

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 16/RP/2019

in

Petition No. 242/MP/2017

Coram:

Shri P.K. Pujari, Chairperson

Dr. M. K. Iyer, Member

Date of order: 26th December, 2019

In the matter of

Review Petition under Section 94 of the Electricity Act, 2003 read with Regulations 103, 111 and 114 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 3.12.2018 in Petition No. 242/MP/2017.

And

In the matter of

Power Grid Corporation of India Limited
Saudamini, Plot No. 2,
Sector-29, Gurgaon-122 001

... Review Petitioner

Versus

Aryan MP Power Generation Private Limited
129, Transport Centre,
Rohtak Road, Punjabi Bagh,
New Delhi – 110 035

....Respondent

Parties Present:

Ms. Suparna Srivastava, Advocate, PGCIL
Ms. Jyoti Prasad, PGCIL
Dr. V. N. Paranjape, PGCIL
Shri Swapnil Verma, PGCIL
Shri Ranjeet Rajput, PGCIL
Shri Matrugupta Mishra, Advocate, Aryan MP
Shri Samyak Mishra, Advocate, Aryan MP
Shri Praveen Kataria, Aryan MP

ORDER

The Review Petitioner, Power Grid Corporation of India Ltd., has filed the present Review Petition under Section 94 of the Electricity Act, 2003 (hereinafter referred to as

the “Act”) read with Regulations 103, 111 and 114 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 3.12.2018 in Petition No. 242/MP/2017 wherein the Review Petitioner was directed to refund the Bank Guarantee after adjustment of the relinquishment charges to the Respondent, Aryan MP Power Generation Private Limited with 9% interest from the date of encashment till the date of payment.

Brief Facts of the case

2. Aryan MP Power Generation Pvt. Ltd had filed Petition No. 242/MP/2017 with the following prayers:

“(a) Declare the letter of invocation of Bank Guarantee dated 23.10.2017 and thereafter the encashment of the subject Bank Guarantee dated 23.2.2010 of an amount of Rs. 56.1 crore issued by the Axis Bank Ltd., as illegal;

(b) Direct PGCIL to return the amount encashed under bank guarantee, bearing No. 00070100004994 dated 23.2.2010, for an amount of Rs. 56.10 crore, issued by Axis Bank Ltd., on behalf of the Petitioner with interest.

(c) Direct PGCIL to pay damages of Rs. 10,00,00,000 to the Petitioner towards the business loss, loss of goodwill, reputation, bankability of the assets and creditworthiness due to the illegal invocation and encashment of Bank Guarantee by PGCIL.”

3. The Commission, after hearing the parties, in its order dated 3.12.2018, *inter alia*, had observed as under:

“20. The Petitioner in the second prayer has prayed to direct PGCIL to return the encashed BG. The Petitioner has contended that despite observing the latest development of invocation and encashment of BG by PGCIL in the order dated 31.10.2017, the Commission did not issue any direction with regard to return of BG. It is pertinent to mention that while finalizing the impugned order, it came to the notice of the Commission through the Writ Petition (C) No. 9386 of 2017 filed by the Petitioner and order passed by the Hon`ble High Court in the said Writ Petition that PGCIL invoked the BG on 23.10.2017 and thereafter the Petitioner withdrew the Writ Petition. Accordingly, the Commission considered the fact of encashment of BG and observed that in the light of the said development, the prayers of the 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 return of BG. It is noted that BG given by the Petitioner indicates that the BG can be encashed notwithstanding any difference between the Petitioner and the Respondent or any dispute pending between them. Therefore, pendency of the Petition No. 69/MP/2014 cannot come in the way of PGCIL to encash the BG in the absence of any stay on such encashment.

21. In the third prayer, the Petitioner has prayed to direct PGCIL to pay damage to the Petitioner due to illegal invocation of BG. In view of our findings that there was no infirmity or illegality in the action of PGCIL to encash the BG, this prayer is not sustainable.

22. Since, the Petitioner has relinquished the LTA granted and the liability of the Petitioner for payment of relinquishment charges shall be decided in the light of the decision in Petition No. 92/MP/2015, we are of the view that there is no requirement to direct PGCIL to refund the encashed BG at this stage. However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to the Petitioner with 9% interest from the date of encashment till the date of payment.”

