

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 26/RP/2020 along with IA No.52/2020
In
IA No.69/2019 in Petition No. 202/MP/2018**

Coram:

**Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 24th July, 2021

In the matter of:

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 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 for review of order dated 9.6.2020 in Petition No. 202/MP/2018.

And

In the matter of

Central Transmission Utility,
(formerly Power Grid Corporation of India Limited),
B-9, Qutab Industrial Area,
Katwaria Sarai,
New Delhi – 110 016.

...Review Petitioner

Vs.

1. Lanco Amarkantak Power Limited,
397, Udyog Vihar, Phase- III,
Gurugram, Haryana – 122 016.

2. Allahabad Bank,
Industrial Finance Branch,
6-3-850/3, 1st Floor, Hyderabad,
Telangana – 500 016.

...Respondents

Parties present:

Ms. Suparna Srivastava, Advocate, CTU
Shri Tushar Mathur, Advocate, CTU
Ms. Soumya Singh, Advocate, CTU
Shri Deepak Khurana, Advocate, LAPL

ORDER

The Review Petitioner, Central Transmission Utility (CTU) has filed the present Review Petition under Section 94 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 and Order 47 Rule 1 of the Code of Civil Procedure, 1908 seeking review of the Commission's order dated 9.6.2020 passed in IA No.69/2019 in Petition No. 202/MP/2018 (hereinafter referred to as 'impugned order'). The Review Petitioner has prayed for as under:

“(a) admit the present Review Petition and review and rectify the Order dated 9.6.2020 passed in IA No. 69/2019 in Petition No.202/MP/2018 on the aspects set out hereinabove;

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

Brief Background

2. Respondent No.1, Lanco Amarkantak Power Limited (LAPL) is setting-up a 2x660 MW (1320 MW) (Units 3 & 4) coal based thermal power project (hereinafter referred to as 'the Project') at Village Pathadi, District Korba in the State of Chhattisgarh, with Lanco Infratech Limited being the EPC contractor and the promoter of LAPL. LAPL has entered into Bulk Power Transmission Agreement (BPTA) dated 24.2.2010 with CTU for availing Long-Term Access (LTA) for transfer of power and furnished Bank Guarantee (BG) of Rs. 42.90 crore in favour of CTU under the provisions of BPTA. On 6.8.2012, LAPL entered into Transmission Service Agreement (TSA) with CTU in terms of the Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as “the 2010 Sharing Regulations”).

3. As per Clause 6 of BPTA, in the event of the Respondent No. 1 failing to

construct its generating station/ dedicated transmission system or making an exit or abandoning the Project, CTU shall have the right to collect the transmission charges and/or damages and may encash BG in case of adverse progress of individual generating units assessed during the coordination meetings.

4. Admittedly, the execution of the Project including the construction of dedicated transmission line was delayed. According to LAPL, there were unexpected delays in obtaining various statutory clearances/ approvals from Central/ State Government Authorities and delay in obtaining land from the State Government, etc. that were beyond the control of LAPL, which consequently led to delay in commissioning of the Project including dedicated transmission lines. Further, Corporate Insolvency Resolution Process (CIRP) was initiated against Lanco Infratech Limited, promoter company of the Petitioner and EPC contractor for execution of the Project including the dedicated transmission line, pursuant to the order dated 7.8.2017 of National Company Law Tribunal (NCLT), Hyderabad bench leading to the Project works being completely stalled.

5. CTU vide its letters dated 4.7.2017, 23.8.2017 and 12.9.2017 had asked LAPL to open Letter of Credit (LC) of Rs. 47.92 crore in terms of BPTA and TSA as required as transmission system for evacuation of power from the generating units of LAPL was to be commissioned shortly. In response, LAPL submitted that it was not liable to pay the transmission charges as the delay in execution was on account of occurrence of various change in law and force majeure events.

6. On account of non-opening of LC and non-payment of transmission charges, CTU vide its letter dated 27.6.2018 encashed BG of 42.90 crore. Aggrieved by the aforesaid action of CTU, LAPL filed Petition No. 202/MP/2018, *inter-alia*, for setting

aside/quashing of letter of CTU dated 27.6.2018 and to restrain CTU from taking any coercive steps/ actions under BPTA dated 24.2.2010 including in respect of BG dated 29.1.2010.

