

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 288/MP/2018

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

Date of Order: 19th of December, 2018

In the matter of:

Petition for approval under creation of security interest under Sections 17 (3) and (4) of the Electricity Act, 2003 over the Petitioner No.1`s assets in favour of the Petitioner`s No. 2, its lenders and for any subsequent transferees, assigns, novatees thereof and any refinancing lenders to the project.

And

In the matter of:

1. Jabalpur Transmission Company Limited
F-1, The Mire Corporate Suite,
1 & 2, Ishwar Nagar, New Delhi-110 065
2. ICICI Bank Limited,
ICICI Bank Tower, Near Chakli Circle,
Old Padra Road,
Vadodara, Gujarat-390 007

...Petitioners

Versus

1. Adhunik Power and Natural Resources
Cresscent Towers, 3rd Floor, 229,
AJC Bose Road,
Kolkata-700 020
2. Corporate Power Limited
8th and 9th Floor, Mahabir Towers,
Main Toad, Ranchi, Jharkhand-834 001
3. Essar Power (Jharkhand) Limited,
Essar House, 11 K.K.Road, Mahalaxmi,
Mumbai-400 034
4. West Bengal State Electricity Distribution Company Limited

Bidyut Bhawan, 7th Floor, DJ Block, Sector-II,
Kolkata-700 091

5. M.B Power(Madhya Pradesh) Limited
213 B, Okhla Industrial Area, Phase-III,
New Delhi-110 020.

....Respondents

The following were present:

Shri Sitesh Mukherjee, Advocate, JTCL
Shri Deep Rao, Advocate, JTCL
Shri Rohit Dwivedi, Advocate, JTCL
Shri T.A.N Reddy, JTCL
Shri Harshit Gupta, JTCL

ORDER

The First Petitioner, Jabalpur Transmission Company Limited, has been granted transmission licence under Section 14 of the Electricity Act, 2003 (hereinafter referred to as "the Act") to transmit electricity as a transmission licensee and for that purpose to undertake the business of establishing of the transmission system under 'transmission system for connectivity lines for System Strengthening scheme common for WR and NR' (hereinafter referred to as "Transmission System") on Build, Own, Operate and Maintain (BOOM) basis, the details of which are specified in the schedule attached to the licence issued vide order dated 12.10.2011.

2. The First Petitioner had approached the Commission in Petition No. 168/MP/2012 for approval under Section 17(3) and (4) of the Act to create security of Rs. 876 crore in favour of SBICAP Trustee Company Limited. The Commission vide order dated 12.9.2012 accorded in-principle approval allowing the First Petitioner to create security in favour of SBICAP Company Trustee Ltd. as Security Trustee. Subsequently, for refinancing and raising fresh loan for the project, the First Petitioner

approached the Commission in Petition No. 70/MP/2016 to create security of Rs. 1300 crore in favour of SBICAP Trustee Company Limited. The Commission vide order dated 15.7.2016 accorded in-principle approval allowing the First Petitioner to create security in favour of SBICAP Trustee Company Ltd. as Security Trustee.

3. Jabalpur Transmission Company Limited and ICICI Bank Ltd. have filed the present petition for creation of security in favour of ICICI Limited as Security Trustee.

The Petitioners have made the following prayers:

“(a) Approve the creation of Security Interest, over Petitioner No. 1’s asset to the extent described in the Petition, in favour of Petitioner No. 2 and for subsequent transferees, assigns, novatees thereof and any refinancing lenders to the Project, acting on behalf of and for the benefit of Petitioner No. 2 pursuant to the Sanction Letter dated 13.7.2018, the draft Indenture of Mortgage, and other security creating documents/financing agreements (Financing Agreements) and for future refinancing transactions also, by way of mortgage/hypothecation/assignment of Mortgaged Properties and Project Assets and for amendment of the security documents to include the assigns, transferees and novatees of Petitioner No. 2; and

(b) Pass such other relief as Hon`ble Commission deems fit and appropriate under the circumstances of the case.”

4. The First Petitioner has submitted that the amount of equity share capital has remained constant since 31.3.2014 onwards to this date at Rs. 0.55 crore. The debt-equity ratio at the end of relevant financial year (2012-13) of the first approval, namely as on 31.3.2013 was 53:47. At present, the equity component has increased with the change in project cost and the debt-equity ratio as on 31.3.2018 is 24:76.

5. The First Petitioner requested ICICI Bank Ltd. for refinancing the the entire existing unsecured, short term loan of an aggregate amount of Rs. 423 crore availed

from Kotak Mahindra Bank Ltd. and related transaction expenses. Pursuant to the request of the First Petitioner, ICICI Bank Ltd., agreed to provide financial assistance as requested for an amount not exceeding in aggregate Rs. 425 crore by way of rupee term loan in the sanction letter No. cal1112366078580 dated 13.7.2018 on such terms and conditions as specified therein.

