

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

(Appellate Jurisdiction)

APPEAL NO.26 OF 2020

APPEAL NO.27 OF 2020 &

APPEAL NO.28 OF 2020

Dated: 20th January, 2022

**Present: Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO.26 OF 2020

In the matter of:

VAAYU RENEWABLE ENERGY (KAVERI) PRIVATE LIMITED

Through its Authorized Signatory

Having its Office at:

Hare Krishna, Presidency Society, North South Road No.8,
Ville Parle (West), Mumbai – 400049

...APPELLANT

Versus

1. CENTRAL ELECTRICITY REGULATORY COMMISSION

3rd& 4th Floor, Chanderlok Building,

26, Janpath, New Delhi – 110001

Through its Secretary

2. POWERGRID CORPORATION OF INDIA LIMITED

(Central Transmission Utility),

'Saudumini', Plot-2, Sector 29, Gurgaon – 122001

Through its Managing Director

...RESPONDENT(S)

APPEAL NO.27 OF 2020

In the matter of:

VAAYU RENEWABLE ENERGY (SIRONJ) PRIVATE LTD.

1102 (3), 11th Floor, Fortune Terrace,
New Link Road, Andheri West, Mumbai – 400053 ...**APPELLANT**

Versus

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**

3rd& 4th Floor, Chanderlok Building,
26, Janpath, New Delhi – 110001
Through its Secretary

2. **POWERGRID CORPORATION OF INDIA LIMITED**

(Central Transmission Utility),
'Saudumini', Plot-2, Sector 29, Gurgaon – 122001
Through its Managing Director

...**RESPONDENT(S)**

APPEAL NO.28 OF 2020

In the matter of:

VAAYU RENEWABLE ENERGY (KRISHNA) PRIVATE LIMITED

Through its Authorized Signatory
Hare Krishna, Presidency Society, North South Road No.8,
Ville Parle (West), Mumbai – 400049

...**APPELLANT**

Versus

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**

3rd& 4th Floor, Chanderlok Building,
26, Janpath, New Delhi – 110001
Through its Secretary

2. **POWERGRID CORPORATION OF INDIA LIMITED**

(Central Transmission Utility),
'Saudumini', Plot-2, Sector 29, Gurgaon – 122001

Through its Managing Director

...RESPONDENT(S)

Counsel for the Appellant(s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Vishal Gupta
Mr. Avinash Menon
Mr. Sumeet Sharma
Mr. Paras Choudhary
Mr. Ashutosh Jain

Counsel for the Respondent(s) : Ms. Suparna Srivastava for R-2

J U D G M E N T (O R A L)

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. This batch of Appeals was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The Appellants namely Vaayu Renewable Energy (Kaveri) Pvt. Ltd. ("VREKPL"), Vaayu Renewable Energy (Sironj) Pvt. Ltd. ("VRESPL") and Vaayu Renewable Energy (Krishna) Pvt. Ltd. ("VREKRPL) in the present Appeals i.e., Appeal no. 26/2020, Appeal no. 27/2020 and Appeal no. 28/2020 respectively have challenged the common Order dated 13.1.2020 ("impugned order") passed by the Central Electricity Regulatory Commission (in short the "Respondent Commission" or "Central Commission") in Petition No.56/MP/2019 ("Petition56"), Petition

No.57/MP/2019 (“Petition57”) and Petition No.58/MP/2019 (“Petition 58”). The Respondent Commission vide the said order has revoked the Stage II Connectivity granted to the Appellants, however, also directed the Respondent no. 2 to encash the Bank Guarantees (“BG”) furnished by the Appellants against the petition of the Appellants seeking time extension of eight (8) months for fulfilling the prescribed regulatory/contractual conditions pertaining to the Stage-II connectivity granted to them by Respondent No.2 for their proposed Wind Power Projects in District Kutch in the State of Gujarat and also restraining Respondent No.2 from encashing the bank guarantees furnished under the Transmission Contracts signed with the Respondent no. 2.

3. The Appellant in the first Captioned Appeal (Appeal no. 26/2020), Vaayu Renewable Energy (Kaveri) Private Limited is a Company incorporated under the provisions of the Companies Act, 2013 and is submitted that the Appellant is engaged in the business of undertaking Renewable Energy Power Development, namely, Wind Energy project and also Solar Power Project at different places in India.

