

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI**

(APPELLATE JURISDICTION)

**APPEAL NO. 53 OF 2022 &
IA NO. 272 OF 2022**

Dated: 12th April 2022

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

In the matter of:

**M/S SHAPOORJI PALLONJI INFRASTRUCTURE CAPITAL
COMPANY PRIVATE LIMITED**

[Through its Authorized Signatory]

SP Centre, 4144 Minoo Desai Marg, Colaba,
Mumbai – 400 005

Email: pankaj.latey@shapoorji.com

... Appellant(s)

VERSUS

**1. POWER GRID CORPORATION OF INDIA LIMITED
(now Central Transmission Utility of India Ltd.)**

[Through its Chief Generation Manager]

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Katwaria Sarai,
New Delhi – 110 016

Email: atul_ag@powergrid.in

2. CENTRAL ELECTRICITY REGULATORY COMMISSION

[Through its Secretary]

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36, Janpath,
New Delhi- 110 001

Email: secy@cercind.gov.in

... Respondents

Counsel for the Appellant (s): Mr. Vishrov Mukherjee
Mr. Janmali Manikala
Mr. Damodar Solanki

Counsel for the Respondent (s): Ms. Suparna Srivastava for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

1. This matter was taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The appeal under Section 111 of Electricity Act, 2003 assails the Order dated 15.02.2022 passed by *Central Electricity Regulatory Commission* (hereinafter referred to as “CERC” or “the Central Commission”) in Petition no. 523/MP/2020 whereby the claim of the appellant *M/s Shapoorji Pallonji Infrastructure Capital Company Private Limited, inter alia*, for discharge or return of *Connectivity Bank Guarantees* (“CBGs”) of Rs.5.0 crore each issued by IndusInd Bank was partly allowed with a direction that an amount of Rs. 50.0 lakh each would stand forfeited, the balance being refunded.
3. The background facts need to be noted in brief.
4. The Central Commission has framed Regulations named *Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009* (for short, “the Connectivity Regulations”). In terms of Regulation 27 of the Connectivity Regulations, detailed procedure was notified by CERC which came into force from 15.05.2018 it being styled as *Detailed Procedure for “Grant of Connectivity to Projects based on Renewable Sources to Inter-State Transmission System”* (hereinafter

referred to as “the Detailed Procedure”). It may be mentioned here itself that the said Detailed Procedure was modified by issuance of what is known as “*Revised Detailed Procedure*” issued on 20.02.2021.

5. While the Detailed Procedure notified on 15.05.2018 was governing the field, certain events took place which have a bearing on the matter at hand. The petitioner was awarded two 250 MW Solar Projects, one at Tuticorin in the State of Tamil Nadu and the other at Anantpur in the State of Andhra Pradesh, the power generated from such solar power projects intended to be supplied to distribution licensees in the State of Telangana through an intermediary procurer viz. NTPC. In that context, the appellant had approached the first respondent – *Power Grid Corporation of India Ltd* (for short, “PGCIL”) and was granted Stage-I connectivity on 24.08.2018 for 500 MW in relation to Tuticorin Project and 500 MW in relation to Anantpur Project respectively.

6. Subsequently, on 17.01.2019, PGCIL granted to the appellant Stage-II connectivity for 250 MW in relation to Tuticorin Project and for 250 MW for Anantpur Project respectively. In terms of the relevant Regulations and pursuant to the *Transmission Service Agreements* (“TSAs”) dated 12.02.2019 executed by the parties, the appellant furnished, on 14.02.2019, the two Connectivity Bank Guarantees (CBGs) bearing nos.

OGT0005190028921 and OGT0005190028926 of Rs.5.0 crore each to the respondent PGCIL, the transmission service provider.

7. On 11.03.2019, pursuant to Letters of Intent (LOIs) dated 17.10.2018 issued by NTPC, *Power Sale Agreement* (“PSA”) was executed between NTPC and the two distribution licensees of the State of Telangana i.e. *Northern Power Distribution Company of Telangana Ltd* (“TNSPDCL”) and *Southern Power Distribution Company of Telangana* (“TSSPDCL”). Subsequently, on 20.03.2019, two companies (Special Purpose Vehicles or “SPVs”) created by the appellant – *M/s Eloise Energy Private Limited* (“EEP”) and *Elaine Renewable Energy Private Limited* (“EREPL”) – entered into separate *Power Purchase Agreements* (“PPAs”) with NTPC in respect of two projects at Anantpur and Tuticorin.

