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

(APPELLATE JURISDICTION)

APPEAL NO. 101 OF 2016

Dated: 11th October, 2018.

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:-

**Power Grid Corporation of India)
Ltd.)
Registered Office:)
B-9, Qutab Institutional Area,)
Katwaria Sarai, New Delhi 110016)
Corporate Office:)
"Saudamini", Plot No. 2, Sector-29,)
Gurgaon-122001(Haryana).)**

....Appellant(s)

AND

**1 Central Electricity Regulatory)
Commission)
Through its Secretary,)
4th Floor, Chanderlok Building 36,)
Janpath, New Delhi-110001.)**

**2 Rajasthan Power Procurement)
Centre,)
Represented by its)
Managing Director & Others.)**

Vidyut Bhawan, Vidyut Marg,)
Jaipur-302005 (Rajasthan))

3 Ajmer Vidyut Vitran Nigam Ltd.)
Represented by its)
Managing Director & Others.)
400 KV GSS Building (Ground)
Floor), Ajmer Road, Heerapura,)
Jaipur-302024 (Rajasthan))

4 Jaipur Vidyut Vitran Nigam Ltd.)
Represented by its)
Managing Director & Others.)
400 KV GSS Building (Ground)
Floor), Ajmer Road, Heerapura,)
Jaipur-302024 (Rajasthan))

5 Jodhpur Vidyut Vitran Nigam Ltd.)
Represented by its)
Managing Director & Others.)
400 KV GSS Building (Ground)
Floor), Ajmer Road, Heerapura,)
Jaipur-302024 (Rajasthan))

6 Himachal Pradesh State Electricity Board)
Represented by its Chairman)
Vidyut Bhawan, Kumar House)
Complex Building II,)
Shimla-171004(Himachal Pradesh))

7 Punjab State Electricity Board)
Represented by its Chairman)
The Mall, Patiala-147001 (Punjab))

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- 8 Haryana Power Purchase Centre)**
Represented by its S. E./C & R-1)
Shakti Bhawan, Sector-6)
Panchkula (Haryana)-134109)
- 9 Power Development Department)**
Represented by its Commissioner)
Government of Jammu & Kashmir,)
Mini Secretariat, Jammu-180001)
- 10 Uttar Pradesh Power Corporation)**
Ltd.)
Represented by its Chairman)
Shakti Bhawan,14 Ashok Marg)
Lucknow -226001 (Uttar Pradesh))
- 11 Delhi Transco Ltd.)**
Represented by its Chairman)
Shakti Sadanm Kotla Road, New)
Delhi-110002)
- 12 BSES Yamuna Power Ltd.)**
Represented by its CEO)
BSES Bhawan, Nehru Place, New)
Delhi-110019)
- 13 BSES Rajdhani Power Ltd.)**
Represented by its CEO)
BSES Bhawan, Nehru Place, New)
Delhi-110019)
- 14 North Delhi Power Ltd.)**

Represented by its CEO)
Power Trading & Load Dispatch)
Group, Cennet Buildin Adjacent to)
66/1kV Pitampura-3 Grid)
Building, Near PP Jewellers,)
Pitampura New Delhi-110034)

15 Chandigarh Administration)
Represented by its Chief Engineer)
Sector-9, Chandigarh-160009)

16 Uttarakhand Power Corporation)
Ltd.)
Represented by its Managing)
Director)
Urja Bhawan, Kanwali Road,)
Dehradun-248001 (Uttarakhand))

17 North Central Railway)
Represented by Chief Electrical)
Distribution Engineer)
Allahabad-211033 (Uttar Pradesh))

18 New Delhi Municipal Council)
Represented by its Chairman)
Palika Kendra Sansad Marg, New)
Delhi-110002)

....Respondent(s)

Counsel for the Appellant(s) : Ms. Suparna Srivastava
Ms. Nehul Sharma
Ms. Sanjana Dua

