IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

REVIEW PETITION NO. 05 OF 2018
IN
APPEAL NO. 107 OF 2015 & APPEAL NO. 117 OF 2015

Dated: 13th March, 2019

Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF:

Lanco Amarkantak Power Limited
Lanco House, Plot No. 397 Phase III,
Udyog Vihar, Gurgaon – 122 016
Through its Authorized Signatory
(Mr. Anil Sharma) … **Review Petitioner**

VERSUS

1. Haryana Electricity Regulatory Commission
   Bays No. 33-36, Sector – 4,
   Panchkula 134 112,
   Haryana (through its Secretary)

2. Haryana Power Purhcase Center (on Behalf of M/s
   Haryana Power Generation Corporation Ltd.)
   2nd floor, Shakti Bhawan, Sector -6,
   Panchkula 134109, Haryana (through its Chief Engineer)

3. Haryana Power Generation Corporation Ltd.
   Urja Bhawan, C-7, Sector 6,
   HPGCL, Panchkula 134 009,
   Haryana (through its Managing Director)

4. PTC India Ltd.
2nd Floor, NBCC Tower, 15,
Bhikaji Cama Place,
New Delhi – 110 066
(Through its Chairman and Managing Director)

5. Chhattisgarh State Power Trading Co. Ltd.
Vidyut Seva Bhavan, Danganiya,
Raipur-492013, Chhattisgarh,
(Through its Managing Director) **….Respondent(s)**

Counsel for the Review Petitioner/
Appellant(s) : Mr. Deepak Khurana
Mr. Tejas Anand

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Mr. Pulkit Agarwal
Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Tanya Sareen

Ms. Raveena Dhamija
Mr. Girik Bhalla

ORDER

PER HON'BLE MR. S.D.DUBEY, TECHNICAL MEMBER

1. The present Review Petition No.05 of 2018 has been filed by the Review Petitioner, Lanco Amarkantak Power Limited under Section 120 of the Electricity Act, 2003 for review of the of the common Judgment and Order dated 21.03.2018 passed by this Tribunal, in Appeal No. 107/2015 and Appeal No. 117/2015. The said Appeals were filed by Haryana Power Purchase Center and Lanco

Amarkantak Power Ltd. respectively challenging the Tariff Order dated 23.01.2015 passed by the Haryana Electricity Regulatory Commission ('**HERC/the Commission**') in Case No. HERC/PRO-05 of 2014.

2. The Review Petitioner/Appellant has prayed for the relief as follows:-

a) review the Judgment dated 21.03.2018 passed in Appeal No. 107/2015 and Appeal No. 117/2015 to the extent of decision on Issue (E) and Issue (G) and allow the claim of the Appellant on the said issues as raised in Appeal No. 117/2015;

b) pass such other or further orders as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

3. The Review Petitioner LAPL in Review Petition (05 of 2018) has sought review of the Impugned Judgment claiming errors apparent on the face of the record and material omissions by this Tribunal in recording facts, evidence and substantive contentions urged by the Review Petitioner during the proceedings in Appeal Nos. 107 of 2015 and 117 of 2015 relating to Issue (E) and (Issue (G) mentioned below:-

(E) Computation of Energy Charges

(G) Non-Recovery of Fixed Charges Corresponding to Share of 5% Power Supplied to State of Chhattisgarh.

4. We have heard the learned counsel, Mr. Deepak Khurana, appearing for Review Petitioner/LAPL and learned counsel, Mr. M.G. Ramachandran, appearing for Respondent No.2/HPPC at considerable length of time. We have carefully gone through the written submissions and the ground urged in the review petition. The issues raised in the Review Petition are dealt hereunder:-

Our Consideration & Analaysis:-

Issue (E) – Computation of Energy Charges

4.1 The learned counsel for the Review Petitioner LAPL has submitted the following submissions for our consideration:-

The findings and decision of the Hon'ble Tribunal on Issue (E) are reproduced hereunder:-

*"**56. Our Findings***

56.1 The Haryana Utilities have contended that energy charges applicable to them should have been restricted as per the fuel cost on the basis of cost of coal from linked mine of Southern Eastern Coalfield (SECL) and high cost of coal from alternate source should have been entirely at the risk and cost of Lanco and in any way not passed on to the Haryana Utilities.

56.2 Lanco has stated that they were being supplied linkage coal from SECL to the extent of yearly average 27% PLF only with month-wise huge variations. They have further submitted that the linkage coal supply by SECL was not even sufficient to run the plant at technical minimum of 50%. We note that the Commission in the impugned order

has considered the consumption of costlier coal for UI energy (some power was sold as UI) in the first instance and consumption of balance coal (including linkage coal) for supply of power to CSPTCL (Chhattisgarh) & HPPC (Haryana) based on the scheduled energy for the period commencing from 07.05.2011 to 30.06.2012. However, w.e.f. 01.07.2012, the costlier coal was considered for UI energy & Chhattisgarh and balance coal was considered for Haryana. While considering the utilization of balance coal (linkage / e-auction/ Open market/ Imported) for Haryana's share of power supply, linkage coal was considered to be first utilized to the full extent and then balance normative consumption was adjusted against e-auction, open market and imported coal in the same order of preference.