7. During the pendency of the Petition No.202/MP/2018, LAPL filed Interlocutory Application (IA) No. 69/2019, seeking amendments to the pleadings/ prayers and to bring on record subsequent facts along with documents in Petition No.202/MP/2018. In the said IA, LAPL submitted that during the pendency of the Petition No. 202/MP/2018, CTU vide its letter dated 28.11.2018 unilaterally terminated TSA dated 6.8.2012 and further vide its letter dated 13.12.2018 revoked LTA (858 MW) granted to LAPL. Accordingly, vide amendments to pleadings/prayers to Petition No. 202/MP/2018, LAPL sought to include the challenge to the above-mentioned unilateral actions of CTU. However, CTU opposed aforesaid IA on the basis that (a) encashment of BG by CTU was as per the provisions of BPTA, (b) demand for opening of LC and consequent termination/ revocation of TSA/LTA was as per the provisions of the agreements/ Regulations of the Commission, (c) termination of TSA and revocation of LTA are separate and unconnected cause of action and cannot be allowed to be included in Petition No. 202/MP/2018, and (d) the said amendments were only an attempt to defeat claims of CTU towards relinquishment charges in the CIRP proceedings initiated against LAPL pursuant to NCLT order dated 5.9.2019.

8. After considering the submissions of LAPL and CTU, the Commission vide impugned order allowed IA No.69/2019 and permitted amendments to the pleadings and prayers as requested by LAPL. Being aggrieved by the aforesaid order, CTU has filed the present Review Petition seeking rectification of the alleged errors apparent in the following findings in the impugned order:

- (i) the cause of action forming the basis of the pleadings and prayers

ought to be amended is in continuation of the cause of action in the main Petition where, the delay in commissioning of the Project on account of force majeure events has been pleaded;

(ii) the admissibility or otherwise of the claim of CTU before the Resolution Professional ('RP') is not an issue before the Commission; and

(iii) prejudice to CTU, if at all any, will not be of such nature which cannot be adequately compensated in terms of money.

Submissions of CTU

9. In support of its plea for review, CTU has mainly submitted as under:

(a) While allowing the amendments sought by LAPL, the Commission has considered the termination of TSA and revocation of LTA as continuing causes of action emanating from the delay in commissioning of the generating station of LAPL on account of various force majeure events and upon which the prayers in main Petition regarding encashment of BG have also been based. However, in doing so, the Commission has inadvertently omitted to consider the averments and specific grounds pleaded by LAPL in its Petition which show that the only cause of action giving rise to the main Petition has been the encashment of BG furnished by LAPL under clause 6 of the BPTA and that too in the limited context of the decision taken in the 19th Joint Coordination Committee (JCC) meeting to take action on account of adverse progress in implementing the Project.

(b) The adjudication was thus to be done within a very narrow compass of "adverse progress" and the larger connotations of a force majeure plea delaying the Project are impermissible. The simple cause and effect co-relation of adverse progress and invocation of BG has been laid down by this Commission in its order dated 3.12.2018 in Petition No.242/MP/2017 (Aryan MP Power Generation Ltd. v. PGCIL). As per the findings of the Commission in the said order, force majeure occurrences at the end of the generator are not relevant for adjudication of claims regarding encashment of BG under clause 6 of BPTA on account of adverse progress.

(c) TSA termination of LAPL has taken place on account of its failure to

open LC as mandated under clause 3.6 of the Billing, Collection and Disbursement Procedure issued under the 2010 Sharing Regulations, which also constitutes an event of default under clause 16 of TSA entitling CTU to terminate TSA. LTA granted to LAPL has been revoked on account of failure of LAPL to complete the construction of the Project (as assessed in various JCC meetings) which constitutes a default under BPTA.

(d) Neither the termination of TSA nor the revocation of LTA led to encashment of BG or has any nexus with it. The two causes of action i.e. in the main Petition and as pleaded in the amendment application, may arise out of the grant of open access made to LAPL. However, since the agreements themselves show, their occurrence and consequences are completely different, their adjudications are also bound to be different.