Counsel for the Respondent(s): Mr. Sethu Ramalingam for R.1

Mr. S.K. Agrawal
Mr. A.P. Sinha, Ms. Rudrani
Ms. Shristi Pandey for R.3 to 5

Mr. Pradeep Misra
Mr. Manoj Kr. Sharma for R.10

Mr. S.K. Chaturvedi
Mr. Vishnu S. Pillai for R.11

Mr. R.B. Sharma
Mr. Mohit Mudgal for R.13

J U D G M E N T

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This Appeal against these 18 Respondents is directed against the impugned Order dated 23.09.2015 passed by Respondent No.1/Central Commission in Review Petition No.11/RP/2015 filed by the present Appellant. For the sake of brevity and convenience, the Appellant would be referred to as "**Appellant/PowerGrid.**" The 1st Respondent would be referred to as "**Central Commission**" and other Respondents would be referred to as number of the Respondent.

2. The brief facts that led to the filing of the present appeal are as follows:

a) Petition No. 99/TT/2012 came to be filed by the Appellant/PowerGrid before the Central Commission for approval of transmission tariff for the transmission assets associated with 765 KV systems for Central part of Northern grid Part-III in Northern Region from the respective dates of commercial operation to 31.03.2014 based on the Central Electricity Regulatory Commission (Terms and conditions of Tariff) Regulations 2009. The Commission approved the transmission tariff for 8 assets comprised in the above transmission system, however, disallowed certain claims while approving the transmission tariff. They are as under:

- “(i) disallowed time overrun of two months out of total overrun of 20 months with respect to Asset-6;*
- (ii) disallowed annuity to landowners payable by the Appellant for the next 31 years as per the Relief and Rehabilitation Policy of the Government of Haryana; and*
- (iii) disallowed the cost of “foundation of structure” for the transmission assets comprised in Assets-3, 5, 7 and 8 involving Bhiwani Sub-Station.”*

b) Aggrieved by the above said disallowances, a Review Petition came to be filed before the Central Commission explaining the errors apparent that had occurred while making the above disallowances by the Central Commission.

c) So far as payment of annuity to the farmers by the Appellant, the Review Petition was allowed and the main Order dated 24.03.2015 was rectified to that extent. With regard to cost variation for “foundation of structure”, at the time of truing up, it has declined to rectify the said error. So far as total time overrun i.e., 20 months with regard to Asset-6, the Review Petition was partly allowed allowing time overrun of 18 months and declined to allow time overrun of two months. Aggrieved by the said order, the Appellant is before us.

d) Respondent Nos. 2 to 8 are the users/beneficiaries of transmission assets forming the subject matter of the present appeal and ultimately the transmission charges to be levied would be the liability of these users/beneficiaries. Board of Directors of the Appellant accorded approval to the investment for the subject project vide Memorandum dated 03.11.2009 for a sum of Rs.1075.12 Crores including the Interest During Construction, which amounts to Rs.77.12 Crores based on 3rd Quarter, 2009 price level. The scope of work under the said project covered the following aspects.

“Transmission Lines:

- (a) Meerut Bhiwani 765 kV S/C line -175 km.
- (b) LILO of Bareilly –Mandola 400 kV D/C Line at Meerut -103 km.

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- (c) *LILO of both circuits of Bawana/Bahadurgarh- Hissar 400 kV D/C line at Bhiwani-15 km.*

Sub-Stations:

- (a) *New 2X1000MVA, 765/400 kV and 2X 500 MVA, 400/220 kV Bhiwani 765/400/220 kV sub-station*
(b) *Extension of Meerut 765/400 kV sub-station*
(c) *Extension of Mandola 400/220 kV sub-station*
(d) *Extension of Ballabgarh 400/220 kV sub-station-
Realignment works*

Reactive Compensation:

Line Reactors

- (a) *Meerut –Bhiwani 765 kV S/C Line (240 MVAR
switchable) Bus Reactor(s)*
(b) *Bhiwani- 2X 240 MVAR”*

- e) The project was to commission within 30 months from the date of investment approval i.e., 30.11.2009, which works out to 03.05.2012. The tariff Petition came to be filed for determination of tariff with the following reliefs.