56.3 We have analysed the contentions of both the parties and find that the State Commission has adopted judicious approach to strike a balance between the generator (Lanco) on the one hand and retail supplier/distributor (HPPC/HPGCL) on the other. In such circumstances, the computation of energy charges carried out by the State Commission is considered just and appropriate. We, therefore, agree with the State Commission on the methodology adopted for computation of energy charges."

4.2 A perusal of the above would show that whilst this Tribunal has noted the methodology adopted by the Commission in computation of energy charges and has agreed with the same, the Tribunal has not dealt with the challenge made by the Petitioner to the said purported methodology. The challenge of the Petitioner is duly noted in the contentions reproduced in Para 24, 55 and 56.2 of the Judgment,

however, there is no finding at all rejecting the said challenge in any manner, much less by assigning reasons for the same.

4.3 The Hon'ble Supreme Court has held in a catena of judgments that the Order must contain reasons in support of the findings recorded based on appreciation of evidence on all the material issues arising in the case. In this regard, reliance is placed on a recent judgment of the Hon'ble Supreme Court in ***Central Board of Trustees v. M/s Indore Composite Pvt. Ltd. –(2018) 8 SCC 443*** - ***[Paras 12-16]***

4.4 The findings and decision of this Tribunal on Issue (E), in respectful submission of the Petitioner, does not contain any reasoning and therefore is an error on the face of the judgement. The grounds urged by the Petitioner to challenge the methodology adopted by the Commission, as noted in Paras 24, 55 and 56.2 of the Order dated 21.03.2018 are valid, sound and legitimate grounds and if considered, the same would establish that the aforesaid methodology was totally arbitrary, unreasonable, illogical and absurd. The said grounds raised by the Petitioner ought to be considered on their merits by this Tribunal.

4.5 The tariff of Unit 2 comprising of fixed charges and energy charges was determined by HERC as per HERC Tariff Regulations, 2008 pursuant to the direction contained in the Order dated 03.01.2014

passed by this Tribunal. As per HERC Tariff Regulations, 2008, the energy charge rates have to be computed month wise based on month wise actual weighted average landed cost of coal from all sources as well as the weighted average GCV of coal actually fired. The Review Petitioner has been currently supplying power at regulated tariff determined by the HERC based on HERC Tariff Regulations, 2008 wherein the month wise energy charges are being billed and paid by the Respondents on the basis of the month wise actual weighted average landed cost of coal from all sources as well as the weighted average GCV of coal actually fired. The principle for billing and payment of energy charges as per HERC Tariff Regulations, 2008 cannot be discriminated for the past and the current supply of power. There cannot be different methodologies for computation of Energy Charges under the same HERC Tariff Regulations, 2008. The yearly weighted average rate computed by HERC adopting a unique/different methodology of preferring the cheapest linkage coal for supplies to Haryana and the costly alternate coal supplies for other beneficiary (Chhattisgarh) is against the principle of fuel cost pass through under the power supply at regulated tariff and therefore the methodology of computation of Energy Charges by HERC is flawed and erroneous. The linkage coal and alternate coal procured each month has its own coal-mix in terms

of linkage coal/e-auction coal/open market coal/imported coal having different prices and quantities. Therefore, the conclusion of the Tribunal on this issue that *computation of energy charges carried out by the State Commission is considered just and appropriate* warrants review by the Tribunal.

4.6 As submitted above, this Tribunal has not given any finding or assigned any reason for rejecting the challenge made by the Petitioner to the findings of the State Commission. Although the Tribunal has noted various contentions and submissions made by the parties on the said issue, however reasons have not been assigned for rejecting the contentions of the Petitioner herein. In this regard the Petitioner reiterates the contents of grounds A to C of the Review Petition. Therefore, he submitted that the prayer sought in the review petition may kindly be allowed as prayed for.

4.7 ***Per contra***, the learned counsel for Respondent No. 2 i.e HPPC submitted that the submissions made by Lanco in regard to Issue (E) is baseless and devoid of any merit for the following reasons:

a. The State Commission, after considering the submissions of HPPC, Lanco and the Report of Ernst & Young (E & Y) suggesting the methodology, in the order dated 23.01.2015 (impugned in Appeal No. 107 and 117 of 2015), has devised a methodology to compute the energy charges.

b. The methodology adopted by the State Commission in the order dated 23.01.2015 (impugned in Appeal No. 107 and 117 of 2015) was challenged both by HPPC and Lanco in the respective appeals filed before this Tribunal.

c. This Tribunal has noted the detailed contentions and arguments of HPPC and Lanco in respect of above issue at Paragraphs 23 and 24 respectively in the judgement.

d. After noting the contentions of HPPC and Lanco, this Tribunal under the head of 'Issue No. 5 Computation of Energy Charges' in Para 54 to 56 has dealt with the respective contentions and the findings of the State Commission in the order dated 23.01.2015 and has, finally, held as under:

"56.3 We have analysed the contentions of both the parties and find that the State Commission has adopted judicious approach to strike a balance between the generator (Lanco) on the one hand and retail supplier/distributor (HPPC/HPGCL) on the other. In such circumstances, the computation of energy charges carried out by the State Commission is considered just and appropriate. We, therefore, agree with the State Commission on the methodology adopted for computation of energy charges."