(e) The joinder of such causes of actions in the main Petition alters the nature of the main Petition and also delays the adjudication of the dispute between the parties. While relying on the settled law regarding amendment, it has also escaped the attention of the Commission that amendments which are not connected with the original cause of action, are liable to be rejected. In this regard, reliance has been placed on the decision of Hon'ble High Court of Delhi in *Marble Art v. China Shipping Container Co. Ltd. & Anr.* [ILR (2009) 4 Del 480].

(f) It has also been escaped the attention of the Commission that it had never been the case of CTU that its claims qua (the under insolvency) LAPL towards payment of relinquishment charges are to be adjudicated in the present proceedings. What CTU had in fact submitted was that owing to the pendency of the present proceedings and proposed amendment which is to protract the on-going proceedings, its legitimate claims towards relinquishment charges are not being admitted in the on-going insolvency proceedings.

(g) When CIRP was initiated against the promoter company of LAPL, CTU had submitted its claims of Rs.173 crore to the RP (Resolution Professional) under CIRP towards the relinquishment charges computed for LAPL which have been notionally admitted as Rs.1 till the pendency of adjudication in Petition No. 202/MP/2018. CTU, being an operational creditor under IBC

(Insolvency and Bankruptcy Code, 2016), as per the principles of priority in distribution of claims laid down by the Hon'ble Supreme Court in the case of Committee of Creditors of Essar v. Satish Kumar Gupta [2019 SCC Online SC 1478], the claims filed by it before RP are as it is not highly prioritized in terms of distribution by utilization of assets and accordingly have been reduced to a notional claim of Rs.1 in view of the pendency of the present Petition before this Commission. It has escaped the attention of the Commission that if the adjudication in the above Petition is delayed, it is highly likely that in the interregnum, the assets of the promoter company of LAPL would be utilized for repaying the financial and operational creditors, while the notional claim of CTU would continue to stand at Rs.1 as opposed to Rs.173 crore. Therefore, it is imperative that the present Petition before the Commission with its original cause of action regarding encashment of BG on account of adverse progress of the Project, be adjudicated in order to enable claims of CTU to be considered during the approval of resolution plan for LAPL.

(h) While relying on the principles of amendment of pleadings laid down by the Hon'ble Supreme Court and applying them in a straight-jacketed formula, the other settled legal position as laid down by the Hon'ble Supreme Court in B.K Narayana Pillai v. Parameswaran Pillai [(2000)1SCC712] has escaped the attention of the Commission which lays down that proposed amendments should not cause such prejudice to the other side which cannot be compensated in terms of money.

(i) Further, an error has also been committed by not taking into consideration that non-recovery of the above relinquishment charges would directly affect the beneficiaries of the transmission system of CTU by imposing additional burden on them. CTU is a revenue neutral entity and owing to protraction of proceedings in the present Petition, the prejudice may be caused to the beneficiaries and users of ISTS whose liability to pay transmission charges may substantially increase if the above claims with respect to relinquishment charges payable by LAPL are not timely admitted and released under the insolvency process. As per the settled position of law, no amendment should be allowed which amounts to or relates in defeating a legal right accruing to the opposite party. The order under review, omitting to take into

account the insolvency process under IBC and holding that prejudice to CTU can be compensated in terms of money, thus suffers from error apparent on the record which is liable to be rectified.

(j) It is settled law that the provisions in the Code of Civil Procedure have been designed to facilitate justice and further its ends and that too technical a construction of sections that leaves no elasticity of interpretation is to be guarded against, provided always that justice is done to both sides. However, while taking into account the applicable principles as formulated by the Hon'ble Supreme Court for allowing the amendment of pleadings as per the procedural law, the Commission has inadvertently omitted to take into account this settled law inasmuch as it has omitted to consider the specific plea of CTU raised during the course of hearing as regards admissibility of its claim (of Rs.173 crore) at a notional value of Rs.1 by the RP.

(k) The amendment to pleadings and prayers would seriously prejudice the rights of CTU before the RP and would also afford LAPL an unfair advantage over CTU by evading its liability to pay relinquishment charges in view of *sub judice* proceedings before the Commission, more so when no billing of transmission charges has been undertaken for LAPL considering the deemed relinquishment from 1.10.2017 i.e. the date of system commissioning of the associated transmission system.

