

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

**(APPELLATE JURISDICTION)**

**Review Petition No. 2 of 2018 in  
Appeal No. 85 of 2015**

**Dated: 01<sup>st</sup> June, 2018**

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

**In the Matter of:**

NTPC Limited  
NTPC Bhavan, Scope Complex,  
Core-7, Institutional Area, Lodhi Road  
New Delhi-110003

**.....Appellant**

**VERSUS**

1. West Bengal State Electricity Distribution Company Limited  
Through its Managing Director  
Vidyut Bhawan, Block `DJ`  
Sector-11, Salt Lake City,  
Calcutta – 700 091
2. Bihar State Power Holding Company Ltd  
Through its Managing Director  
Vidyut Bhawan, Bailey Road,  
Patna – 800 021
3. Jharkhand Urja Vikas Nigam Limited  
Through its Managing Director  
Engineering Bhawan, HEC,  
Dhurwa, Ranchi – 834 004

4. GRIDCO Ltd.  
Through its Managing Director  
Vidyut Bhawan, Janpath  
Bhubaneshwar-751 007
5. Damodar Valley Corporation  
Through its Managing Director  
DVC Towers, VIP Road,  
Calcutta – 700 054
6. Power Department,  
Govt. of Sikkim,  
Through its Secretary  
Arithang, East District, NH-31A  
DPH Road, Gangtok– 737 101  
Sikkim 737101
7. Central Electricity Regulatory Commission,  
Through its Secretary  
3<sup>rd</sup> & 4<sup>th</sup> Floor Chandralok Building,  
36, Janapath  
New Delhi – 110 001

**.....Respondents**

- Counsel for the Appellant(s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Ms. Poorva Saigal  
Ms. Anushree Bardhan
- Counsel for the Respondent(s) : Mr. R.B. Sharma for R-2 & 4

**JUDGMENT**

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

1. The present Review Petition has been filed by the Review Petitioner, NTPC Ltd. (herein after referred to as 'NTPC') for review of the Judgment and Order dated 15.02.2018 passed by this Tribunal in Appeal

No. 85 of 2015. This Tribunal vide judgement dated 15.02.2018 in Appeal No.85 of 2015 has upheld the orders dated 21.01.2014 and 17.12.2014 (**Impugned Orders**) passed by the Central Electricity Regulatory Commission.

2. The main Appeal No. 85 of 2015 had been filed against the Order dated 21.01.2014 read with the Order dated 17.12.2014 passed by the Central Electricity Regulatory Commission (hereinafter referred to as '**Central Commission**') in Petition No. 204/GT/2011 and Review Petition No. 9 of 2014, respectively relating to the generation tariff for the period from the actual date of commercial operation of Farakka Super Thermal Power Station, Stage-III (1 x 500 MW) (hereinafter referred to as '**Farakka Station**') of the Appellant - NTPC i.e. 04.04.2012 to 31.03.2014. The Appellant has prayed for setting aside the Order dated 21.01.2014 passed by the Central Commission.
3. We have heard at length the learned counsel for the Review Petitioner as well as the learned counsel for the Respondent and considered their written submissions.
4. **The learned counsel for the Review Petitioner, Mr. M.G. Ramachandran has made the following arguments and submissions in Appeal No.85 of 2015 filed before this Tribunal:-**

- (a) The costs over run for the delay of 14 months has to be shared equally between NTPC and the beneficiaries on the ground that NPTC cannot be absolved of its responsibility for the delay even though the delay was for reasons not attributable to NPTC and was due to the failure on the part of contractors / sub-contractors;
- (b) Disallowance of Rs.2132 lakhs on pro rata basis as increase in contract cost expenditure due to escalation of cost for the period of delay of 14 months for the main plant turnkey package and the main plan civil work package;
- (c) The non-consideration of the delay of 2 months due to the damaged sluice gate as a force majeure event;
- (d) Disallowance of Rs.7920.52 lakh (50% of 15841.04 lakhs to be shared equally between NPTC and the beneficiaries) as cost overrun towards Interest During Construction & Financing Charges;
- (e) Disallowance of Rs.760.18 lakh (50% of Rs.1520.36 to be shared equally between NTPC and the beneficiaries) as cost overrun due to time overrun for incidental Expenditure During Construction; and
- (f) Calculation of the weighted average rate of coal as Rs.3494.27 per MT instead of the recomputed Rs.3544.99 per MT.