4.8 Learned counsel further submitted that in view of the above, the contention of the Lanco that this Tribunal has not assigned reasons or has not dealt with the contentions and arguments in regard to energy charges is false and baseless and without any substance. It is well-settled that the finding in case being erroneous cannot be a ground for review though it may be open to challenge in appeal. In

the light of the above decision which specifically states that this Tribunal agrees with the State Commission on the methodology adopted for computation of energy charges, it cannot be said that there is an error apparent on the face of record or otherwise there is a cause for exercising review jurisdiction. It is further submitted that even HPPC is aggrieved with the order passed by this Tribunal adopting a methodology which was challenged by HPPC in Appeal No. 107 of 2015. Hence, he submitted that review petition filed by the petitioner is liable to be dismissed as devoid of merit with cost.

Our Findings :-

4.9 We have carefully considered the submissions of the learned counsel of Review Petitioner and Respondent No.2 and also took note of the findings & analysis brought out in the impugned judgement. It is relevant to note that the entire grounds, pleadings, arguments and submissions of the Review Petitioner/Appellant to contest this issue in this Review Petition were duly considered by this Tribunal in detail while adjudicating the said Appeal filed by the Review Petitioner/Appellant and passing the referred judgment dated 21.03.2018. Neither any additional nor fresh ground has been made out by the review petitioner now which otherwise, strengthen its pleadings in support of its intended review of the judgment relating to

the Issue (E). Further, it is well settled principles of law that finding in a case being erroneous cannot be a ground for review in view of the well settled law laid down by the apex court in the catena of judgments.

4.10 Having regard to the considered decision of HERC for computation of energy charges based on the linkage coal & other coal, which was upheld by this Tribunal, we are of the considered view that there is no error apparent on the face of record and also, no fresh cause or sufficient / additional ground has been made out by the Review Petitioner to re-adjudicate the matter and allow review in respect of this issue. Hence, we are not inclined to accept the prayer of the Review Petitioner in as much as review of Issue (E) is concerned.

5. Issue (G) – Non-recovery of fixed charges corresponding to share of 5% power supplied to State of Chhattisgarh

5.1 The learned counsel for the Review Petitioner has submitted that findings and decision of this Tribunal on Issue (G) in the Judgement dated 21.03.2018 are reproduced hereunder :-

> *"**62. Our Findings***
>
> *62.1 Lanco is obligated to supply 5% power at variable costs as per the Implementation Agreement dated 01.08.2009 executed with the State of Chhattisgarh. Accordingly, Lanco has claimed charges corresponding to their obligation to*

supply 5% power to the State of Chhattisgarh at variable costs. On the other hand, Haryana Utilities have contested that as per the PPA, there is no such provision. As per HPPC, Lanco is expected to bear the risk and cost of such obligation and it cannot claim for any recovery of fixed charges for the balance 5% capacity from Haryana Utilities. Lanco has relied upon the orders dated May, 2014 and September, 2016 in respect of Adhunik Power and Natural Resources Ltd. (APNRL) passed by the JSERC, wherein JSERC held as follows: "The Commission also notes that in case the Annual Fixed Charges are not allowed to be recovered from the balance capacity of 88%, the generating company shall be unable to recover the fixed charges corresponding to 12% of the capacity and the same shall lead to significant reduction in its return on equity."

62.2 The reliance of Lanco on the above order of JERC may not be justifiable as the same pertains to some hydroelectric project. In case of hydro projects, 12 percent free power is given to the home state for the distress caused by setting up of the project in form of compensation to local area's affected persons. In the instant case, the matter is altogether different and any provision to the effect of obligation of Lanco to supply 5% power at variable cost to Chhattisgarh does not find a place in the PPA signed by Lanco/PTC with Haryana Utilities. We, therefore, agree with the decision of the State Commission for not considering/allowing recovery of fixed charges for the reference 5% capacity to Lanco."

(emphasis added)

5.2 Learned counsel submitted that perusal of the above would show that this Tribunal has duly noted that the Petitioner is obliged to supply the said 5% power to the State of Chhattisgarh at variable charges in terms of the Implementation Agreement executed between the said parties and therefore the Petitioner has claimed fixed charges

corresponding to its obligation to supply 5% power at variable costs to the State of Chhattisgarh.

5.3 Learned counsel further contended that during proceedings before this Tribunal, the Petitioner had placed reliance on Tariff Orders dated 26.05.2014 and 01.09.2016 issued by the Jharkhand State Electricity Regulatory Commission (JSERC) in the matter of *Adhunik Power and Natural Resources Ltd. (APNRL)*, wherein, in a similar case, the Jharkhand Commission had granted fixed charges corresponding to the power supplied at variable charges to the generator.

5.4 Further, he quick to point out that this Tribunal has distinguished the said Orders of the JSERC on the premise that the said Orders pertain to hydroelectric project. This is an error apparent inasmuch as the said Orders indisputably pertain to a thermal project and not hydroelectric project. The said Orders of the Jharkhand Commission are in respect of APNRL which owns and operates a 2x270 MW coal based thermal power project in the State of Jharkhand and not any hydro generation project.