4. The Respondent No.1 is Central Electricity Regulatory Commission (CERC) is a statutory body function under Section-76 of the Electricity Act, 2003.

5. The Respondent No.2 herein, Power Grid Corporation of India Limited has been notified by the Central Government as the Central

Transmission Utility [the “**CTU**”] for undertaking various functions as provided under Section 38 of the Electricity Act, 2003.

6. The history of the facts leading to the appeal being presented may be noted in brief.

7. Three captioned Appeals are similar in nature and filed against the impugned common order passed by the Central Commission and therefore the Appeal No. 26 of 2020 will be discussed in detail which will set out the principle of law for the other two Appeals.

8. Vaayu Renewable Energy (Kaveri) Private Limited, the Appellant in the first captioned Appeal, is engaged in the business of undertaking Renewable Energy Power Projects and proposed to set up Wind Farm and Generation Project of 300 MW at Meghpur, Kutch District in the State of Gujarat ("Project").

9. The Appellant vide applications dated 25.05.2018 and 17.06.2018 respectively, as part of the process of setting up the project applied for Stage I and Stage II connectivity under the Detailed Procedure for Grant of Connectivity to Projects based on Renewable Energy sources to Inter-state Transmission System ("Detailed Procedure") notified by the Central Commission on 15.05.2018 as per Regulation 27 of CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in Inter-State Transmission and related matters) Regulations, 2009 ("CERC Grant of Connectivity Regulations, 2009"),.

10. Further, the Appellant acquired 50% of the land required for the project i.e., 55 footprints against the requirement of 109 land footprints for the Project, pursuant to the order of District Collector and under Gujarat Land Policy, 2004.

11. Subsequent to the connectivity applications, Respondent no. 2, on 19.07.2018 granted Stage I Connectivity to the Appellant for the Project with primary connectivity at Bhuj Pooling Station and alternative connectivity at Bhuj II Pooling Station.

12. In the meanwhile, the Appellant in the months December. 2017 and Jan. 2018 applied before the District Collector seeking acquisition of 54 land footprints, i.e., the balance land footprint required for the project.

13. On 03.08.2018, the Appellant and Respondent no. 2 entered into a Transmission Agreement for Connectivity and as per the Detailed Procedure and the Transmission Agreement for Connectivity dated 03.08.2018, the Appellant furnished a bank guarantee of Rs. 5 (Five) crores on 16.08.2018 to remain valid till 01.09.2020.

14. The process of acquisition of balance land for the project was delayed due to the directions issued by letter dated 25.07.2018 of Department of Revenue, Government of Gujarat to the District Collectors, instructing them to consider only applications/ requests of project developers selected by Gujarat Urja Vikas Nigam Limited ("GUVNL") for allotment of revenue lands till the finalization of a new land policy.

15. As land allotment was a pre-condition for achieving financial closure, Appellant, by its letter dated 31.12.2018 informed the Respondent that uncertainties in land allotment would adversely affect the schedule for financial closure of the Project.

16. On 25.01.2019, Department of Revenue, Government of Gujarat notified the New Land Policy, 2019. The New Land Policy, 2019 considered wind power projects with minimum capacity of 1000 MW for allotment of revenue land. As such the project of the Appellant was not covered for the allotment of Revenue Land.

17. Against the above backdrop, Appellant filed Petition No.57/MP/2019 before the Central Commission praying for extension of a period of 8 months for achieving financial closure in terms of Regulation 33A as provided under the CERC Grant of Connectivity Regulations, 2009.

18. The petition was disposed of by the Central Commission by Order dated 13.01.2020 thereby revoking the Connectivity granted to the Appellant, however, directing the Respondent no. 2 to encash the Bank Guarantee. Being aggrieved by the said order, the Appellant filed the present Appeal.

19. The Central Commission, while passing the order, made the following observations: -

“31. We have considered the submissions of the parties. It is noted that prior to New land Policy, the Petitioners have been

granted more than 50% of the land required for their projects Further, the Petitioners had also applied for allotment of balance revenue land required for their projects. We observe that the government policies quoted by Petitioner are regarding revenue land. However, the Petitioners have the option of acquiring other lands, such as private land.

32. The Petitioners have, in its Petition, made a prayer for extension of time for 8 months to complete balance activities. However, during the hearing on 5.9.2019, the Petitioners have submitted that they shall not be able to implement the Projects and they have no other option but to surrender the connectivity and has prayed for return of Bank Guarantee furnished by the Petitioners.