8. The above said PPAs were presented before *Andhra Pradesh Electricity Regulatory Commission* (“APERC”) for approval which, however, was not accorded by APERC till 20.05.2019. Subsequently, the *Telangana State Electricity Regulatory Commission* (“TSERC”) was approached by the Telangana distribution licensees (TNSPDCL and TSSPDCL) for approval of extension which did not come-forth during the extended period of three months. In the result, the PPAs dated 20.03.2019 were terminated by the parties, with mutual consent, in August-September, 2019, in accordance with the provisions of the said PPAs. It is stated that as a sequel to this

development, NTPC returned the *Performance Bank Guarantees* (“PBGs”) of Rs. 125.0 crores (Rs.62.5 crore each) which had been furnished by the appellant under the PPAs.

9. Against the above backdrop, the appellant approached the respondent PGCIL on 15.01.2020, through its SPVs EEPL and EIPL, for cancellation of Stage-II connectivity in respect of Anantpur and Tuticorin projects, termination of PSAs and return of the CBGs. Acceding to the said request, PGCIL revoked the Stage-II connectivity with immediate effect on 04.03.2020 and though returning the consultancy fee and *ad hoc* operation & maintenance charges in respect of both the projects declined to discharge the CBGs stating that the Detailed Procedure provided for discharge of such CBGs only subsequent to commencement of power evacuation from the power plant.

10. The appellant filed the petition, being no. 523/MP/2020, before CERC on 08.05.2020, on which the impugned order has been passed, setting out its prayers as under:

“a) To exercise power under Regulation 33A of the CERC (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 and relax the procedure set out in Clause 10.11 of the Detailed Procedure for “Grant of Connectivity to Projects Based on Renewable Sources to Inter-State Transmission System”;

b) Direct Respondent to discharge/return Connectivity Bank Guarantee No. OGT0005190028926 and Connectivity Bank

Guarantee No. OGT0005190028921 of Rs.5 Cr. each issued by IndusInd Bank; and /or

c) Pass such other order / orders, as may be deemed fit and proper in the facts and circumstances of the case.”

11. While the abovementioned Petition no. 523/MP/2020 was pending before CERC, Revised Detailed Procedure came to be notified on 20.02.2021.

12. Admittedly, under the Detailed Procedure, as enforced prior to issuance of the Revised Detailed Procedure, there was no express provision made for discharge or return of the CBGs if Stage-II connectivity were revoked, such discharge having been mentioned primarily in relation to the commencement of power evacuation from the power plant. Two specific clauses of the Detailed Procedure (pre-revised) need to be quoted here:

“10.11 Conn-BG shall be discharged six months after commencement of evacuation of power from the renewable project.

...

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.

13. Under the Revised Detailed Procedure, however, Clause 5.1 would provide as under:

“5.1 After coming into force of this Procedure, for an entity which has been granted Stage-II Connectivity under the Pre-revised Procedure,

(1) Any action already initiated for revocation of Stage-II Connectivity or encashment of Bank Guarantee prior to the issue of this Procedure shall be completed under the Pre-revised Procedure.

(2) Any action including revocation of Stage-II Connectivity or encashment of Bank Guarantee initiated after the issue of this Procedure shall be in accordance with this Procedure.

(3) Conn-BG submitted under the Pre-revised Procedure shall be treated as ConnBG1 for Rs. 50 lakh and Conn-BG2 for the balance amount.

(4) In the event of encashment of such Conn-BG1 or Conn-BG2 as worked out in terms of sub-clause (3) of Clause 5.1 above, under Clause 10.8 of this Procedure

(i) If the associated bay(s) at the ISTS sub-station is being constructed by Stage-II grantee itself, amount corresponding to Conn-BG1 shall be forfeited and balance amount being treated as Conn-BG2 under this Procedure shall be refunded.

(ii) If the associated bay(s) at the ISTS sub-station is being constructed by ISTS licensee, amount corresponding to Conn-BG1 and amount of ConnBG2 in terms of Clause 10.8(a) of this Procedure shall be forfeited and any excess amount submitted as Conn-BG under the Pre-revised Procedure shall be refunded.”

14. The CERC applied the abovementioned Clause 5.1 of the Revised

Detailed Procedure observing through the impugned order as under:

“11. We have heard the submissions of the parties and perused the documents available on record. The only issue which arises for our consideration is regarding treatment of Connectivity Bank Guarantee furnished by the Petitioner to the Respondent, for its solar power projects at Anantpur and Tuticorin.