5.5 Learned counsel for the Review Petitioner vehemently submitted that, therefore, in as much as the decision of the Tribunal on Issue (G) is premised on an error apparent that the Orders of Jharkhand

Commission pertain to a hydroelectric project where '*12 percent free power is given to the home state for the distress caused by setting up of the project in form of compensation to local area's affected persons'* and consequently not applicable to the present case which is one of a thermal power projects. For the aforesaid reason, the decision of the Tribunal therefore warrants review the judgement.

5.6 Further, the finding of the Tribunal that there is no provision to the effect of obligation of Petitioner to supply 5% power at variable cost to Chhattisgarh in the PPA signed by Lanco/PTC with Haryana Utilities is again an error apparent on the face of the Order, inasmuch as it is plainly contrary to the provisions of the PPA.

5.7 Learned counsel contended that it was in terms of the Conditions Precedent contained in Clause 3.1.1 (ii) of the PPA between the Petitioner and Respondent No. 3 herein, the Petitioner entered into an Implementation Agreement with the Government of Chhattisgarh (GoCG). Thus, clearly the Implementation Agreement was executed in terms of the PPA. This is also noted by the Tribunal in Para 10(B) of the Judgement at Page 9 thereof. Therefore, the finding of the Tribunal that there is no provision in the PPA for supply of variable cost power to Chhattisgarh is an error apparent on the face of the record.

5.8 Learned counsel further submitted that the Petitioner entered into the Implementation Agreement dated 01.08.2009 with the Government of Chhattisgarh, as it was a *condition precedent* to be satisfied under Clause 3.1.1 (ii) of the PPA. Though the signing date of 01.08.2009 of the Implementation Agreement is after the date of signing of PPA of 19.10.2005, however, the PPA dated 19.10.2005 became effective only after the satisfaction of conditions precedent by the Petitioner. The satisfaction of conditions precedent by the Parties in the PPA was an important event for effectiveness of the PPA.

5.9 Learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in ***Kunhayammed & Ors vs State Of Kerala & Anr.- (2000) 6 SCC 359,*** wherein it was held as under:-

> *"……In Sushil Kumar Sen Vs. State of Bihar AIR 1975 SC 1185 the doctrine of merger usually applicable to orders passed in exercise of appellate or revisional jurisdiction was held to be applicable also to orders passed in exercise of review jurisdiction. This Court held that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one……"*

5.10 It is an admitted position that in terms of the said Implementation Agreement, the Petitioner was obligated to supply 35% of the net power generated from its Unit 2 to Chhattisgarh State Power Trading Company Limited ('CSPTCL'), in *lieu* of various state facilities, clearances and permits etc. provided by the Government of Chhattisgarh. Out of the total 35% power, 5% power was to be supplied at variable charges and the remaining 30% power was to be supplied at a total Tariff comprising of fixed charges and variable charges to be determined by the Appropriate Commission based on CERC Tariff Regulations. Grant of concessional facilities by the Chhattisgarh State Government has resulted in reduction of capital cost of the project which has directly benefited HPPC by way of lower power purchase cost than it would have been if such concessional facilities were not granted. This has also been observed by this Tribunal in the Order dated 23.03.2011 in Appeal No. 15/2011 (between the same parties). It was on the basis of the PPA dated 12.01.2011 executed by the Petitioner with CSPTCL, this Tribunal in its interim order dated 23.03.2011 directed the Petitioner to supply 35% power to Chhattisgarh and supply balance power (65%) to PTC so that PTC can discharge its obligation to Haryana in pursuance of the PSA entered into between them. All the said admitted facts

thought noted (*in Paras 37.4 and Para 60.2*) have not been considered by this Hon'ble Tribunal, thereby rendering the decision on Issue (G) contrary to the admitted facts and position on record. This, in respectful submission of the Petitioner, is an error apparent on the face of the Order dated 21.03.2018.

5.11 Learned counsel vehemently submitted that the Petitioner has to supply the entire power from its Unit 2 to only two state beneficiaries (Haryana and Chhattisgarh)and cannot sell any power to any other third party. As 100% capacity of Unit 2 is allocated to two states beneficiaries, the Petitioner does not have any spare power for merchant sale in its Unit 2 which means that there is no possibility of recovery of fixed charges corresponding to 5% of 300 MW (15 MW gross capacity) which is to be supplied at variable charges only to State of Chhattisgarh. The annual fixed charges for Unit 2 has to be recovered from the available balance 95% capacity of the Unit 2 (5% capacity is at only variable charges). Therefore, the Petitioner is entitled to claim fixed charges for the said 5% host state share of power in the proportion of 35%:65% from Chhattisgarh and Haryana respectively (i.e. 1.75% from Chhattisgarh and 3.25% from Haryana-HPPC) as per the Order dated 04.11.2011 of this Hon'ble Tribunal and continued by the Hon'ble Supreme Court in its order dated 16.12.2011. All the said admitted facts thought noted *(@ Para 37.4)*

have not been considered by this Tribunal, thereby rending the decision on Issue (G) contrary to the admitted facts and position on record. This, in respectful submission of the Petitioner, is an error apparent on the face of the Order dated 21.03.2018.