- “1) *Approve the Transmission Tariff for the assets covered under this petition, as per para-9 above. The billing shall be done from the actual date of commercial operation.*
- 2) *Approve the additional capitalization during the year 2011-12.*
- 3) *Approve the additional ROE in line with Regulation 2009.*
- 4) *Allow the Petitioner to recover the shortfall or refund the excess Annual Fixed Charges, on account of Return on Equity due to change in applicable minimum Alternate/*

Corporate Income Tax rate as per the Income Tax Act, 1961 (as amended from time to time) of the respective financial year directly without making any application before the Commission.

- 5) *Approve the reimbursement of expenditure by the beneficiaries towards petition filing fee, and publishing of notices in newspapers in terms of Regulation 42 CERC (Terms and Conditions of Tariff) Regulations, 2009, and other expenditure (if any) in relation to the filing of petition.*
- 6) *Allow the Petitioner to bill and adjust impact on Interest on Loan due to change in Interest rate on account of floating rate of interest applicable during 2009-14 period, if any, from the Respondent.*
- 7) *Allow the Petitioner to bill and recover Service tax on Transmission Charges separately from the Respondents, if at any time exemption from service tax is withdrawn and transmission is notified as a taxable service.*
- 8) *Allow the Petitioner to bill and recover License fee separately from the Respondent after the amendment in the Regulation' 2009 in line with order dated 25.10.2011 in petition No.21/2011.*
- 9) *Allow provisional tariff in accordance with clause (3) of Regulation 5 Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 (First and second Amendment).*
- 10) *Allow the Petitioner to bill Tariff from actual DOCO."*

f) The details of Assets for which the Appellant claimed tariff in its tariff petition together with respective dates of commercial operation are detailed below:

<i>Assets as per Tariff Order dated 24.03.2015 in petition no. 99/TT/2012 with their Actual DOCO</i>	
<i>LILO of Circuit-1 of 400 kV D/C Bareilly-Mandola Line at Meerut Sub-station. (Hereafter referred to as Asset-1")</i>	<i>1.10.2012</i>
<i>LILO of Circuit-2 of 400 kV D/C Bareilly-Mandola Line at Meerut Sub-station (Hereafter referred to as "Asset-2")</i>	<i>1.4.2013</i>
<i>765 kV Bays for Bhiwani-Moga Line at Bhiwani Substation; 765 kV 240 MVAR Bus Reactor-I along with Associated Bays at Bhiwani Sub-station; 765/400 kV 1000 MVA ICT-I Alongwith Associated Bays at Bhiwani Sub-station. (Hereafter referred to as "Asset-3")</i>	<i>1.6.2012</i>
<i>LILO of Hissar-Bawana at Bhiwani Alongwith 2 No 400 kV Bays at Bhiwani Sub-station. (Hereafter referred to as "Asset-4")</i>	<i>1.7.2012</i>
<i>765 kV Bays For Jattikalan-Bhiwani Line at Bhiwani Sub-station. (Hereafter referred as "Asset-5")</i>	<i>1.10.2012</i>
<i>765 kV S/C Meerut-Bhiwani Line alongwith Associated Bays At Meerut &Bhiwani and 765 kV, 240 MVAR Line Reactor at Bhiwani Sub-station (Hereafter referred to as "Asset-6")</i>	<i>1.2.2014</i>
<i>765/400 kV, 1000 MVA ICT-II alongwith associated bays at Bhiwani Sub-station (Hereafter referred to as "Asset-7")</i>	<i>1.10.2012</i>
<i>765 kV, 240 MVAR Bus Reactor-II Along with Associated Bays at Bhiwani Sub-station (Hereafter referred to as "Asset-8")</i>	<i>1.7.2012</i>

g) In response to the notice issued by the Central Commission, some of the Respondent/beneficiaries filed their replies making their submissions on different components of tariff determination. While

determining the tariff, three claims, which are referred to above, were disallowed after lengthy discussion on factual basis.