33. Clause 9.3.3 of the Detailed Procedure requires the Stage II grantee to fulfill the conditions enshrined in clause 9.3.1 or clause 9.3.2 and in the event of failure to fulfill the conditions of clause 9.3.1 or clause 9.3.2, as the case may be, Stage II Connectivity shall be revoked by CTU. Clause 9.3.3 of Detailed Procedure dated 15.5.2018 is reproduced as under :

Order in Petitions No.56/MP/2019, 57/MP/2019 Page 19 of 20 and 58/MP/2019 “9.3.3 In the event of failure to achieve above milestones as listed in Clause 9.3.1or Clause 9.3.2 above, as applicable, Stage-II connectivity shall be revoked by the CTU under intimation to the grantee.”

34. It is noted that the Petitioners were granted Stage-II Connectivity on 19.7.2018 and as per Detailed Procedure dated 15.5.2018, the Petitioners were required to complete the financial closure by 18.4.2018, which the Petitioners have

failed to achieve and therefore, the Stage II Connectivity granted to the Petitioners is revoked.

35. It is noted that the construction at Bhuj sub-station is at advanced stage and there is no pending application for grant of Stage-II Connectivity at Bhuj (WR), where connectivity to the Petitioner's projects have been granted. As we have decided that the Stage-II Connectivity granted to the Petitioners is revoked, the Connectivity BG is liable to be encashed.

36. The Detailed Procedure dated 15.5.22018 stipulates encashment of BG under clause 11.2, as under : "The Stage-II Connectivity grantees shall be required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months from the date of intimation of bay allocation at existing or new/under-construction ISTS sub-station. If the grantee fails to complete the dedicated transmission line within the stipulated period, the Conn-BG of the grantee shall be encashed and Stage-II connectivity shall be revoked. The payment received in terms of these provisions shall be adjusted in the POC pool."

37. Clause 1 (f) The Transmission Agreement for Connectivity executed between the Petitioners and PGCIL reads as under: "The Bank Guarantee shall be encashed by Powergrid in case of failure of Stage II Connectivity grantee to complete the dedicate transmission line and pooling sub stations within 24 months from the date of intimation of bay allocation at existing or new/ under construction ISTS sub-stations or in case of non-fulfillment of conditions to be met by Stage II Connectivity grantee in terms of Clause 9.3.3 of RE

Connectivity Procedure.” Order in Petitions No.56/MP/2019, 57/MP/2019 Page 20 of 20 and 58/MP/2019

38. As per clause 11.2 of Detailed Procedure dated 15.5.2018, the Connectivity BG can be encashed only in the event the Stage II Connectivity grantee fails to complete the dedicated transmission line within 24 months from the date of intimation of bay allocation.

39. Thus, there is provision for the encashment of BG, if Stage II connectivity grantee fails to complete the dedicated transmission line within 24 months from the date of intimation of bay allocation. However, in the instant case, the Petitioners have submitted that they shall not be able to implement the project and are surrendering the connectivity. Therefore, without waiting for 24 months period, PGCIL shall encash the BG furnished by the Petitioners.”

20. From the above, it is seen that the Central Commission vide para 33 and 34 has rightly acknowledged the fact that the Appellant has failed to achieve the milestones as per clause 9, and thus the Stage II Connectivity shall be revoked. However, it failed to appreciate that as per clause 9.3 only Connectivity can be revoked and there is no provision for encashment of Bank Guarantee. Once clause 9.3 has been attracted, any other provision becomes redundant in case linked to continuation of the Connectivity.

21. The Central Commission while passing the order has referred to the provision pertaining to the encashment of BG, if Stage II connectivity

grantee fails to complete the dedicated transmission line within 24 months from the date of intimation of bay allocation. On the contrary, in the instant case, invoked the provision even before the expiry of such period of 24 months and directed PGCIL to encash the BG furnished by the Petitioners.

22. The relevant statutory provisions under the law are required to be referred herewith:-

(i) “Detailed Procedure for “Grant of connectivity to projects based on renewable sources to inter-state transmission system”

9.2 Eligibility for Stage-II Connectivity

Any of the following shall be eligible for grant of Stage-II Connectivity:

9.2.1 An entity which has been selected through the tariff based competitive bidding carried out by the agency designated by the Central Government or the State Government for development of renewable generation projects including hybrid projects and is either a grantee of Stage-I connectivity or has applied for Stage-I and Stage-II Connectivity simultaneously. Such entity shall be required to submit letter of award issued by designated agency for development of the renewable generation project including hybrid projects.