5.12 In a regulated tariff structure, the generator is allowed a nominal return of 14% equity as per HERC Tariff Regulations, 2008 after meeting all the normative fixed expenses. This is also noted in the Order dated 26.05.2014 passed by the JSERC as follows:-

> *"The Commission also notes that in case the Annual Fixed Charges are not allowed to be recovered from the balance capacity of 88%, the generating company shall be unable to recover the fixed charges corresponding to 12% of the capacity and the same shall lead to significant reduction in its return on equity."*

5.13 Thus, allowing recovery of fixed charges for 5% capacity in proportion of 35%:65% from Chhattisgarh and Haryana respectively would not lead to any reduction of return in equity of the generating company and also, it would be in line with the regulations.

5.14 The Respondent No. 2 in its reply has raised a contention that Order of JSERC would not apply to the present case as in the Jharkhand case there was a provision in the PPA for recovery of annual fixed charges from the 88% power supplied to JUVNL and a similar methodology was being followed by CERC and SERCs in case of hydro power plants where 12% or higher power is provided to home

state free of cost, whereas in the present case there is no such provision in the PPA/PSA, and that the Implementation Agreement providing for 5% supply to Chhattisgarh was executed after the PPA. This contention is utterly misconceived.

5.15 The Respondent No. 2 has erroneously sought to draw a distinction between the Order passed by Jharkhand State Electricity Regulatory Commission in case of Adhunik Power. Although the Respondent No. 2 has made reference to the Implementation Agreement dated 01.08.2009 entered into between the Petitioner and State of Chhattisgarh, which clearly provides that supply of 5% power to State of Chhattisgarh is at variable cost only, however, has sought to disregard the same. Once the PPA itself contained a condition precedent for entering into an Implementation Agreement, the Respondent No. 2 cannot contend that it has no concern with what is contained in Implementation Agreement.

5.16 The PPA itself stipulated a condition precedent to be satisfied by the Petitioner which was execution of Implementation Agreement with the Government of Chhattisgarh in as much as the Government of Chhattisgarh was to provide various facilities, benefits and concessions to the Petitioner herein for setting up the power project in the State, from which the Respondent No. 2 is taking power.

Therefore, both the PPA and Implementation Agreement signed by the Petitioner with the Government of Chhattisgarh are to be read together and consequently the supply of 5% power at variable cost is part and parcel of the entire arrangement for supply of power from the Petitioner to Respondent No. 2/3. Therefore, the contention of the Respondent No. 2 as well as finding of the Tribunal that Adhunik Power is a Hydro project and that there is no provision in the PPA to the effect of placing any obligation on Lanco to supply power to Chhattisgarh at variable cost, is an error apparent on the face of the Order.

5.17 The Respondent No. 2 has also placed reliance on the amendment dated 31.03.2008 to the tariff policy 2006. Any such reference and reliance is misconceived in as much as the said policy admittedly pertains to Hydro Power Project. In any case, the Hon'ble Supreme Court vide its order dated 16.12.2011 specifically directed the Petitioner to supply 100% capacity of the 300 MW Unit 2 to only two state beneficiaries (Chhattisgarh and Haryana) in terms of the Tribunal order dated 23.03.2011 and therefore it is entitled to recover the fixed charges for the 300 MW Unit from the two state beneficiaries in the proportion of their allocation of power which is in the ratio of 35%:65%. Therefore, he submitted that the relief sought in the instant review petition may kindly be granted.

5.18 ***Per contra,*** the learned counsel for the Respondent No. 2 submitted that, in respect of Issue (G) above, Lanco is seeking review of the order, allegedly, on the ground that this Tribunal has not considered the orders dated May, 2014 and 01.09.2016 passed by the Jharkhand State Electricity Regulatory Commission on an erroneous premise that the said orders pertains to a hydro project. Lanco has contended that the orders were passed by Jharkhand Commission in respect of a thermal power station i.e. Adhunik Power and Natural Resources Ltd. and, therefore, there is an error in the order dated 21.03.2018 passed by this Hon'ble Tribunal.

5.19 The submission of the learned counsel appearing for the Lanco on the above mistake is not of the nature which in any manner would change the decision of the Tribunal. In this regard, the following aspects are relevant:

(a) At the outset, it is submitted that the reference to the hydro project came up in the context of Government of India having provided for a mandatory free power to be given to the Home State in case of Hydro Power however, there is no such statutory mandate in case of non-hydro project to provide any free power to the Home State where the generating station is situated. The Petitioner is raising hyper technical ground on a selective reading of the order of this

Hon'ble Tribunal without considering the full reasons given for rejecting the adjustment for 5% power to be supplied at variable charges to the State of Chhattisgarh.

(b) The order of Jharkhand Commission allowing the full recovery of annual fixed charges from the annual fixed charges from the capacity tied up under the PPA entered into by Adhunik Power with Jharkhand Urja Vikas Nigam Limited is premised on two reasons, namely,

i. the PPA specifically provided for the recovery of annual fixed charges from the 88% power to supplied to JUVNL and 12% power was to be supplied at variable charges;

ii. a similar methodology was being followed by the Central Electricity Regulatory Commission and other State Electricity Regulatory Commission in cases of hydro power plants where a certain proportion of power (12% of higher) is provided to the home state free of cost.