h) This disallowance ultimately resulted in disallowance of Rs.3.20 Crores and Rs.57 lakhs, respectively, towards Interest During Construction and Incidental Expenses During Construction (“**IDC & IEDC**”). According to the Appellant, the reasons or explanations for the plea of time overrun were placed on record by the Appellant contending that the disputes pertaining to right of way (“**ROW**”) were taken up with the concerned authorities, and while considering the said explanation, delay of 2 months was rejected since there was no correspondence on record as placed by the Appellant so far as the explanation of 18 months time overrun. According to the Appellant, the 2 months’ time overrun has occurred even in the intervening period for which the delay was not condoned. It is the case of the Appellant that disputes regarding right of way was continuously preventing the Appellant from undertaking the works of the project and discussions on regular basis including correspondence were taking place. Appellant contends that the Central Commission cannot expect the Appellant to have a mechanical practice “ a letter a month”

policy to be adopted by the Appellant. According to the Appellant, the Central Commission failed to understand that if the right of way dispute had been resolved and the work had commenced including the two intervening months, no further requirement of correspondence thereafter to follow up with the authorities would have arisen. The hyper-technical consideration of time overrun by the Central Commission has led to a grave error apparent on the face of the record. Correspondence for the period before and after the said two months was placed before the Central Commission. Explaining above position, a Review Petition came to be filed before the Central Commission, and the Central Commission had to appreciate the problem of the Appellant for the period between 10.06.2011 to 06.08.2013 as the period of agitation was persisting continuously and not in parts i.e., 10.06.2011 to 01.02.2012 and again from 19.10.2012 to 06.08.2013.

i) Contending that errors apparent occurred on the face of the record, the Appellant filed another correspondence dated 30.09.2012 addressed to SHO at Maham (Rohtak). This correspondence explained how several hindrances from the residents of above locality

delayed the implementation of transmission system project is the stand of the Appellant.

j) In response to the Appellant's case, Respondent No.13 contended that the Appellant had not produced any relevant document in explaining the two months time overrun. Therefore, there was justification for the Central Commission in disallowing the two months time overrun. Therefore, according to Respondent no.13, there was no apparent error on the face of the record.

3. Raising the following questions of law, this appeal came to be filed.

- A. *Whether while determining tariff for transmission assets in a Tariff Petition filed by a transmission licensee, the Central Electricity Regulatory Commission is justified and correct in computing the time overrun in completion of transmission assets by not taking into account a few intervening months from out of the total months of time overrun on the ground that no documentary evidence with respect to the said intervening months has been placed on record?*
- B. *Whether the Central Electricity Regulatory Commission which is entrusted under the Electricity Act, 2003 with the function of determining tariff for inter-State transmission of electricity, is justified in discharging the said function by adopting a hyper-technical approach and thus denying the transmission licensee of its legitimate allowances under tariff determination for the transmission assets developed by it?*

4. In response to the appeal, Respondent Nos. 3 to 5 have filed common objections. On the following objections, they sought for dismissal of the appeal.

(i) That there has been a time overrun of 20 months thereby consequential delay in completion of the Asset-6 and out of the total delay of 20 months, the delay for 18 months was condoned by the Central Commission and rightly the remaining 2 months delay was disallowed for which the Appellant could not provide acceptable evidence and explanation. Hence IDC amounting to Rs.301.66 Lakh and IEDC amounting to Rs.57.00 Lakh for the period of 2 months delay was disallowed, while confirming the findings.

(ii) That the Appellant could not justify the delay of each and every day with cogent and valid explanation with proof which he ought to have done. That the Central Commission had rightly took note of the same and rejected the issue No. (i) of the Review Petition.

(iii) That the attitude of the Appellant was lax and the laxity in approach towards the alleged problems raised by the Appellant as the cause of delay could not be taken cognizance of by the Commission. In a sense, the Appellant went in hibernation without caring for its duties and responsibilities of completing the required work of Asset 6 on time.

