



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No.: 22/RP/2020 alongwith IA No. 48 of 2020
in
Petition No. 69/MP/2019

कोरम/ Coram:

श्री पी. के. पुजारी, अध्यक्ष/ Shri P. K. Pujari, Chairperson
श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member

आदेश दिनांक/ Date of Order: 31st of August, 2021

IN THE MATTER OF:

Review petition under Section 79(1)(f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of Order dated 04.10.2019 passed by this Hon'ble Commission in Petition No. 69/MP/2019.

And in the matter of

Phelan Energy India RJ Pvt. Limited,
Office Number 409, Southern Park Building,
District Centre, Saket,
(Landmark - Backside of Select City Walk Mall)
New Delhi – 110017

...Review Petitioner

Versus

1. Solar Energy Corporation of India Limited,
Represented Through Director (Finance),
D-3, First Floor, A wing, District Centre,
Saket, New Delhi - 110017

2. Jaipur Vidyut Vitran Nigam Limited,
Represented through Superintending Engineer (IT),
Vidyut Bhawan, Janpath Jyoti Nagar,
Jaipur -302005
3. Ajmer Vidyut Vitran Nigam Limited,
Represented through Additional Chief Engineer (IT),
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road, Ajmer – 305004
4. Jodhpur Vidyut Vitran Nigam Limited,
Represented through Nodal officer, Superintending Engineer (IT),
New Power House, Jodhpur – 342003
5. M/s Rajasthan Urja Vikas Nigam Limited,
Through its authorized signatory,
Vidyut Bhawan, Janpath, Jyot Nagar,
Jaipur- 302005, Rajasthan

...Respondents

Parties present: Shri Sujit Ghosh, Advocate, PEIRJL
Ms. Mannat Waraich, Advocate, PEIRJL
Shri Toshin Bishnoi, Advocate, PEIRJL
Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Srishti Khindaria, Advocate, SECI
Ms. Neha Singh, SECI
Shri Ajay Kumar Sinha, SECI
Shri Abhinav Kumar, SECI
Shri Uday Pavan Kumar Kruthiventi, SECI

आदेश/ ORDER

The Review Petitioner, Phelan Energy India RJ Pvt. Limited, has filed the present Review Petition alongwith I.A. with the following prayers:

Prayers in Review Petition No. 22/RP/2020

- (a) Allow the present Review Petition;
- (b) Modify Order dated 04.10.2019 in Petition No. 69 /MP/2019 to allow for compensation on account of imposition of safeguard duty for import of solar cells

- and modules even beyond the commissioning of the project;*
- (c) *Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.*

Prayers in I.A. No. 48/2020

- (a) *Condone delay of days in filing the Petition; and*
- (b) *Pass such order(s) as this Commission may deem fit and proper in facts and circumstances of the present case.*

2. The matter was heard on 18.06.2021 through video conferencing.
3. During the course of hearing, the learned counsel for the Review Petitioner referred to Order dated 04.10.2019 in Petition No. 69/MP/2019 and submitted that the impugned Order is inconsistent with the subsequent Orders of the Commission in which the claims of safeguard duty has been allowed beyond Scheduled Commissioning Date ('SCoD') and up to Commercial Operation Date ('COD') of the project. The relevant portion of the impugned order dated 04.10.2019 is as under:

"85. The decisions in this Order are summed up as under:

a. Issue No.1: The imposition of the "Safeguard Duty" vides Notification No. 1/2018 (SG) dated 30.07.2018 is squarely covered as the event classified as "Change in Law" under first, second and last bullet of Article 12 of the PPAs. The Commission directs the Petitioners to make available to the Respondent No.1 all relevant documents exhibiting clear and one to one correlation between the projects and the supply of imported goods till Scheduled Commissioning date duly supported by relevant invoices and Auditor's Certificate. ..."

4. The learned counsel for the Review Petitioner further submitted that the restriction of claims of safeguard duty up to COD as held in line with claims under GST Laws is also not correct as the entire concept of 'time of supply of goods' as applicable in respect of GST Laws is not relevant to safeguard duty. As per the provisions of Customs Tariff Act, 1975 and Customs Act, 1962, the obligation of payment of safeguard duty and determination of its rate would be on the basis of date on which a bill of entry in respect of such goods is presented. In this regard, reliance was placed on Section 8B(4A) of the Customs Tariff Act, 1975 and Sections 12, 15 and 17 of the Customs Act, 1962.