4. Aggrieved by the said decision of the Commission, the Review Petitioner has made the following prayers:

“(a) Admit the present Review Petition and review and modify the order dated 3.12.2018 to the extent sought in the above Petition; and

(b) Pass such further and other order(s) as this Commission may deem fit and proper in the facts and circumstances of the present case.”

Submissions of the Review Petitioner

5. The Review Petitioner has submitted that in the impugned order dated 3.12.2018, while adjudicating on the issue as to whether the Respondent is entitled to refund of Bank Guarantee in the facts of the case and in light of the order dated 31.10.2017 in Petition No. 69/MP/2014, the Commission found no infirmity in the invocation of Bank Guarantee by the Review Petitioner. The Review Petitioner has further submitted that the Commission in the impugned order also observed that since the Respondent has relinquished the Long Term Access granted to it and its liability for payment of relinquishment charges is to be calculated in the light of decision in Petition No. 92/MP/2015, there was no requirement to direct the Review Petitioner to refund the

encashed Bank Guarantee at that stage. Accordingly, the Review Petitioner was directed that if any amount becomes due and payable after adjustment of the relinquishment charges, the same is to be refunded to the Respondent with 9% interest from the date of encashment till the date of payment. However, in observing so, the Commission inadvertently omitted to consider that there was no finding in the order as regards any wrongful detention of monies by the Review Petitioner. On the contrary, there is a clear finding that the invocation and encashment of the Bank Guarantee is in accordance with the contractual arrangement and, therefore, the erroneously fastened interest liability has to be rectified.

6. Notices were issued to the Respondent to file reply. Reply to the Review Petition has been filed by the Respondent. The Respondent vide its reply dated 21.11.2019, has submitted that the Petition filed under Section 94 of the Electricity Act, 2003 is totally misconceived and is liable to be dismissed and has mainly submitted as under:

(a) The Review Petition is not maintainable as the requisite grounds required to be fulfilled for maintaining an application for review of the order are not met by PGCIL. Order 47 Rule 1 of the Code of Civil Procedure, 1908 provides limited and narrow grounds for seeking review and the present Review Petition is not covered under them. In its support, the Respondent has placed its reliance on the judgments of Hon'ble Supreme Court in the cases of (i) Ajit Kumar Rath v. State of Orissa and Ors., [AIR 2000 SC 84], (ii) Parison Devi and Ors. v. Sumitra Devi & Ors., [(1997) 8 SCC 715], (iii) State of West Bengal v. Kamal Sen Gupta, [(2008) 8 SCC 612].

(b) The issues decided under an original proceeding, cannot be re-agitated by way of seeking a review of the order passed pursuant to the original proceedings. If PGCIL is aggrieved by the attachment of 9% interest, it ought to have preferred

an appeal against the order and should not have approached the Commission by way of the present Review Petition.

(c) Contention of the Review Petitioner that the Commission has found no infirmity with the invocation and encashment of Bank guarantee by PGCIL and, therefore, it has committed an error in attaching the said interest liability is baseless and devoid of any merit and there is no error apparent on the face of record.

(d) While the issue of relinquishment of LTA was pending adjudication in Petition No. 92/MP/2015 in which PGCIL was a party, PGCIL arbitrarily invoked the Bank Guarantee vide impugned letter dated 23.10.2017 without any cause of action, in violation of the order dated 21.7.2015 in Petition No. 92/MP/2015.

(e) The Respondent has a vested right in claiming interest on prematurely/ wrongfully encashed Bank Guarantee in terms of clear stipulations under the BPTA along with jurisprudence in this regard laid down by the various courts/ tribunal. In this regard, the Respondent has placed its reliance on the judgments of Hon'ble Supreme Court in the cases of (i) Central Bank of India v. Ravindra and Ors., [(2002) 1 SCC 367], and (ii) Secy. Irrigation Dept., Govt. of Orissa v. G. C. Roy & Ors. [(1992) 1 SCC 508].

(f) Once the amount of Rs. 56.10 crore under the Bank Guarantee was debited from the Respondent's account, the liability to pay interest on the remainder amount from the date of encashment, *ipso facto*, gets attached to PGCIL in terms of the settled principles qua payment of interest/ compensation.