9.2.2 An entity who is a grantee of Stage-I Connectivity or who has applied for grant of Stage-I and Stage-II Connectivity simultaneously, and is not covered under Clause 9.2.1 above, and having achieved the following milestones:

(i) Ownership or lease rights or land use rights for 50% of the land required for the capacity of Stage-II connectivity; and

(ii) Achievement of financial closure, (with copy of sanction letter)

or

Release of at least 10% funds towards generation project execution supported by Auditor's certificate regarding release of such funds through equity.

Note: In case Stage-I Connectivity is granted to a parent company and it is eligible for grant of Stage-II Connectivity as per Clause 9.2 above for execution of the generation projects through its 100% owned SPV / 100% owned Subsidiary, the parent company will apply for Stage-II Connectivity for such capacity for which it is eligible. An illustrative example is given below:

a) Suppose Company "A" is granted Stage-I Connectivity for 1000 MW. Its 100% owned subsidiary "B" wins the bid (as identified under this Procedure) for 300 MW and attains eligibility for grant of Stage-II Connectivity. In that case "A" will apply for Stage-II Connectivity for "B" for 300 MW which shall be considered as per this Procedure.

b) In another case, suppose Company "A" is granted Stage-I Connectivity for 1000 MW. Its 100% owned subsidiary "B" attains eligibility for grant of Stage-II Connectivity for 300 MW under Clauses 9.2.2 & 9.3.2. In that case "A" will apply for Stage-II Connectivity for "B" for 300 MW along with necessary documents and shall be considered for grant as per this Procedure.

9.3 Conditions to be met by Stage-II Connectivity Grantees

9.3.1 After grant of Stage II connectivity, the grantee covered under Clause 9.2.1 shall have to achieve the following milestones in accordance with bidding documents and submit the proof to CTU within a week of achieving the milestone(s):

(i) *Ownership or lease rights or land use rights of the land required as per bidding documents for the capacity of Stage-II connectivity.*

(ii) *Financial closure within the time stipulated in the PPA. Sanction letter from financial institution to be submitted as proof of financial closure.*

(iii) *Proof of release of at least 10% funds towards generation project execution within three months from the date of financial closure supported by Auditor's certificate regarding release of such funds through equity.*

9.3.2 After grant of Stage II connectivity, the grantee covered under Clause 9.2.2 shall have to achieve the following milestones and submit the proof to CTU within nine months from date of grant of Stage-II Connectivity:

(i) *In case of an entity who has submitted the proof of release of at least 10% funds shall submit documents regarding achievement of financial closure;*

(iii) *In case of entity who has submitted documents regarding achievement of financial closures shall submit the proof of release of at least 10% funds. 9.3.3 In the event of failure to achieve above milestones as listed in Clause 9.3.1 or Clause 9.3.2 above, as applicable, Stage-II connectivity shall be revoked by the CTU under intimation to the grantee.*

11. Monitoring of progress of renewable projects after grant of Stage-II Connectivity

11.1 Stage-II Connectivity grantee shall furnish progress of the monitoring parameters on quarterly basis in the format given at FORMAT-RCON-II-Mof by the last day of each quarter. Failure to update progress of the monitoring parameters shall be considered as adverse progress and in such case CTU shall approach the Commission for

appropriate directions. The payment received in terms of these provisions shall be adjusted in the POC pool.

11.2 The Stage-II Connectivity grantees shall be required to complete the dedicated transmission line(s) and pooling sub-station(s) within 24 months from the date of intimation of bay allocation at existing or new / under-construction ISTS sub-station. If the grantee fails to complete the dedicated transmission line within the stipulated period, the Conn-BG of the grantee shall be encashed and Stage-II connectivity shall be revoked. The payment received in terms of these provisions shall be adjusted in the POC pool.”

23. From the Clause 9.2 above, it is clear that the Appellant is covered under sub-clause 9.2.2 as it is not covered under 9.2.1. Further, as per sub-clause 9.3.2 the Appellant shall have to achieve certain milestones and submit the proof to CTU within nine months from date of grant of Stage-II Connectivity failing which the Stage-II connectivity shall be revoked by the CTU under intimation to the grantee.

