.2015 directed as under:-

“3. In response to the Commission`s query regarding reasons for non-operationalization of LTA and amount for which LC is to be opened by the petitioner, the learned counsel for PGCIL submitted that the transmission systems for operationalization of LTA have been commissioned and LTA of the petitioner can be operationalized subject to opening of LC of



approximately of ₹22.50 crore by the petitioner. The Commission directed the petitioner to file the status of operationalization of the LTA within one week.

4. The Commission observed that the amount of BGs submitted by the petitioner is more than required LC and directed PGCIL to return the excess amount of ₹17.50 crore to the petitioner immediately. The remaining amount of BG shall be returned to the petitioner after opening of LC for operationalization of LTA. The Commission further directed the petitioner to open required LC for operationalization of LTA within one week and PGCIL to operationalize LTA of the petitioner within one week thereafter. The Commission directed the petitioner and the respondent to submit a report with regard to return of BG and opening of LC within three weeks thereafter. The Commission directed that due date of filing the status and report shall be complied with and no further extension on that account shall be granted.”

This direction of the Commission in the above RoP was challenged in Appeal No. 266 of 2015 before the Appellate Tribunal. In its order dated 25.7.2016, the Appellate Tribunal directed that the impugned order shall be given effect to by all concerned, irrespective of the pendency of the Appeal, before this Appellate Tribunal.

12. The Review Petitioner also filed Petition No. 41/MP/2016 seeking relinquishment of the part LTA with the following prayers:

“(a) Holder and declare that the LTA of 800 MW under BPTA dated 24.2.2010 stands modified to 647 MW (being 387 MW in NR and 260 MW in ER), in terms of the present petition, without any liability on the Petitioner;

(b) Direct the Respondent No. 1 to process the LTA application dated 30.9.2015 (bearing online application No. 1200000204) of the Petitioner thereby granting and LTA of 260 MW to the Eastern Region in order to source power to the Bihar Discoms as per the PPA dated 9.11.2011.

(c) Quash the letters dated 17.7.2015 (Annexure P-15) and 24.9.2015 (Annexure P-16) of the Respondent No. 1; and

(d) Pass any order and/or any such orders as the Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of the justice.”



Accordingly, in para 12 of the impugned order, the Commission has noted that the Review Petitioner has filed Petition No. 41/MP/2016 seeking modification of its LTA of 800 MW to 647 MW and for reducing the Letter of Credit commensurate to the capacity covered under the LTA. Therefore, the issue of opening of LC was raised in Petition No. 41/MP/2016. The issue of Bank Guarantee was dealt with by the Commission in different stage of proceedings in the said petition as under:

(a) In the RoP dated 22.3.2016 in Petition No. 41/MP/2016, the Commission while considering the question of surrender of part LTA capacity by the Review Petitioner directed as under:-

“4. The Commission further directed the petitioner to open the LC for 647 MW within one week subject to the final decision in the petition. Learned counsel agreed to take necessary steps to open LC for 647 MW.”

(b) In the RoP for the hearing dated 12.4.2016 in Petition No. 41/MP/2016, the Commission directed as under:-

“3. The Commission directed the petitioner to open the LC for 647 MW within two weeks. The Commission directed PGCIL not to realise any amount towards LC till disposal of the petition.”

(c) In the RoP dated 26.5.2016 in Petition No. 41/MP/2016, the Commission observed as under:-

“4. The Commission observed that despite specific directions to the petitioner to open LC for 647 MW, the same has not been complied with. The Commission directed the petitioner to open an LC for 647 MW as per earlier direction dated 12.4.2016.”

(d) In the RoP dated 19.1.2017 in Petition No. 41/MP/2016, the following was recorded with regard to opening of LC:



“2(f) As per the Commission’s direction dated 12.4.2016 and 26.5.2016, the petitioner opened letters of credit for 647 MW. Thereafter, the petitioner vide its letter dated 21.6.2016 accepted and agreed that the LTA quantum was 800 MW and informed to retain out of 540 MW in Northern Region, 387 MW in Northern region and surrendered the remaining 153 MW. Owing to the said surrender, the LTA granted in favour of the petitioner stands at 647 MW for which the necessary letter of credit has been opened by the petitioner.”

13. PGCIL vide its written submission dated 14.2.2017 submitted that the LCs opened by the Review Petitioner suffered from procedural infirmities which had been intimated to the Review Petitioner vide PGCIL’s letter dated 16.1.2017. The written submission has also been served by PGCIL on the Review Petitioner.

14. In the light of the above background facts, the Commission in the impugned order directed PGCIL to release the BG to the Review Petitioner subject to its satisfaction with regard to LC. Para 43 (b) is extracted as under:-

“43 (b) The project developer is under statutory and contractual obligations to open the unconditional LC before operationalization of LTA. In the present case, the Petitioner has opened the LC for 647 MW in terms of the directions of the Commission. Subject to the satisfaction of PGCIL with regard to the LC, BG shall be returned to the Petitioner.”

15. Therefore, the direction in Para 43 (b) has been issued based on the dispute raised by the Review Petitioner with regard to LC in Petition Nos. 203/MP/2015 and 41/MP/2016. Since the Review Petitioner has challenged combined impugned order based on the issues raised in Petition No. 41/MP/2016, the Review Petition filed after filing of the appeal for seeking the review in Para 43 (b) of the order is not maintainable in view of the bar in Order 47 Rule 1 (1) of the CPC i.e. review can be filed against a decree or order from which an appeal is allowed, but from which no appeal has been preferred.



16. The directions in Para 43 (b) has been issued independent of the directions in Para 43 (a) in view of the background facts narrated above. Since, the only objection of PGCIL with regard to non-release of BG are the infirmities in the LC opened by the Review Petitioner, we direct the Review Petitioner to rectify the infirmities and approach PGCIL in terms of our direction in para 43 (b) for release of the Bank Guarantee.

17. The Review Petition No. 12/RP/2018 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/-
(P.K.Pujari)
Chairperson