(iv) The Appellant was, during the execution of the project, inert, lax and dissolute and could not handle the problem of alleged ROW rightfully and later on made lame excuses putting forth untenable and inappropriate evidences without any documentary proof specially in the case of FIR to the Police Station regarding the ROW.

(v) The Appellant unsuccessfully tried to produce a letter of 30.09.2012 before the Commission on the issue of time overrun to cover-up the delay of 2 months but the Commission did not agree to accept the same as a valid proof as it did not have the receipt of the police station.

(vi) Though under Order XLVII Rule 1 there is scope of permissibility of review of new and important matter for evidence but which could not have been discovered even after the exercise of due diligence at the time of passing the impugned order.

(vii) After having realized his lax, inert and irresponsible attitude as regards the execution of the project (Asset 6), the Appellant has tried vehemently to cover up by all means but in vain.

5. They also contend that appeal is not maintainable against the order passed in Review Petition, wherein the review has been rejected or has been partially rejected refusing to review certain portions of the order.

6. Respondent No.10 - Uttar Pradesh Power Corporation Limited contended that Section 61 (Tariff Regulations) along with preamble of the Act makes it abundantly clear that the paramount consideration of the Commission has to be safeguarding the interest of the

consumer for the delay and latches on the part of the Appellant and the consumers in the state of UP cannot be burdened with IDC & IEDC. Therefore, the Central Commission has rightly rejected the claim of the Appellant. They further referred to the Judgment dated 10.05.2012 passed by this Tribunal in Appeal No. 180 of 2011 to stress on the point that damages in the form of IDC & IEDC should not be passed on to the beneficiaries unjustifiably. Similar view was taken by this Tribunal in Appeal No. 281 of 2014 by Order dated 13.08.2015. In another Judgment in Appeal No. 98 of 2015, this Tribunal refused to grant IDC & IEDC to the Appellant opining that such burden unjustifiably cannot be passed on to the beneficiaries. With these submissions, Respondent No.10 contended that discretionary power of the Central Commission in not condoning the delay in date of commercial operation (2 months) in respect of Asset-6 is justifiable and therefore appeal ought to be dismissed.

7. Respondent No.11- Delhi Transco Limited contends that the appeal is nothing but an abuse of process of law and therefore on the question of maintainability itself the appeal deserves to be dismissed. It is further contended that the 11th Respondent has nothing to do

with the controversy raised in the appeal, in any manner, and therefore they ought to be deleted from the proceedings.

8. The contesting Respondent No.13 – BSES Rajdhani Power Limited has in detail contested the appeal on following grounds:

On the issue of maintainability, they contend that an order rejecting the Review Petition is not maintainable in terms of Order 47 Rule 7 of the Civil Procedure Code since such appeal would be maintainable only against the main order dated 24.03.2015. In support of this preposition, reliance is placed on the Judgment of this Tribunal in Appeal No. 88 of 2013 dated 02.12.2013. They further contend that Asset-6 completion was delayed by 20 months. However, the Central Commission condoned the delay of 18 months rejecting to condone the two months delay. As a matter of fact, the Appellant re-argued on the issue of time overrun in the Review Petition before the Central Commission. According to Respondent No.13, the Appellant has to explain and justify each and every day's delay. Its responsibility does not end by placing complaints before the authorities with regard to the right of way. The Appellant has to be diligent and must follow up the execution of work to complete the

project in scheduled time. The Appellant had taken a relaxed attitude and cannot seek intervention of the authorities to condone the delay, which is not properly explained i.e., the two months intervening period. Letter dated 30.09.2012 was relied upon to explain the delay of two months and the same was rejected by the Central Commission opining that there is nothing in the said letter which shows that Police Station had received/acknowledged the said letter. The second ground of rejection was that review could be allowed only on discovery of new and important matter or evidence which was not within the knowledge or could not be produced by the Review Petitioner after exercise of due diligence, at the relevant point of time. Since there was no apparent error on the face of record, the Central Commission rightly rejected the request of the Appellant to condone the delay of two months time overrun. Since there was no proper case made out for review of the order, the Central Commission was justified in rejecting the Review Petition pertaining to the issue of two months time overrun.