12. *The Petitioner has stated that it was awarded two 250 MW solar projects, one each at Tuticorin (in the State of Tamil Nadu) and Anantpur (in the State of Andhra Pradesh) and the power from these solar power projects was to be supplied to the Telangana Discoms through an intermediary procurer, NTPC. Subsequently, the Petitioner was granted Stage-II connectivity by the Respondent for 250 MW each with respect to its Tuticorin solar power project and Anantpur solar power project. Consequently, TSAs were entered into with the Respondent and the Petitioner furnished BG of Rs.5 crore under each TSA. The Connectivity was sought for PPAs that was entered into by SPVs of the Petitioner with the Telangana Discoms wherein PPAs required approval of TSERC as a condition precedent within a period of 60 days of effective date of PPAs. However, despite extension of 3 months, the PPAs were not approved by TSERC and accordingly, the parties terminated the PPAs. Consequent to termination of the PPAs, the Petitioner vide its letters dated 15.01.2020 sought to cancel Stage-II connectivity granted to it and requested to return CBGs (of Rs. 10 crore). The Respondent vide its letter dated 04.03.2020 revoked the Stage-II Connectivity granted to the Petitioner. However, the Petitioner's request for return of CBGs was declined by the Respondent.*

...

14. *A plain reading of clause 5.1(3) of the Revised Detailed Procedure indicates that a Connectivity Bank Guarantee submitted under the Detailed Procedure (prerevised) shall be treated as Conn-BG1 for Rs.50 lakh and Conn-BG2 for the balance amount. Further, in terms of clause 5.1(4)(i) of the Revised Detailed Procedure, in the event of encashment of BG, if the associated bay(s) at the ISTS sub-station is being constructed by Stage-II grantee itself, amount corresponding to Conn-BG1 shall be forfeited and balance amount (being treated as Conn-BG2) shall be refunded. We are of the view that the Revised Detailed Procedure is a procedural law and is to be applied even on existing agreements.*

15. *We observe that in the present case, the Respondent had revoked the Stage II Connectivity granted to the Petitioner vide its letter dated 04.03.2020. However, the Respondent had not initiated any action for encashment of Bank Guarantee under the Detailed Procedure (pre-revised). Therefore, any action pertaining to encashment of*

Connectivity BG has to be dealt under the Revised Detailed Procedure in terms of clause 5.1(2) of the Revised Detailed Procedure.

16. Since the terminal bays for the Anantpur solar power project and Tuticorin solar power project was under the scope of the Petitioner, in terms of clause 5.1(3) read with clause 5.1(4)(i) of the Revised Detailed Procedure, the amount of Rs.50 lakh (corresponding to Conn-BG1) shall be forfeited and balance amount of Rs.4.5 crore (corresponding to Conn-BG2) shall be refunded to the Petitioner for each solar power project.”

15. It may be mentioned at this stage that PGCIL has fairly conceded, even by additional affidavit submitted on 22.10.2021 before CERC, *inter alia*, that:

(a) Stage-II Connectivity granted to SPICCCPL for Anantpur and Tuticorin Projects have been revoked on 04.03.2020 under the Pre-revised Procedure / Detailed Procedure, however no action was initiated towards encashment of Conn-BGs submitted by SPICCCPL in absence of any clear provision.

(b) No expenditure has been incurred under ISTS for Connectivity granted to SPICCCPL at N P Kunta (bay no. 224) for its Anantpur Project.

(c) Regarding expenditure incurred under ISTS for Connectivity granted to SPICCCPL at Tuticorin-II GIS (bay no. 211) for its Tuticorin Project, these works were identified as common facilities works at Tuticorin-II GIS S/s for facilitating connectivity to RE developers. Upon revocation of Stage-II connectivity, the bay no. 211 was allocated to NTPC.”

16. From the above facts, affirmed on behalf of PGCIL itself, it is clear that PGCIL does not claim any loss suffered on account of grant of Stage-II connectivity or its revocation, upon request of the appellant, in relation to the two projects. There is no expenditure incurred by PGCIL in relation to

Anantpur project, the expenditure incurred for the purposes of Tuticorin project having been properly utilized for another entity.

17. As has been noted earlier, the appellant had approached the CERC with a prayer for relaxation of the conditions respecting CBGs for exercise of power available to it (CERC) under Regulation 33A of Connectivity Regulations. In our considered view, in the matter at hand, there was no need for such power of relaxation to be invoked in as much as under the Detailed Procedure brought in force from 2018 the only occasion for CBGs to be invoked was in the event of inordinate delay due to non-performance during the period prior to commencement of the power evacuation, the CBGs having served the purpose and liable to be discharged upon such commencement of power evacuation after the elapse of the period specified for the same.