24. Further, as per sub-clause 11.2, the failure to complete the dedicated transmission line within the stipulated period i.e., 24 months from the allocation of bay, the Conn-BG of the grantee shall be encashed and Stage-II connectivity shall be revoked.

25. The Ld. Sr. Advocate, Mr. Sajan Poovayya invited our attention to the above provisions and submitted that vide the impugned order, the Central Commission has directed the Respondent no. 2 to encash the bank Guarantee.

26. He added that as per provision under clause 9.3 (specific reference to sub-clause 9.3.2), there Stage II connectivity can only be revoked in case the grantee of Stage II fails to achieve financial closure within 9 months from the specified date. It was also brought before us that the delay in achieving financial closure was on account of change in Govt of Gujarat Land Policy and was certainly not under the control of the Appellant.

27. The provisions under sub-clause 9.3.2 and 11.2 were highlighted wherein clause 9.3.2 provides for revocation of Connectivity where as failure to comply with the condition as specified under 11.2 may result into forfeiture of BG also.

28. However, from the above, it is clear that the Appellant has reached the Central Commission much before the specified period of 24 months as required for commissioning of dedicated transmission line is to expired. The Central Commission erroneously has invoked the provision before the expiry of such period.

29. On the contrary Ms. Suparna Srivastava Ld Counsel for the Respondent no. 2 has submitted that the encashment of the BG is on account of the fact that the Appellant has abandoned the project. She made the submission that in the working of the Connectivity Regulations and the Detailed Procedure, 2010, it was observed that there were no enumerated reciprocal obligations on the connectivity applicant to sign any agreement or submit any bank guarantee or fulfill any financial obligation.

As a result, once the connectivity was granted, often the grantee took no action towards making actual use of the connectivity which resulted in the connectivity grantees blocking the available infrastructure in the ISTS sub-station for use by other entity(s). This situation was further compounded when the Government of India, Ministry of New and Renewable Energy (MNRE) notified on 22.10.2016, "Guidelines for Implementation of Scheme for Setting Up of 1000 MW ISTS Wind Power Projects" for implementation by the Solar Energy Corporation of India Ltd. (SECI) through e-reverse auction for award of the wind projects. The Scheme resulted in a large number of connectivity applications from wind generators [and solar power park developers under other such schemes], who were granted connectivity by Respondent No.2 in terms of the Connectivity Regulations at the nearby existing/under-construction sub-stations till the available bay spaces were completely exhausted, upon which new sub-stations in the vicinity were planned and connectivity was granted at these new sub-stations.

30. We are not inclined to accept the above, as it is mere perception of the Respondent which may be right but there is no legal or contractual provision placed before us which supports such an argument. On the contrary the relevant provisions have already been detailed in the foregoing paragraphs.

31. Against the question of not invoking the clause 9.3.2, when the Appellant failed to achieve the financial closure and intimated the same to the Respondent no. 2, it was submitted that the Appellant has filed the Petition before the Central Commission. But this fact was not pleaded before the Central Commission.

32. The forfeiture of Bank Guarantee is an act of levying penalty. There cannot be any argument that any penalty can only be imposed or carried out when a person found guilty of committing an act which attracts such a penalty as provided under the law. A penal clause requires to be construed and enforced strictly. Since the requisite period of twenty-four months had not yet lapsed, the penalty of encashment of BG could not have been imposed.

33. For the foregoing reasons, on the given facts and in the circumstances, the appellant deserves grant of reliefs prayed for by the appeal at hand. We are compelled to again place it on record our strong disapproval over the arbitrary and unreasonable denial of effective relief by the Central Commission.

ORDER

34. In light of the above, we are of the considered view that the issues raised in the Appeals have merits and hence must succeed. The impugned order (common order) dated 13.01.2020 in Petition Nos. 56/MP/2019,

57/MP/2019 & 58/MP/2019 passed by Central Electricity Regulatory Commission cannot be allowed to stand in its entirety. Thus, the impugned order to the extent thereby the directions were given to the Respondent Commission to invoke the bank guarantees is vacated. The bank guarantee shall be released forthwith by the Respondent/CTU unto the parties which furnished the same.

The appeals are disposed of in above terms.

No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 20th DAY OF JANUARY, 2022.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Officiating Chairperson**

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