(g) The Respondent has filed an appeal against the impugned order which is pending before the Appellate Tribunal bearing Appeal No. 218/2019, wherein, *inter-alia*, it has been pleaded that the invocation and subsequent encashment of Bank Guarantee was void and illegal under the facts and circumstances of the case as there exist special equities in favour of Respondent in as much as Bank

Guarantee was sought to be encashed even though no fault of Respondent qua commissioning of the Project.

(h) The Respondent has filed Petition No. 282/MP/2019 before the Commission, regarding non-compliance of the express directions of the Commission that any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to Respondent with 9% interest from the date of encashment till the date of actual payment. It is pertinent to note that in terms of the aforesaid order dated 3.12.2018 read with the order dated 8.3.2019 in Petition No. 92/MP/2015, the Review Petitioner quantified the applicable relinquishment charges on 20.5.2019 by way of notification dated 20.5.2019.

Analysis and Decision

7. We have considered the submissions of the Review Petitioner and the Respondent. We have also perused the documents available on record. The Review Petitioner has sought review of the impugned order dated 3.12.2018 on the ground that the Commission's direction to refund the Bank Guarantee after adjustment of the relinquishment charges to the Respondent, Aryan MP Power Generation Private Limited with 9% interest from the date of encashment till the date of payment, is an error apparent on face of record.

8. The Review Petitioner has submitted that in the impugned order, there is no finding as regards any wrongful detention of monies by the Review Petitioner and rather there is a clear finding that the invocation and encashment of Bank Guarantee was in accordance with contractual arrangement. Therefore, the interest liability has erroneously been fastened on the Review Petitioner and such error is required to be

rectified. The Review Petitioner has submitted that it is settled position of law that interest can be granted either under an agreement, based on usage of trade under a statutory provision, under the Interest Act, 1978 or on the basis of equity. Under the BPTA executed between the Review Petitioner and the Respondent, the Connectivity Regulations as well as the Interest Act, 1978, there is no provision for award of interest at the time of refund/ return of Bank Guarantee. Therefore, the Commission has committed an error apparent on the face of record while exercising its equitable jurisdiction and awarding interest in favour of the Respondent. The Review Petitioner, in support of its contention, has relied upon the judgments of Hon'ble Supreme Court in the cases of (i) Trojan & Co v. Nagappa Chettiar [1953 SCR 789], (ii) South Eastern Coalfields Limited v. State of M.P. [(2003) 8 SCC 648], and (iii) India Council for Environmental Legal Action v. Union of India [(2011) 8 SCC 161].

9. *Per contra*, the Respondent has submitted that the Review Petition is not maintainable in terms of the limited grounds available for review under Section 94(1)(f) of the Act read with Order 47 Rule 1 of the Code of Civil Procedure, 1908. There is also no error apparent on the face of record in the impugned order. The Respondent, in support of its contentions, has relied upon the judgments of Hon'ble Supreme Court in the cases of (i) State of West Bengal v. Kamal Sen Gupta [(2008) 8 SCC 612] and (ii) Parsion Devi & Ors. v. Sumitri Devi & Ors. [(1997) 8 SCC 715]. The Respondent has submitted that in terms of the settled principle of law, a person, deprived of the use of money to which he is legitimately entitled to, has right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages. However, in the instant case, the Respondent has been deprived of the legitimate use

of the Bank Guarantee amount, albeit after the adjustment towards the relinquishment charges, from the day the Bank Guarantee was encashed. Therefore, the Respondent is entitled for interest on the refund of the balance amount. The Respondent has submitted that disbursement of amount under the Bank Guarantee in the POC pool account is of no consequence. In support, the Respondent has relied upon the judgment of Hon'ble Supreme Court in the case of Executive Engineer, Dhenkanal Minor Irrigation Division Orissa, and Ors. v. N. C. Budharaj (Deceased) by Lrs. and Ors. [(2001) 2 SCC 721]. The Respondent has submitted that the conduct of the Review Petitioner in invoking the Bank Guarantee was itself arbitrary in the first place as the Review Petitioner invoked the Bank Guarantee while the substantial question of relinquishment and consequential liability was pending for adjudication and in violation of the Record of Proceeding dated 21.7.2015 in Petition No. 92/MP/2015.