(c) The above order would not apply to the facts of the present case because:

i. there is no provision in the PPA dated 19.10.2005 entered into between the Lanco and Power Trading Company (PTC) and the back to back Power Sale Agreement dated 21.09.2006 (PSA) entered into between HPPC and PTC or in the

regulations or in law providing for any such adjustment for 5% power;

ii. The Implementation Agreement dated 01.08.2009 entered into between Lanco and State of Chhattisgarh providing for supply of 5% power to the State of Chhattisgarh at variable cost only, firstly, was after the PPA entered into with HPPC and cannot therefore affect the rights of HPPC in regard to the proportionate cost at which electricity is to be supplied for the contracted capacity and (b) in any event, it cannot be taken to mean that the fixed charges would have to be recovered from 95% capacity tied up by Lanco with HPPC;

iii. The obligation under the Implementation Agreement is to the account of Lanco and there can be no adjustment made in the determination of fixed charges in view of the requirement to supply of 5% power to the State of Chhattisgarh at variable cost only;

iv. Even otherwise, Lanco was required to supply power to HPPC and the Chhattisgarh State in the ratio of 65%:35% under the order passed by this Tribunal dated 23.03.2011 and the order dated 16.12.2011 passed by the Hon'ble Supreme Court. In the

circumstances, the fixed charges to be considered for determination of tariff for Haryana Utilities is directly proportional to the 65% capacity of power supplied from the 300MW Unit II of Lanco;

v. The above order of Jharkhand Commission relies on the regulations of the Central Electricity Regulatory Commission and other State Electricity Regulatory Commission in cases of hydro power plants where a certain proportion of power (12% of higher) is provided to the home state free of cost.

5.20 In view of the above, the contention of the Lanco that there is an error in the finding of the State Commission in regard to the non-recovery of fixed charges corresponding to share of 5% power supplied to State of Chhattisgarh is erroneous as this Hon'ble Tribunal in Para 62.2 of the order dated 21.03.2018 has categorically held that there is no provision in the PPA providing for the obligation of Lanco to supply 5% power to the State of Chhattisgarh and has also dealt with the orders passed by Jharkhand Commission.

5.21 Besides the above, the Review Petition filed by the Petitioner is vexatious, repetitive and an attempt to re-open the entire matter for review after the same having been duly considered and decided by this Tribunal with detailed reasoning. A perusal of the grounds for

review incorporated in the Review Petition would show that Lanco is trying to re-open the decided issue which, in-turn, would show that Lanco is not merely pointing out any error apparent on the face of the record, which is a pre-condition for exercise of the review jurisdiction.

5.22 In the context of the above, the Review Petition filed by Lanco is not maintainable as per the principles laid down by the Hon'ble Courts in the context of the provisions of Order 47 Rule 1 of the Code of Civil Procedure, 1908. HPPC would crave reference to a decision dated 17.11.2016 passed by the Tribunal in Review Petition 13 of 2016 in the matter of **The Tata Power Company Limited –v- Maharashtra Electricity Regulatory Commission** on the scope of the review jurisdiction. The relevant extract of the judgment is as under:

> "*12. It is clear from the nature of issues raised by the Review Petitioner at this stage that the Review Petitioner wants to reopen the entire matter and wants this Tribunal to reconsider each and every issue. This Tribunal has given detailed reasons for taking the view that it has taken after considering the Appellant's contentions. Reconsideration of the entire matter cannot be undertaken by us inasmuch as it is only material error or errors manifest on the face of the record or patent error which can be considered in a review petition. The Review Petitioner is trying to equate the review proceedings with the original hearing of the appeal. Concluded adjudication cannot be reopened in this manner. Even if it is assumed for the sake of argument that the judgment of this Tribunal is erroneous, as held by the Supreme Court in* ***Kamlesh Verma*** *a review is by no means an appeal in disguise whereby erroneous decision is reheard and corrected. Review lies only for correcting patent*

error. We do not see any patent error or error apparent on the face of record in the order of which review is sought. Review petition is, therefore, dismissed."

5.23 In view of the above, the review petition deserves to be rejected.

Our Consideration & Analysis:-

5.24 We have carefully considered the rival submissions of the learned counsel for the Review Petitioner and Respondent No. 2 . The Review Petitioner / Appellant was aggrieved by the order of the HERC relating to the non-recovery of fixed charges corresponding to share of 5 % power being supplied to State of Chhattisgarh and in turn, challenged the same before this Tribunal through A.No.117 of 2015. The contentions of the Appellant in this regard was that in terms of Implementation Agreement executed between LAPL and State of Chhattisgarh, 5% power from Unit-II (300 MW) was to be supplied to Chhattisgarh at variable charges and fixed charges relating to this 5% were unrecovered causing financial hardship to it to that extent. In support of his contentions, the Appellant had placed reliance on tariff order dated 26.05.2014 and 01.09.2016 of the Jharkhand State Electricity Regulatory Commission in the matter of *Adhunik Power and Natural Resources Ltd. (APNRL)*, wherein the Commission had granted fixed charges corresponding to the power supplied at variable charges to the generator.