(l) The Hon'ble Supreme Court in the matter of Indian Council for Enviro-Legal Action v. Union of India & Ors. [(2011) 8 SCC 161], has held that no litigant can derive benefit from the mere pendency of a case in a court of law, As such, an error has occurred in permitting LAPL to misuse the technicalities of the procedural law and derive benefit from pendency of the main Petition, thereby causing palpable injustice to CTU.

10. CTU has also filed IA No. 52/2020 seeking exemption from filing certified copy of the impugned order dated 9.6.2020 passed by the Commission in IA No. 69/2019 in Petition No. 202/MP/2018. It has been further submitted that CTU had applied for certified copy of the impugned order on 12.6.2020. However, it is yet to be provided

certified copy and, therefore, CTU has been constrained to file the present Review Petition based on the copy uploaded on the website of the Commission. Considering the difficulties projected by CTU, we exempt the CTU from filing certified copy of the impugned order.

Hearing dated 20.7.2021

11. Case was called out for virtual hearing on 20.7.2021. During the course of hearing, the learned counsel for CTU submitted that vide impugned order, the Commission has allowed amendments to the pleadings of Petition No. 202/MP/2018 so as to include the challenge to TSA termination and LTA revocation. While allowing so, the Commission in the impugned order has noted that the admissibility or otherwise of claims of CTU claim towards relinquishment charges for Rs.173 crore before RP is not an issue before this Commission and that the prejudice to CTU, if at all any, will not be of such nature which cannot be adequately compensated in terms of the money. However, CTU had not sought the admissibility of its claims of relinquishment charges by the Commission but had stated that owing to the addition of cause of action, the Petition including the issue of relinquishment charges would continue to remain pending and in view thereof, its claim before RP would continue to remain at notional value of Rs. 1. It was further submitted by the learned counsel that LAPL, in fact, has contended during CIRP that owing to the pendency of the Petition before this Commission, the claim of CTU towards relinquishment charges cannot be considered beyond Rs. 1. The learned counsel submitted that if the claim towards relinquishment charges for Rs. 173 crore is not admitted by RP, there would be a shortfall in PoC pool account which will cause direct injury to other DICs who will then be required to share extra burden of sharing of these transmission charges.

12. We have considered the submissions made by the Review Petitioner. It

appears that the primary concern of the Review Petitioner is that upon amendments to pleadings of Petition No. 202/MP/2018 so as to include LAPL's challenges to the termination of TSA and LTA revocation therein, its claim towards relinquishment charges for Rs. 173 crore has become subject to the adjudication of Petition No. 202/MP/2018 and considering the pendency of the said Petition, RP has admitted its claim at notional value of Rs. 1 only. It is also the concern of the Review Petitioner that such amendments, which have an effect of further protracting the proceedings in Petition No.202/MP/2018, may result into non-recovery of relinquishment charges leading to a shortfall in the PoC pool account and consequently, affecting the other beneficiaries of ISTS. We take note of the above concerns of the Review Petitioner. In our view, the above concerns of the Review Petitioner can be more effectively addressed by the expeditious disposal of the Petition No. 202/MP/2018 itself rather than examining the admissibility of the instant Review Petition as adjudication would aid the Review Petitioner to raise/ agitate its claims before the RP/ NCLT. The above noted observation, which was put forth before the parties as suggestion during the course of hearing, was agreed to by the learned counsels for the Review Petitioner as well as by the learned counsel for LAPL.

13. Accordingly, the Petition No. 202/MP/2018 will be listed for hearing in the month of August 2021 and in order to enable the Commission to expeditiously decide the said Petition, it is expected that no parties shall seek any uncalled for adjournments. In the meanwhile, the parties are directed to complete the pleadings in Petition No. 202/MP/2018. CTU is directed to file its reply to the amended Petition No.202/MP/2018 within one weeks and LAPL may file its rejoinder thereof, if any, within one week thereafter.

14. In view of the aforesaid observations and by the consent of the parties, the present Review Petition No. 26/RP/2020 and IA No. 52/2020 are disposed of without examining their admissibility.

Sd/-
(Arun Goyal)
Member

sd/-
(I.S.Jha)
Member

sd/-
(P. K. Pujari)
Chairperson