10. With regard to imposition of 9% interest on the amount to be refunded back to the Respondent after adjustment of the relinquishment charges, the Commission in the impugned order dated 3.12.2018 had observed as under:

22. Since, the Petitioner has relinquished the LTA granted and the liability of the Petitioner for payment of relinquishment charges shall be decided in the light of the decision in Petition No. 92/MP/2015, we are of the view that there is no requirement to direct PGCIL to refund the encashed BG at this stage. However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to the Petitioner with 9% interest from the date of encashment till the date of payment."

11. The Review Petitioner has contended that the amount under the Bank Guarantee encashed as per the provisions of the BPTA is never retained by the Review Petitioner but it is disbursed in the POC pool as per the Billing, Collection and Disbursement Procedure issued under the Central Electricity Regulatory Commission (Sharing of

Transmission Charges and Losses) Regulations, 2010 and accordingly, there is no question of earning of interest thereon. The Review Petitioner has submitted that there has been no instance wherein the Commission has directed to refund the Bank Guarantee along with interest even though direction for adjustment of encashed Bank Guarantee with liability towards relinquishment charges had been passed in various Petitions.

12. During the course of hearing, learned counsel for the Respondent submitted that the Respondent has vested right in receiving the interest on the encashed bank guarantee amount in terms of settled principles of law laid down by the Hon`ble Supreme Court in the case of Executive Engineer, Dhenkanal Minor Irrigation Division, Orrisa and others Vs. N.C. Budharaj (Deceased) by Irs. and others [(2001) 2SCC 721] in which the Hon`ble Supreme Court held that a person deprived of the use of money to which he was legitimately entitled, has a right to be compensated for the deprivation by whatever name it may be called, viz, interest, compensation or damages.

13. The Commission, in the order dated 3.12.2018 in Petition No. 242/MP/2017, had come to the conclusion that the Respondent herein (Aryan) had relinquished the LTA granted and the liability of the Respondent for payment of relinquishment charges would be decided in the light of the decision in Petition No. 92/MP/2015 and observed that there was no requirement to direct the Review Petitioner to refund the encashed BG. The Commission further observed that any amount that becomes due and payable after adjustment of the relinquishment charges, is required to be refunded by the Review Petitioner with 9% interest from the date of encashment till the date of payment.

However, the Commission in Para 22 of the impugned order had not issued any specific direction to CTU to keep the encashed BG in a separate/ fixed account till the disposal of the Petition No. 92/MP/2015. According to the Review Petitioner, when a Bank Guarantee is encashed by CTU as per the provisions of the BPTA, the encashed Bank Guarantee amount is disbursed to the POC pool and there is no question of earning of interest thereon. The Review Petitioner has further submitted that in the present case, the Bank Guarantee has been retained by it as per the Commission's order and therefore it cannot be termed as wrongful detention of monies and interest thereon. Moreover, CTU has been dealing with the LTA matters in discharge of its statutory functions under Section 32 of the Act and not as a commercial entity. The Respondent has submitted that CTU encashed its BG of Rs. 56.10 crore on 23.10.2017 and pursuant to the Commission's order dated 8.3.2019 in Petition No. 92/MP/2015, CTU calculated the relinquishment charges as Rs. 24.58 crore. The Respondent has submitted that after adjustment of relinquishment charges, CTU returned Rs. 27.09 crore without interest to the Respondent.

14. In terms of the Orders of the Commission, the encashed Bank Guarantee amount was not to be disbursed to the PoC pool and had to be retained by the Review Petitioner. Rather the Review Petitioner was required to adjust the encashed BG amount once order in Petition No. 92/MP/2015 was issued. Hence, the contention of the Review Petitioner that the amount encashed under the Bank Guarantee is disbursed to the POC Pool by CTU and there is no question of earning of interest thereon, is not justified in present case. Therefore, PGCIL is liable to pay the interest earned on encashed BG (after adjustment of relinquishment charges) amount from the date of

encashment till the date of payment as per order in Petition No. 92/MP/2015.

Accordingly, we modify the last sentence of Para 22 of the impugned order as under:

“However, if any amount becomes due and payable after adjustment of the relinquishment charges, the same shall be refunded by PGCIL to the Petitioner with any interest earned from the date of encashment till the date of payment.”

15. Review Petition No. 16/RP/2019 is disposed of in terms of the above.

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

sd/-
(P.K.Pujari)
Chairperson