5.25 Review Petitioner has submitted that while this Tribunal noted the contentions of the Appellant but disallowed the same on the premise that (a) it is not envisaged in the PPA between LAPL and Haryana Utilities; and (b) the said Orders of the JERC are relating to some hydroelectric project. Learned counsel for the Review Petitioner quick to point out that this is an error apparent on the face of the record. Admittedly, the Review Petitioner / Appellant entered into IA dated 01.08.2009 with Govt. of Chhattisgarh as it was a condition precedent to be specified under Clause 3.1.1 (ii) of the PPA. Though, signing date (01.08.2009) of the Implementation Agreement is after the date of signing of PPA (19.10.2005), however, the PPA became effective only after the satisfaction of conditions precedent by the Petitioner. Learned counsel emphasised that thus, the IA and PPA signed between the concerned parties have to be read together so as to correctly interpret the provision of 5 % power to Chhattisgarh at variable cost. In this regard, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in ***Kunhayammed & Ors vs. State Of Kerala & Anr.- (2000) 6 SCC 359,*** which categorically held that "Entertaining an application for review does not vacate the decree sought to be reviewed. However, after the matter is heard afresh and the decree passed therein whatever be nature of the new decree, would be a decree superseding the earlier one".

(Emphasis supplied)

5.26 Learned counsel for the Appellant further contended that Chhattisgarh being the home state for the project provided a number of concessional facilities which in turn, resulted into reduction of capital cost which had directly benefited Haryana utilities by way of lower power purchase cost. This aspect has also been considered by this Tribunal in the Order dated 23.03.2011 in Appeal No. 15/2011. It is an admitted position that the Review Petitioner has to supply the entire power from its unit-II to only two states i.e. Haryana and Chhattisgarh and as such 100 % capacity of unit-II is allocated to these two states and the petitioner does not have any spare capacity for sale to third party. This implies that there is no other option or otherwise, possibility of recovering the fixed charges corresponding to 5% (15 MW) capacity being supplied at variable charges to state of Chhattisgarh. Summing up his submissions, learned counsel reiterated that in the facts and circumstances of the instant case, the petitioner is entitled to claim fixed charges for the said 5% host state share in proportion of 35% : 65% from Chhattisgarh and Haryana respectively (i.e. 1.75% from Chhattisgarh and 3.25% from Haryana-HPPC) as per the Order dated 04.11.2011 of this Tribunal which is confirmed by Hon'ble Supreme Court in its order dated 16.12.2011. Learned counsel further submitted that the similar provision already

exists for recovering annual fixed charges from the beneficiaries where some power is supplied to home state either free of cost or at variable charges as being the case in Hydro Project as well as the referred Thermal Project in the State of Jharkhand. By way of allowing recovery of fixed charges of 5% capacity in proportion of 35% : 65% from Chhattisgarh and Haryana, respectively would not lead to any reduction in RoE of the generating company and it would also be in line with the related Regulations.

5.27 ***Per contra,*** learned counsel for Respondent No. 2 submitted that LAPL in the name of review is seeking review of the Tribunal's judgment on an erroneous premise that the said orders of JSERC pertain to a hydro project. Learned counsel contended that the above misstate, as pointed out by LAPL is not of the nature which in any manner would change the decision of this Tribunal. He was quick to point out that wherever such provisions are made for the home state or in case of Hydro projects, the recovery of fixed charges from the balance capacity are envisaged in PPA or policy guidelines. Learned counsel vehemently submitted that the obligation of LAPL under IA is to the account of Review petitioner and there can be no adjustment made in the determination of fixed charges in view of the requirement to supply power 5% to state of Chhattisgarh at variable cost. He placed reliance on the judgment of this Tribunal dated

23.03.2011 as confirmed by Apex Hon'ble Supreme Court. dated 16.12.2011 as per which LAPL was required to supply power to Haryana and Chhattisgarh in the ration of 65% : 35%. Learned counsel further contended that the findings of the State Commission (HERC) as well as this Tribunal in its judgment dated 21.03.2018 in this regard cannot be treated as an error apparent on the face of the record. As such, the Review Petition filed by the Petitioner is vexatious, repetitive and an attempt to re-open the entire matter for fresh adjudication which is not maintainable as per settled principles of law and view of the well settled law laid down by the Apex court and this Tribunal in host of judgement.

5.28 To substantiate his submission, learned counsel placed reliance on the judgment dated 17.11.2016 passed by this Tribunal in Review Petition No. 13 of 2016 in the matter of **The Tata Power Company Limited –v- Maharashtra Electricity Regulatory Commission** (relevant excerpts brought out in Para 5.22)

Learned counsel further submitted that in view of the facts stated above, the Review Petition is not maintainable and deserves to be rejected.