6. The First Petitioner has submitted that it had taken loan of Rs. 423 crore from Kotak Mahindra Bank Ltd. which is unsecured and short-term loan, and loan did not, in any manner, involve the assignment of First Petitioner`s transmission licence or transfer of its transmission project and related project assets by sale, lease, exchange or otherwise. Therefore, Section 17 (3) and (4) of the Act is not attracted with regard to above unsecured, short-term loan as the First Petitioner`s regulated transmission assets were not implicated as part of those short term transactions. Accordingly, prior approval of the Commission was not sought for these loans.

7. The First Petitioner has submitted that for securing the loan of Rs. 425 crore, the First Petitioner has agreed with Petitioner No. 2 to execute an Indenture of Mortgage creating a charge on all assets of the First Petitioner which is presently in draft form and same would be executed after obtaining the Commission`s approval under Section 17 of the Act. The Petitioner has submitted that pursuant to the terms of the draft Indenture of Mortgage for Rs. 425 crore and as continuing security for the payment and discharge of the Facility Agreement, secured obligations and other monies (including any costs, expenses, charges and other monies whatsoever), the First Petitioner as legal and/or beneficial owner has proposed to agree with the conditions

mentioned in the draft Indenture of Mortgage.

8. The First Petitioner has submitted that it has agreed to create security of Rs. 425 crore in favour of the Second Petitioner, namely lender, pursuant to lender's sanction letter dated 13.7.2018, draft Indenture of Mortgage and other financing documents, by way of mortgage/hypothecation/assignment in accordance with the provisions, including clause 13.2 of the draft Indenture of Mortgage and the Financing Agreements. The Petitioner has submitted that as per clause 15 (a) of the draft Indenture of Mortgage, it shall be lawful for the Second Petitioner, at any time without any further consent of the First Petitioner to sell, assign or concur with any other person in selling, assigning the mortgaged property or any part thereof, either by public auction or private contract, the land, leasehold estate, buildings and structures or separately therefrom with liberty to make any arrangements as to the removal of plant, machinery, fixtures, fittings and other implements of the land, building, and structures and with liberty also to make such conditions or stipulations that the Second Petitioner may deem proper.

9. The First Petitioner has submitted that Article 15.2.2 of the TSA entered into between the First Petitioner and the beneficiaries of the project provide that the First Petitioner is free to create any encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the representative of the lenders as security for amount payable under the Financing Agreements and any other amounts agreed by the parties.

10. The First Petitioner has submitted that in terms of Article 15.2.4 of the TSA, the

Petitioner is required to take permission from this Commission prior to assignment of its rights, benefits, interests and obligations in the TSA. The First Petitioner has stated that in view of the provisions of sub-sections (3) and (4) of Section 17 of the Act, the First Petitioner, prior approval is essential for creation of security interest over the project assets and tie up the necessary financing.

11. The petition was heard after notice to the Petitioners and the Respondents on 15.11.2018. None was present on behalf of the Respondents. No reply has been filed by the respondents.

12. The First Petitioner, vide Record of Proceedings for the hearing dated 15.11.2018, was directed to file the following information:

- (a) Reasons for not taking the Commission's approval for the loan availed from Kotak Mahindra Bank, and
- (b) Copy of the sanction letter dated 13.7.2018.

13. The First Petitioner has submitted the information called for which has been discussed in succeeding paragraphs

Analysis and Decision:

14. After grant of licence, the First Petitioner approached the Commission by way of Petition No.168/MP/2012 for creation of security interest for an amount of Rs. 876 crore in favour of Security Trustee, SBICAP Trustee Company Ltd. acting as Security Trustee for the benefit of State Bank of India consortium. Approval was accorded vide order dated 12.9.2012.

15. On account of delay in execution of the project resulting in cost over-run, the First Petitioner approached other lenders to refinance the loan and raising the fresh loan. The First Petitioner got the rupee term loan of Rs. 1300 crore comprising (i) Rs. 1120 fresh loan and (ii) Rs. 140 crore for refinance the outstanding loan and approached the Commission for creation of security interest for an amount of Rs. 1300 crore in favour of Security Trustee, namely SBICAP Trustee Company Limited. The Commission in its order dated 15.7.2016 in Petition No. 70/MP/2016 accorded approval for creation of security interest. The First Petitioner has paid the entire loan of Rs. 1300 crore to the lenders. SBICAP Trustee Company Ltd. acting as a Security Trustee on behalf of the lenders vide its letter dated 4.9.2017 has submitted that it has received no due certificate (s) from confirming repayment of Rs. 1300 crore and has given no due certificate in this regard.

16. Subsequently, the First Petitioner got un-secured loan of Rs. 423 crore from Kotak Mahindra Bank. The First Petitioner, vide Record of Proceedings for the hearing dated 15.11.2018 was directed to explain the reasons for not taking the Commission's approval for the loan availed from Kotak Mahindra Bank. The Petitioner vide affidavit dated 26.11.2018 has submitted that the loan of Rs. 423 crore availed from Kotak Mahindra Bank was an unsecured loan with no recourse whatsoever to the Petitioner's transmission project and did not, in any manner, involve the assignment of its transmission licence or transfer of its transmission project and related projects assets by sale, lease, deed, exchange or otherwise create any charge or lien on the transmission assets of the First Petitioner. According to the First Petitioner, since its regulated transmission assets were not implicated as part of this short-term transaction, the

Commission`s prior approval under Section 17 (3) & (4) of the Act was not sought in this regard. We are not in agreement with the contention of the First Petitioner. The present petition has been filed for refinancing the existing term loan of Rs. 423 crore taken from Kotak Mahindra Bank. Since, the First Petitioner had taken loan from Kotak Mahindra Bank on behalf of the transmission project, we take a serious view of the matter and warn the First Petitioner to invariably seek prior approval of the Commission before taking loan from the lenders as in such cases new charge is created on the transmission assets and the transmission licence.