4.1 NTPC has sought review on issues (b), (d) and (e) in Para 4 above, for which it had contended, amongst other aspects, that assuming (but not admitting) that the Central Commission was right in holding issue (a)

against NTPC, namely that the present case would fall under category (iii) of the principles prescribed by this Tribunal for cost/time over-run and such cost has to be borne in the ratio of 50:50 by NTPC and its beneficiaries, in terms of the judgment dated 27.04.2011 passed in Appeal No.72 of 2010 in the case of Maharashtra Power Generation Corporation Limited v. Maharashtra Electricity Regulatory Commission, there was no actual cost over-run caused due to time over-run.

4.2 NTPC had submitted before this Tribunal that the Central Commission, while comparing the awarded and actual value of the main plant turnkey and the main plant civil work package, had not considered that NTPC had supplied free material to the contractors and that if the same were to be excluded from the total cost incurred, then the expenditure would be well within the awarded value. Similar ground had been raised in regard to the exclusion of pre-commissioning expenses from the total expenditure incurred on main plant package.

4.3 Further, in as much as Issue (e) in Para 4 above is concerned, NTPC had made submissions regarding the reduction in the Interest During Construction and the Financing Charges which ought to have been considered proportionately for the period of time-overrun. NTPC had also relied on the order passed by the Central Commission granting proportionate reduction in a Power Grid case.

4.4 In the Appeal, the questions of law raised by NTPC on the aforementioned aspects included the following:

*B. Whether the Central Commission was justified in disallowing Rs.2132 lakhs claimed as an increase in the expenditure due to escalation of costs for the period of delay of 14 months for the main plant turnkey package and the main plant civil work package, when NTPC had clarified that the price escalation on account of the delay beyond the schedule date on the part of the contractor is borne by the contractor themselves and does not result in cost overrun of the works cost?*

*C. Whether the Central Commission erred in not excluding the costs of Owner issued materials (as mentioned in Form – 5 D of the Tariff Petition) while comparing the actual expenditure incurred as on the date of commercial operation with the awarded price, for the Main Plant Civil Package while undertaking prudence check?*

*E. Whether the Central Commission was justified in ignoring the decision of the Hon'ble Tribunal in Appeal No.72 of 2010 in the case of Maharashtra Power Generation Corporation Limited v. Maharashtra Electricity Regulatory Commission & Ors. And its own decision dated 19.05.2014 in Petition No.112/TT/2012 relating to Powergrid Corporation of India wherein it had considered the time over run/cost over run on a proportionate basis?*

4.5 While the grounds raised by NTPC on the aspect of cost over-run due to time over-run and the deferred debt deployment have been recorded at Paras 4.6 to 4.13 and Paras 4.18 to 4.28 of the judgment, there has however been no consideration or analysis or decision in the Judgment by this Tribunal on the exclusion of pre-commissioning expenses, the cost of free issue of material etc, and the deferred deployment of debt and its consequences.

4.6 In the Impugned Order, in Para 6, this Tribunal has framed the following questions of law for consideration:

6. We have heard at length the learned counsels for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. The following main issues arise in the present appeal :-

- (1) *a) Whether the project was delayed due to factors beyond the control of Appellant?*  
*b) Whether the cost over-run to the delay of 14 months should be shared equally by NTPC and the beneficiaries or not?*
- (ii) *Whether the time and cost overrun on account of the damaged sluice gate should be treated as a Force Majeure event or not?*
- (iii) *Whether the disallowance of various claims of cost overrun on account of time over-run is justified or not?*
- (iv) *Whether the weighted average cost of coal has been considered correctly or not?*

4.7 While formulating the above questions of law, this Tribunal has not included the questions of law raised by NTPC on the issue of free owner issued material, pre-commissioning expenses and the actual debt deployed.

4.8 The non consideration of the issue of the free issue of material, pre-commissioning expenses and pro rata reduction in the Interest During Construction and the Financing Charges amounts to an error apparent on

the face of record or otherwise constitutes sufficient reason for review of the Order dated 15.02.2018. Reference in this regard has been made to the decisions of the Hon'ble Supreme Court in the case of (i) Moran Mar Basselios v Mar Poulouse Athanasium (1955) 1 SCR 520 and; (ii) Rajdnder Singh v. Lt. Governor, Andamon & Nicorbar Islands, (2005) 13 SCC 289.

4.9 During the course of the arguments before this Tribunal, NTPC had filed its written submissions and rejoinder submissions. NTPC had clearly stated that there would infact be no cost over-run due to time over-run if the cost of free issue of material and the pre-commissioning expenses were excluded from the total expenditure incurred on the main plant and main turnkey package. Further. NTPC had also made detailed submissions regarding the deferred deployment of loan and the consequential impact on the Interest During Construction and the Financing Charges.