9. Learned counsel appearing for the parties reiterated their respective stands in the form of arguments before us. We have

considered their arguments and have gone through the decisions relied upon by them.

10. On the issue of maintainability of the appeal, according to Ms. Suparna Srivastava, learned counsel for the Appellant, in a matter of this nature if Appellant could explain the delay at the commencement of the project and for subsequent period except the two months intervening period, it is to be understood that the said problem or obstruction continued even for the said intervening period of two months, and therefore the absence of correspondence or communication ought not to have come in the way of Central Commission to exclude the two months intervening period of time overrun. She further contends that same obstruction or hindrance is to be presumed for the intervening period of two months and therefore the hyper-technical manner in which the Central Commission has considered the issue deserves to be rejected.

11. With regard to maintainability of the appeal, she places reliance on the Judgment of this Tribunal in Appeal No. 30 of 2013 dated 07.03.2014. First question was with regard to maintainability of appeal against the review order rejecting the review by confirming the

original order in respect of one issue. The relevant portion of the order is as under:

“19. We find that in this case the Central Commission in the suo-motu review order dated 14.3.2012 corrected the inadvertent clerical/arithmetical errors in respect of undischarged liability and the linkage errors in respect of the calculation of Advance Against Depreciation and Depreciation which had occurred in the main order dated 16.1.2012. Consequently, the capital cost, Return on Equity, Interest on loan, depreciation, etc were modified and revised Annual Fixed Charges for FY 2004-09 were redetermined. Thus, the suo-motu order resulted in redetermination of the various components of the tariff and consequently, the Annual Fixed Charges for the project to be recovered from the beneficiaries.

20. In the Review Petition, the Appellant had raised five items of error in the Main Order including three grounds of errors which were corrected in the suo-motu order dated 14.3.2012 by the State Commission.

.....

Accordingly, the Central Commission re-determined and revised the annual fixed charges for the project for the period 2007-09 in the Review Order dated 5.9.2012. Thus, the original order dated 16.1.2012 was changed by the earlier review order dated 14.3.2012 got further changed in the Review Order dated 5.9.2012. Therefore the main order got merged with the Review Order. It is noticed that the interest on loan for the FY 2008-09 allowed in the Main Order was Rs.13326.99 lacs but in the Review Order, the interest on loan allowed is only Rs.12865.76 lacs. Similarly, the annual fixed charges for the project for the FY 2008-09 allowed for the project was Rs.29978.18 lacs which has been rectified as Rs.31961.36 lacs in the Impugned Review Order dated 5.9.2012.

22.

The interest on loan and Annual Fixed charges for FY 2008-09 have also been modified in the Review order dated 5.9.2012 with respect to the Main order dated 16.1.2012. Thus, in the present case, the Doctrine of Merger will be applicable and main order

dated 16.1.2012 and suo-motu Review order dated 14.3.2012 will merge with the Review order dated 5.9.2012.

.....”

12. Learned counsel for the Appellant and learned counsel for Respondent no.13 rely upon the Judgment of this Tribunal in Appeal No. 88 of 2013. The relevant portion of the said order reads as under:

“11. On the basis of these decisions, it was argued by the learned Counsel for the Respondent that when the Review Petition raises several distinct matters and the same are partly rejected, the doctrine of merger in so far as the matters for which review is rejected, will not have any application and consequently, the present Appeal is not maintainable.

12. He further stated that assuming that the Review was partly allowed; even then the doctrine of merger will be applicable only to the extent the review was allowed and will not be applicable to the matters for which the review was rejected.”

13. In the above judgment reliance was placed on the Supreme Court Judgment in the case of **Municipal Corporation of Delhi v Yashwant Singh Negi**¹ wherein it is stated that once the Court has refused to entertain the Review Petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order

¹ (2013 (5) SCALE 447)

dismissing the Review Petition because with the dismissal of the Review petition, the principle of merger does not apply.