5. The learned counsel for the Review Petitioner has submitted that as per the contractual arrangement with EPC contractor, the modules were imported by the contractor and the safeguard duty in relation to the same was paid by them. As evident from Bill of Entry, all the modules were imported and liability to pay safeguard duty in relation to the same accrued prior to COD. However, solely due to operational reasons, the invoicing by contractor to the Review Petitioner was delayed and actual payment of safeguard duty by the Petitioner to its contractor took place after COD. As a result, SECI has disallowed the total claims of approximately Rs. 5.44 crore citing them to be beyond COD even though Bill of Entry (7.12.2018 and 18.12.2018) for such claims was prior to its COD (i.e. 22.12.2018).
6. Review Petitioner vide IA No. 28/2020 has submitted that there is a delay of 161 days in filing the instant Review Petition. The delay has occurred mainly on account of the Petitioner being occupied in truing up its account and collecting documents/ details for submission of incremental impact of change in law expenditure, significant management changes and outbreak of Covid-19 and consequent lockdown. As such, it has prayed that the delay in filing the Review Petition may be condoned. SECI has submitted that there is an inordinate delay in filing this review petition for which the Review Petitioner has not given any justifiable reasons. In its various Orders, the Commission has disallowed the Review Petitions filed with such delay for no valid reasons. We have considered the submissions of the parties. After considering the reasons for delay in filing this Review Petition, the delay of 161 days in filing this petition is condoned.
7. The learned counsel of the Respondent No. 1 (SECI) stated that it has already allowed and considered the claims of safeguard duty with respect to COD instead of SCoD in line with subsequent decisions of the Commission. The Commission has considered COD as cut-off date for consideration of the claims of safeguard duty. Accordingly, for claiming the safeguard duty, evidence has to be produced regarding the solar cells/ modules having been installed prior to COD. Despite the contractor having imported the solar cells/ modules prior to COD, there has been considerable delay in invoicing of such cells/ modules onto the Project company/ generator, which clearly indicates certain elements of mismatch therein. There are no cogent reasons as to why the safeguard duty has not been paid by the Petitioner

to the contractor before COD if such solar modules/ cells have been imported prior to COD and have been installed at the site. Also, there is no evidence available regarding installation of such modules/ cells at the project site by COD and one to one correlation between the modules/ cells imported and those that are installed up to COD has not been established. It is precisely for this reason that the cut-off date for claims of safeguard duty has been prescribed as up to COD of the project.

8. We have considered the submissions of the parties and perused the documents on record. As per the provisions of Order 47 Rule 1 of Code of Civil Procedure, 1908, an application of review would be maintainable on account of (i) discovery of a new and important piece of evidence, which after the exercise of due diligence was not within knowledge or could not be produced at the time when the order was passed, or (ii) there exists an error apparent on the face of record, or (iii) any other sufficient reason.
9. Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 stipulates as under:

“Amendment of Orders
103A. Clerical or arithmetical mistakes in the orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Commission either of its own motion or on the application of any of the parties.”
10. The Review Petitioner has submitted that the impugned Order dated 04.10.2019 in Petition No. 69/MP/2019 is inconsistent with the subsequent Orders of the Commission and that the same may be modified to allow for compensation on account of imposition of safeguard duty for import of solar cells and modules even beyond the date of commissioning of the project. The Review Petitioner has submitted that SECI has disallowed the total claims of approximately Rs. 5.44 crore citing such claims to be beyond the COD even though Bill of Entry (07.12.2018 and 18.12.2018) for such claims was prior to its COD (i.e. 22.12.2018).
11. The Commission vide the impugned Order dated 04.10.2019 in Petition No. 69/MP/2019 had allowed the claims of safeguard duty up to SCoD. However, SECI has submitted that it has already allowed and considered the claims of safeguard duty with respect to COD instead of

SCoD in line with subsequent decisions of the Commission. We further observe that SECI has submitted that there is no evidence available regarding installation of such modules/cells at the project site by COD and the one to one correlation between the modules/cells imported and those that are installed up to COD has not been established.

12. The Review Petitioner has neither pointed out any grounds for review of the impugned Order, nor pointed out any reasons for invocation of Regulation 103A of the CERC (Conduct of Business) Regulations, 1999. The prayer of the Review Petitioner is not covered under any of the grounds of review as provided in Order 47 Rule 1 of Code of Civil Procedure, 1908. Review of an order on the basis of decisions in subsequent petitions is not permissible in law. However, we do note that the Respondent No.1, SECI, has already allowed the claims of safeguard duty with respect to COD instead of SCoD in line with subsequent decisions of the Commission. Thus, as submitted by SECI, in implementation, the impugned Order dated 04.10.2019 in Petition No. 69/MP/2019 stands consistent with the subsequent Orders of the Commission in which the claims of safeguard duty has been allowed beyond SCoD and up to COD of the project. Hence, there is no ground for review of the impugned Order and as such the Review Petition is not allowed.
13. Review Petition No. 22/RP/2020 alongwith I.A. No. 48/2020 in Petition No. 69/MP/2019 is disposed of in terms of the above.

Sd/-
आई. एस. झा
(सदस्य)

Sd/-
पी. के. पुजारी
(अध्यक्ष)