4.10 NTPC had submitted before this Tribunal that the Central Commission, while comparing the awarded and actual value of the main plant turnkey and the main plant civil work package, had not considered that NTPC had supplied free material to the contractors and that if the same were to be excluded from the total cost incurred, then the expenditure would be well within the awarded value.

4.11 NTPC had made detailed submissions regarding the deduction in the Interest During Construction and the Financing Charges which ought to have been considered proportionately for the period of time-overrun. NTPC had also relied on the judgment passed by the Central Commission granting proportionate reduction in a Powergrid case.

4.12 During the course of the arguments before this Tribunal on 19.01.2018, 22.01.2018 and 23.01.2018, NTPC had re-iterated its submissions and had clearly stated that there would in fact be no cost over-run due to time over-run if the cost of free issue material and the pre-commissioning expenses were excluded from the total expenditure incurred on the main plant and main civil package. Further, NTPC had also made detailed submissions regarding the deferred deployment of loan and the consequential impact on the Interest During Construction and the Financing Charges.

4.13 NTPC has submitted that one of the primary issues raised in the Rejoinder arguments before this Tribunal on 23.01.2018 was that the aforementioned aspect regarding actual cost over-run due to time over-run had not been considered by the Central Commission in the Impugned Orders on the ground that it was never raised during the hearing of the main petition.

**5. The learned counsel for the Respondent No.2 & 4, Mr. R.B. Sharma has made the following submissions for our consideration :-**

5.1 The petitioner in his review petition has stated that there are errors apparent on the face of the record or otherwise constitutes sufficient reason for review of the Judgment dated 15.02.2018 in Appeal No. 85 of 2015.

5.2 On the question of review, the Tribunal vide its order dated 24<sup>th</sup> March, 2009 in Review Petition 1 of 2009 in Appeal No. 64 of 2008 has summed up the position as under;

*“2)This Tribunal has the power to review its own decisions under section 120(2) (f) of the Electricity Act, 2003. For the purpose of reviewing its own decisions this Tribunal have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908. In view of this provision, this Tribunal can review its decision to the extent it can be done by a Civil Court under the Code of Civil Procedure. Accordingly, this Tribunal is also guided by the principles governing review as available in the Civil Procedure Code. Review under the Civil Procedure Code is permissible under Order XXXVII Rule 1 on the following grounds:*

- i. Discovery of new and important matter or evidence which after exercise of due diligence, was not within the knowledge of the Petitioner or could not be produced by him at the time when the decree or order was passed.*
- ii. Some mistake or error apparent on the face of the face of the record and*

iii. *For any other sufficient reason.*

3. *The words ‘any other sufficient reason’ occurring in Rule 1 has to be analogous to the first two grounds. Pleas akin to those which can be taken in appeal cannot be a ground for review. Nor does the applicant seeking review can re-argue the original matter and seek a new judgment. The error in judgment can not be cured in a review petition. The present applicants have not attempted to show any apparent error in the judgment dated 10.12.08. Instead they allege some errors which may be stated in brief as under:”*

The present review petition will also be dealt in accordance with the principle set out by this Tribunal which is based on principles pronounced by the Hon’ble Supreme Court of India through various cases on review.

5.3 Petitioner-NTPC in his review petition has stated that there has been no consideration or analysis or decision in the judgment by the Tribunal on the exclusion of pre-commissioning expenses, the cost of free issue of material and the deferred deployment of debt. Our views on all these issues are furnished in the following paras.

5.4 The perusal of the submission of the Petitioner-Appellant would show that the question related to the pre-commissioning expenses and the cost of free issue of material were included in the impugned order at paras 4.6 to 4.13 of the impugned judgment and the total claim on this account has been worked out as Rs. 2132 lakhs. The Tribunal, as may be perused from the impugned judgment after considering the views of the parties

concerned and the impugned Order(s) dated 21.01.2014 and 17.12.2014 in the main tariff petition and the review petition, gave its findings and analysis on this issue vide para 7.1 of the impugned judgment. Thus, it cannot be said that there is no consideration on pre-commissioning expenses and the cost of free issue of material which is included in the total claim of Rs. 2132 lakhs as per Petitioner-Appellant. It seems that the Petitioner-Appellant is claiming error in judgment which cannot be cured in a Review Petition.