17. The First Petitioner and ICICI Bank Ltd. have filed the present petition for seeking prior approval of the Commission for creation of security interest in favour of lender, namely ICICI Bank Ltd. The Petitioner approached the lender for a rupee term loan for Rs. 425 crore for the purpose of refinancing the entire existing term loan of Rs. 423 crore availed from Kotak Mahindra Bank Limited and transaction expenses related to availing of the facility on the terms subject to the conditions contained in the Rupee Loan Facility Agreement dated 30.7.2018 entered into between the First Petitioner and the lender. The lender vide its letter dated 13.7.2018 has agreed to grant Rupee term loan of Rs. 425 crore to the First Petitioner subject to the terms and conditions set out therein and conditions contained in the documents to be executed in this regard. The First Petitioner has agreed with Second Petitioner to execute an Indenture of Mortgage creating a charge on the all assets of the First Petitioner after obtaining the approval of the Commission.

18. The transmission projects are capital intensive projects requiring huge capital investment. These projects are financed through equity of the project developer and loans by the financial institutions and issuance of debentures which is a form of loan. It is a normal practice followed by financial institution/banking industry to ask for sufficient security from the borrower to back the loan in order to mitigate the credit risk of the lenders. In the instant case, the Second Petitioner, namely ICICI Bank Ltd. has agreed to provide loan of Rs. 425 crore to the First Petitioner for which draft Indenture of Mortgage has been finalized and executed upon the Commission`s approval for creation of security over all the movable and immovable assets of the project. In accordance with Article 15.2 of the TSA, the Transmission Service Provider has been allowed to create encumbrance over all or part of the receivables, Letter of Credit or other assets of the project in favour of the lenders or the lender`s representatives, as security for amounts payable under the Financing Agreements and any other amounts agreed by the parties.

19. Section 17 (3) and (4) of the Act provides as under:

“17(3). No licensee shall be any time assign his licence or transfer his utility, or any part thereof, by sale, lease, exchange or otherwise without the prior approval of the Appropriate Commission.

(4) Any agreement relating to any transaction specified in sub-section (1) or sub-section (3), unless made with the prior approval of the Appropriate Commission, shall be void.”

As per the above provision, a licensee is required to obtain prior approval of the Commission for assigning his licence or transfer its utility or any part thereof by way of sale, lease, exchange or otherwise and to enter into an agreement relating to any of these transactions.

20. The First Petitioner has approached for approval to creation of security interest in favour of ICICI Bank Ltd. In our view, ICICI Bank Ltd. acting as account bank on behalf of the lender needs to be given comfort for creation of security for the benefit of the lender/banks/financial institutions/non-banking financial companies as security for the financial assistance provided by the lender. We, therefore, accord in-principal approval allowing the First Petitioner to create security in favour of ICICI Bank Limited, by way of mortgage on project assets by execution of Indenture of Mortgage and refinancing documents for the project. The First Petitioner is directed to submit copy of signed copies of Indenture of Mortgage and refinancing documents for the project immediately after their execution.

21. It is, however, made clear that the transmission licence granted by the Commission to the First Petitioner and the underlying assets cannot be assigned in favour of the nominee of the lender unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. Before agreeing to assignment of licence and the assets of the First Petitioner to the nominee of lender, the Commission shall evaluate such nominee's experience in development, design, construction, operation and maintenance of the transmission lines, and ability to execute the project and undertake transmission of electricity. The licensee, lenders, debenture trustee or its nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself about the circumstances necessitating such transfer. This decision of ours is in accordance with Regulation 12 of the Central Electricity Regulatory Commission

(Procedure, Terms and Conditions for grant of Transmission Licence and other related matters) Regulations, 2009 which reads as under:

“12. Assignment of Licence In case of default by the licensee in debt repayment, the Commission may, on an application made by the lenders, assign the licence to a nominee of the lenders.”

Accordingly, in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lender or its nominee, approve the assignment of the licence to a nominee of the lender subject to proper due diligence of the process. Therefore, specific prior approval of the Commission shall be necessary for assigning the licence to the lender or its nominee and transfer of any assets to them. Lastly, finance documents and statements shall be filed by the Petitioner as and when required by the Commission for any specific purpose.

22. This approval is issued in supersession of all earlier approvals including approval dated 15.7.2016 in Petition No. 70/MP/2016 under Section 17 (3) and (4) of the Act to the First Petitioner.

23. Petition No. 288/MP/2018 is disposed of in terms of the above.

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

sd/-
(P.K. Pujari)
Chairperson