Our findings:-

5.29 We have considered the submissions of the learned counsel of Review Petitioner and Respondent No.2 and also, critically analysed the same along with other material placed on record for our consideration. What thus emerges therefrom is that firstly, there is admittedly, an inadvertent error apparent on the face of the judgment in as much as the referred order of JERC indisputably pertain to a Thermal Power Project not any Hydro Electric Project as considered under Para 62 "Our Findings". Secondly, there has been an omission in consideration of conditions precedent contained in clause 3.1.1(ii) of the PPA between the Petitioner and the Respondent No.3 to the extent of that the Petitioner had entered into an Implementation Agreement (IA) with the Govt. of Chhattisgarh which was also noted in Para 10(B) of our Judgment at Page 9 thereof. Admittedly, the Petitioner entered into IA on 01.08.2009 with the Govt. of Chhattisgarh as it was a condition precedent to be satisfied under the PPA executed on 19.10.2005 which in fact became effective only after the satisfaction of conditions precedent by the Petitioner. As per the above referred IA, the Govt. of Chhattisgarh granted a number of concessional facilities to the Petitioner for setting up the Thermal Project which, in turn, resulted into reduction of capital cost of the project which has directly benefitted Haryana Utilities by way of lower

power purchase cost as being the major stakeholder (65%) in the project. The Review Petitioner contends that though all these facts have been duly noted by the Tribunal in its judgment in Para 37.4, 60.2 etc. but have not been considered and thereby rendering the decision on this issue contrary to the admitted facts and position on record which tantamounts to an error apparent on the face of the judgment dated 21.03.2018. The Review Petitioner vehemently submitted that the entire power from its Unit-II is being supplied to only two states (Haryana & Chhattisgarh) and does not have any spare power for sale to third party or through merchant sale which implies that there is no possibility of recovery of 5% fixed charges (15 MW) from any other source.

5.30 Learned counsel for the Review Petitioner emphasised that in view of these facts, the annual fixed charges for Unit-II has accordingly to be recovered from the available balance 95% capacity as 5% capacity for the home state is at only variable charges. Learned counsel reiterated that the Petitioner is, therefore, entitled to claim fixed charges for the said 5% capacity being supplied to home state in the proportion of 35% :65% from the two beneficiaries i.e. Chhattisgarh and Haryana respectively (1.75% from Chhattisgarh and 3.25% from Haryana Utilities).

5.31 Learned counsel for the Respondents contended that order of JSERC would not apply to the present case as in that case, there was a specific provision in the PPA for recovery of annual fixed charges from 88% power supplied to JUVNL after considering 12% power at variable costs to the home state. Additionally, a similar methodology was also being followed in case of hydro power plants where 12 % or higher power is provided to home state free of cost which gets adjusted in balance 88% power supplied to beneficiaries. However, no such provision is envisaged in the present PPA/PSA. Besides, the IA so relied upon by the Petitioner was executed after the signing date of PPA.

5.32 Learned counsel for the Respondents was quick to point out that the obligation of the Review Petitioner under the IA is solely to their account and there can be no adjustment made in the determination of fixed charges in lieu of 5% power being supplied to Chhattisgarh at variable costs. Learned counsel for the Respondents further contended that all the aspects raised by the Review Petitioner were duly considered by this Tribunal with detailed reasoning and LAPL is now trying to re-open the decided issue which, in turn, would show that LANCO is not merely pointing any error apparent on the face of record which is a pre-condition for exercise of the review jurisdiction.

Learned counsel reiterated that the Review Petition is not maintainable as per principles laid down by various courts in the context of provisions of Order 47, Rule I of CPC 1908. To further substantiate his submission, learned counsel placed reliance on the decision dated 17.11.2016 of this Tribunal in Review Petition No.13 of 2016 in the matter of Tata Power Ltd.. Vs. MERC.

5.33 Having regard to the submissions and pleadings of both the parties, we are of the considered view that there is an error apparent on the face of the judgment dated 21.03.2018 of this Tribunal to the extent as pleaded by the Review Petitioner on this issue (Issue G). After taking a decision to that effect, we have critically analysed the provisions under the IA, PPA, JSERC Orders, various judgments and Govt. policies etc.. It is not in dispute that the Review Petitioner is obligated to supply entire (100 %) power to only two beneficiary states i.e. Chhattisgarh and Haryana in proportion of 35% : 65%. As there is no other source or option to recover the 5% fixed charges, petitioner is entitled to claim the fixed charges for 5% power being supplied to home state at variable cost through the balance 95% power from the beneficiary states in the same proportion as to supply of power (35% : 65%) which works out to 1.75% from Chhattisgarh and 3.25% from Haryana. We, thus, inclined to accept the

contentions of the Review Petitioner in the interest of justice and equity and having regard to the facts and circumstances of the case in hand .

5.34 Accordingly, the Review Petition 05 of 2018 in Appeal No.107 of 2015 & 117 of 2015 is partly allowed for the reasons stated above, so far it relates to issue No. (G) only. In respect of the Issue (E), for the reasons brought out in Para 4.9 & 4.10, review is not being allowed.

ORDER

For the forgoing reasons, as stated supra, the Review Petition No. 05 of 2018 in Appeal No.107 of 2015 & 117 of 2015 is partly allowed, so far it relates to Issue No.(G) only. In respect of Issue No.(E), we answer against the Review Petitioner.

Accordingly, Haryana Electricity Regulatory Commission/ Respondent No.1 is directed to pass consequential orders in line with our observations as stated in para 5.29 as expeditiously as possible at any rate within three months from the receipt of a copy of this Order.

No order as to costs.

Pronounced in the Open Court on this **13th day of March , 2019.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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