5.5 Similarly, the perusal of the submission of the Petitioner-Appellant would also show that the question related to the pro-rata reduction in the IDC and the Financing charges was included in the impugned order at paras 4.18 to 4.28 of the impugned judgment and the total dis-allowance of Rs. 7920.52 lakhs being 50% of Rs. 15841.04 lakh. The Tribunal as may be perused from the impugned order after considering the views of the parties concerned and the impugned Order(s) dated 21.01.2014 and 17.12.2014 in the main tariff petition and the review petition gave its findings and analysis on this issue vide para 7.3 of the impugned judgment. Thus, it cannot be said that there is no consideration on IDC and the Financing charges which is included in the total claim of Rs. 7920.52 lakh as per claim of Petitioner-Appellant. It seems that the

Petitioner-Appellant is re-arguing the case which is not permissible in a review petition.

5.6 It is well settled that there are definitive limits to the exercise of the power of review and the review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1. The Review Petition, in effect, is questioning the correctness of the judgment dated 15.02.2018 passed in Appeal No. 85 of 2015 by the Tribunal. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the later only can be corrected by exercise of review jurisdiction. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for patent error. Thus, none of the ground for the review of the judgment dated 15.02.2018 is justified. In this regard the decision of the Hon'ble Supreme Court in a case Parsion Devi and others Vs. Sumitra Devi and others (1997) 8 SCC 715 laying out the above principles is referred to.

5.7 In view of the facts and circumstances explained above, the Review Petition filed by the Petitioner is absolutely devoid of merits and is liable to be dismissed with costs by the Tribunal.

6. **We have gone through the contents of the Review Petition No.2 of 2018 and also, heard the learned counsel appearing for the Review Petitioner as well as the Respondents. After having the careful examination of all the associated aspects brought before us and submissions made by the rival parties, we decide as under:-**

6.1 The Review Petitioner has submitted that this Tribunal has not dealt with all the issues raised by it in the Appeal No.85 of 2015 having specific reference to disallowance of increase in contract costs due to time overrun in the items b, d & e under para 3 of the Review Petition.

6.2 The Review Petitioner has contended that the judgment of this Tribunal dated 15.02.2018 has not considered the issue of free materials to the contractors while comparing the awarded and actual costs of the main plant turnkey and the main plant civil works package. In this regard, it is reiterated that though not specifically mentioned under questions of law, this issue had been considered by this Tribunal along with the findings of the Central Commission in its orders dated 21.01.2014 and 17.12.2014. It is further pointed out that this element falls under the ambit of “computations of cost overruns” which has been duly considered and analyzed in the impugned judgment. It is also relevant to note from the findings of the Central Commission that the cost approved by the Board of the petitioner company was on higher side and the capital cost actually bid on different contract packages worked out to be much lesser than the

approved cost. In case the project had been completed without delay, the escalation of cost beyond the scheduled COD for the different packages could have been avoided.

6.3 Considering all the facts and documents placed before this Tribunal, it has been established beyond doubt that the matter relating to time and cost overrun in the present case would fall under category (iii) described in Para 7.4 of this Tribunal judgment dated 27.04.2011 in Appeal No.72 of 2010 in the case of Maharashtra Power Generation Corporation Limited v. Maharashtra Electricity Regulatory Commission & Ors.. The same principle has been applied in the case for sharing the cost over-runs (50 : 50) between the Appellant and beneficiary Respondents.

6.4 The review petitioner has also relied on some of the judgments of the Hon'ble Supreme Court. We find that cited judgments do not have relevance based on the facts and circumstances of the case in hand.

6.5 This Tribunal, based on the submissions made by the Appellant and the Respondents and in depth examination of the Orders passed by the Central Commission, upheld the decision of the Central Commission on the various issues raised by the Review Petitioner in the original Appeal. It is accordingly, evident that the impugned judgment of the Tribunal dated 15.02.2018 has been passed, exercising due diligence on the merits of all aspects in the interest of justice and equity.

7. In view of the above facts, we find that the issues brought before us in the Review Petition have been duly considered in the impugned judgment dated 15.02.2018 and the Review Petitioner is trying to seek re-hearing / re-argue the original matter which is not permissible under the settled principles of law.
8. The Review Petitioner has failed to establish any error apparent on the face of records or any good ground as such made out by the petitioner necessitating the review of the impugned judgment. Hence, the Review Petition filed by the Petitioner is dismissed as devoid of merits.
9. Pronounced in the Open Court on this **01<sup>st</sup> day of June, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**

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