18. On careful scrutiny of the facts at hand, we are of the view that CERC has fallen into error by applying the Revised Detailed Procedure which was issued on 20.02.2021, merely on the reasoning that it is a procedural law and is to be applied even on existing agreement. The question as to whether Revised Detailed Procedure is procedural was not germane or of any consequence for the simple reason Clause 5.1, as extracted earlier, itself makes it clear that it would apply if the revocation of Stage-II connectivity

was ordered or action initiated for encashment of bank guarantee “after the issue of this Procedure”.

19. The language employed in Clause 5.1(1) of Revised Detailed Procedure leaves no room for doubt that if action for revocation of Stage-II connectivity had been initiated prior to issuance of the Revised Detailed Procedure, the manner in which CBGs are to be dealt with is governed by “Pre-revised Procedure”. Similarly, if action had been initiated for encashment of bank guarantee prior to issuance of the Revised Detailed Procedure, such action will also have to be completed under the “Pre-revised Procedure”. It all hinges on initiation of action to give trigger for two events; (i) revocation of Stage-II connectivity, and (ii) encashment of CBGs. If the action for initiation of either is after the issuance of the Revised Procedure, it would be under the said Revised Procedure; else, the pre-revised procedure would continue to apply. In the present case, revocation was already complete. No action for encashment was initiated, before or after, by the contracting party (PGCIL). We may elaborate.

20. The request for revocation of Stage-II connectivity had concededly been made on 15.01.2021, more than a year prior to the issuance of the Revised Detailed Procedure. The said request had been acceded to by the respondent PGCIL on 04.03.2021, again more than eleven months prior to issuance of the Revised Detailed Procedure.

21. The purpose of requirement of CBGs is to insulate or indemnify the transmission utility against any loss it might incur on account of defaults on the part of the entity entering into TSA in timely compliances till the commencement of evacuation of power. As noted earlier, no loss has been suffered by the respondent PGCIL on account of either grant of Stage-II connectivity or its revocation.

22. More important than the above, however, is the fact that PGCIL has not initiated at any stage, not even till date, any action for encashment of CBGs. If there was any need for compensation for the loss suffered, PGCIL would have initiated action for encashment of the CBGs while granting revocation as requested, on 04.03.2020. From this conduct, from the correspondence exchanged (compelling the appellant to approach the CERC), and from the submissions made, it is clear that PGCIL was clueless as what was to be done with the CBGs that had been furnished as a pre-condition for grant of the Stage-II connectivity, after the same had been revoked and the TSAs cancelled upon request *albeit* with mutual consent. Since PGCIL had not suffered any financial loss in the process and since it was not finding a cause to initiate action to encash CBGs under the extant Detailed Procedure, the only just and fair dispensation to be accorded on the petition of the appellant by CERC was to allow the CBGs to be discharged and returned.

23. The provision contained in Clause 5.1(2), (3) & (4) of the Revised Detailed Procedure could not have been invoked by CERC to impose virtually a penalty of Rs.50.0 lakh each against the two CBGs on the appellant on the assumption that action for encashment of CBGs had been initiated after the issuance of the Revised Detailed Procedure for the simple reason there is no claim of such action having been initiated at any stage by PGCIL.

24. The decision of CERC also falls foul of Section 73 of the Indian Contract Act wherein compensation is payable to the party to the contract in the event it has suffered loss due to inability of the party to discharge contract. In the facts at hand, it bears repetition to say, there is no claim made by PGCIL of having suffered any loss as requires to be compensated. Concededly, there has been no occasion for PGCIL to invoke Clause 11.2 of the Pre-revised Detailed Procedure to claim a right to encashment of CBGs.

25. For the foregoing reasons, the impugned order directing forfeiture of Rs. 50.0 lakh each from the two CBGs cannot be upheld. The said direction is hereby set aside and vacated. The petition of the appellant before the CERC for substantive relief is allowed. The two Connectivity Bank Guarantees, mentioned earlier, shall be returned forthwith. If PGCIL has encashed the bank guarantees to the extent of forfeiture permitted by CERC

through the impugned order, the said amount shall be refunded forthwith to the appellant.

26. The appeal and the pending application are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 12TH DAY OF APRIL, 2022.**

(Sandesh Kumar Sharma)
Technical Member

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(Justice R.K. Gauba)
Officiating Chairperson