14. They also referred to a decision of the Karnataka High Court in the case of **Kothari Industrial Corporation Vs Agricultural Income Tax Officer**². The High Court had laid down the principles with regard to doctrine of merger as under:

- (a) *Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.*
- (b) *If the appeal or revision is restricted to a delinkable part or portion of the original order or one of the several matters or issues dealt by the original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.*
- (c) *Where the Appellate authority has given plenary jurisdiction over the entire matter dealt with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of*

² ILR 1998 Karnataka 1510

views. The view of this Court in such cases has been that the merger will be in respect of the entire order.

(d) There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."

15. After referring to the above two decisions, the Tribunal opined that the purpose of doctrine of merger is to ensure that at one time one order is operative, which means, part of the order which is not the subject matter of appeal cannot be said to have merged with the order passed by the superior court. The doctrine of merger will apply in cases where an appeal or revision even if the same is dismissed by the superior court, but the same principle will not be applicable in the event review is rejected. They also referred to the Supreme Court Judgment in **DSR Steel Private Limited Vs. State of Rajasthan**³. Paragraph Nos. 25.2, 25.3 and 26 are relevant, which read as under:

"25.2. The Second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review Petition is allowed and the decree/order under review is

³ (2012) 6 SCC 762

reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review Petition. The decree in such a case suffers neither any reversal nor dismissed thereby affirming the decree or order. In such a contingency, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the Review Petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the Appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

26. The decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been noted, shall also have to be understood in that lights only.”

16. After referring to these judgments, this Tribunal on the principle of doctrine of merger opined rightly that review will be applicable only to the subject matter reviewed and the same will not be applicable if the review is rejected in respect of the said subject matter. They further proceeded to opine that if the Review Petition raises several distinct issues and some are rejected, the doctrine of merger insofar

as the issues which were rejected in the review order will not have any application. In that event, it was opined that the party had to file an appeal against the main order and not against the order of rejection passed in the Review Petition. Having regard to the disputed issues raised in the said case, this Tribunal opined that no appeal can be filed against the part of the review order wherein the review has been rejected.

17. In the latest judgment dated 01.05.2018 in Appeal No. 85 of 2016 this Tribunal had an occasion to refer to the Order dated 02.12.2013 in Appeal No. 88 of 2013, which is already discussed here-in-above. They also referred to the Judgment in Appeal No. 30 of 2013 dated 07.03.2014 of this Tribunal. In the said judgment by modifying the main order dated 13.08.2015, the Central Commission had allowed the review on one aspect i.e., DOCO of Asset-B, wherein DOCO was allowed as 01.08.2013 instead of 01.01.2014 in the main order, which was the only modification. Therefore, the Tribunal opined that the doctrine of merger will apply to that case and capital cost of Asset-B shall be taken as on 01.08.2013 at the time of truing up instead of 01.01.2014 as mentioned in the main order. In this Judgment, the Tribunal never proceeded to discuss, analyse and

opine any situation where part of the reliefs sought in the Review Petition was allowed and other parts were disallowed. The Judgment of this Tribunal dated 02.12.2013 in Appeal No. 88 of 2013 with regard to merger of review order, if part of the reliefs in a review are allowed is not distinguished. Therefore, we are of the opinion that this appeal is not maintainable since there is no challenge to the main order dated 24.03.2015, as there is rejection of review, reviewing the original order insofar as two months time overrun while reviewing other two reliefs sought by the Appellant in the Review Petition. The reasons given by the Central Commission for not accepting the time overrun of 2 months in commissioning of Asset - 6 in the main order dated 24.03.2015 are as under:

“28. As regards the commissioning of Asset-6, there is a delay of 20 months. The petitioner has attributed the delay to hindrance created by the villagers of village PipliKhera, village Bamla, village Tihar Malik etc. at various locations of this line. It has been stated that the matter was taken up with Higher Authorities in the Administration to resolve the issue. The RoW problem was so serious that the police protection was taken for construction of this line. The petitioner has submitted copies of letters written to SDM, Bhiwani, SHO, Sadar Thana, Bhiwani, SDM Gohana, Sonapat, SHO, Bhiwani, SHO, Maham, Rohtak, SDM Mohana, Sonapat, SHO, Kharak, Bhiwani, The Deputy Commissioner, Rohtak (HR), The Deputy Commissioner, Sonapat (HR) and the District Magistrate, Bhiwani (HR). The letters submitted by the petitioner indicate the hindrances caused at various locations for the erection of 765 kV Meerut-

Bhiwani Transmission Line. The letters submitted by the petitioner in regard to hindrances caused by villagers at various locations of 765 kV S/C Meerut-Bhiwani do not indicate the start date and end date of the hindrance. From the submission of the petitioner it is difficult to determine the delay at each tower location. There is evidence to establish that work was held up at different locations from 10.6.2011 to 1.2.2012 and again from 19.10.2012 to 6.8.2013. Letters in the month of June, 2011, August, 2011, December, 2011, February, 2012, October, 2012, November, 2012, December, 2012, January, 2013 February, 2013, March, 2013, April, 2013, July, 2013 and August, 2013 submitted under Affidavit dated 07.10.2014, establish this. We, therefore, have no hesitation in condoning the delay of 18 months i.e. from 10.6.2011 to 1.2.2012 (8 months) and from 19.10.2012 to 5.8.2013 (10 months). The delay of remaining 2 months in respect of Asset 6 is disallowed. Consequently, the capital cost of this asset is reduced by Rs.358.66 lakh (Rs.301.66 lakh towards IDC and Rs.57.00 lakh towards IEDC)”

18. Coming to the merits of the case, what is relevant to be considered is what is the impact of delay in completing the project within the scheduled time? Apparently, when fresh correspondence came to be filed before the Central Commission i.e., letter dated 30.09.2012, it was without any acknowledgment from the concerned police station. Further, why this letter was not placed before the Central Commission at the time of considering the main order is not at all explained. At the time of filing the main Tariff Petition, this letter was not placed before the Central Commission. There is nothing on record which explains that after exercise of due diligence they were

not able to produce this letter or the same was not within their knowledge. No convincing reasoning was forthcoming, therefore the time overrun came to be condoned for 18 months by accepting the explanation given i.e., disputes pertaining to right of way at different locations during this period by rejecting to condone 2 months time overrun. If the hindrance was at different locations at different periods, we cannot accept the argument of learned counsel for the Appellant that if an explanation is given for the period earlier to and after the intervening two months, the same explanation would hold good. Since the burden on account of delay in completion of the project ultimately passes on to the consumers, one has to explain the delay with proper reason and explanation apart from placing material in support of the reasons or explanation. It is noticed that the intervening two months of time overrun was tried to be explained by the Appellant by placing one complaint to SHO at Maham (Rohtak) dated 30.09.2012. As rightly observed by the Central Commission there is no acknowledgment whatsoever to confirm with certainty that such complaint for removal of hindrance/obstruction by residents was ever addressed to SHO at Maham. It is neither pleaded nor indicated by the Appellant either before the Central Commission or before us

that this is a discovery of new and relevant fact which after exercise of due diligence was not within their knowledge or could not be secured by the Appellant. If such document was available, we find no good reason why it did not find place when the main petition came to be filed. The very fact that there is no acknowledgement of the SHO of the Police Station, it is clear that this document has come into existence now for the purpose of review. Therefore, the explanation offered for 18 months cannot be taken as explanation for explaining the delay of two months time overrun as contended by the Appellant.

19. In view of the above discussion and reasoning, we are of the opinion that the appeal fails both on the ground of maintainability and on merits. Accordingly, the appeal is dismissed.

20. Parties to bear their own cost.

S.D. Dubey
[Technical Member]

Justice Manjula Chellur
[Chairperson]

Dated: 11th October, 2018

REPORTABLE/~~NON-REPORTABLE~~