

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

REVIEW PETITION NO. 4 OF 2017

IN

APPEAL NO. 338 OF 2016

AND

REVIEW PETITION NO. 5 OF 2017

IN

APPEAL NO. 338 OF 2016

Dated: 02nd August, 2017.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

REVIEW PETITION NO. 4 OF 2017 IN APPEAL NO. 338 OF 2016

In the matter of:

**Madhya Pradesh Power Management
Co. Ltd.**

... Appellants

And

**M.P. Biomass Energy Developers
Association & Ors.**

... Respondents

Counsel for the Review Petitioner(s): Mr. Purushendra Kaurav, Sr. Adv.
Mr. G. Umapathy
Mr. Aditya Singh
Mr. Nitin Gaur
Ms. Anuradha Mishra
Mr. G.L. Pandey

Counsel for the Respondent(s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-1

Mr. Venkatesh
Mr. Varun Singh
Mr. Pratyush Singh
Mr. Natabrata Bhattacharya

for R-5

WITH**REVIEW PETITION NO. 5 OF 2017 IN APPEAL NO. 338 OF 2016****In the matter of:**

**Madhya Pradesh Electricity
Regulatory Commission. ... Appellants**

And

**M.P. Biomass Energy Developers
Association & Ors. ... Respondents**

Counsel for the Review Petitioner(s): Mr. Venkatesh
Mr. Varun Singh
Mr. Pratyush Singh
Mr. Natabrata Bhattacharya
Ms. Aditi Mohapatra

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri for R-1

Mr. Purushaindra Kaurav, Sr.Adv.
Mr. Nitin Gaur
Ms. Anuradha Mishra for R-2

ORDER

1. These two review petitions seek review of judgment of this Tribunal dated 20/03/2017 in Appeal No.338 of 2016 and connected interim applications.

2. At the outset, it must be stated that looking to the importance of the issue involved in this case, bench of three Members was constituted in exercise of power under Section 111(2)(b) of the Electricity Act, 2003 (“the said Act”) to hear Appeal No.338 of 2016. On 31/05/2017, one of the three Members i.e. Hon’ble Shri Munikrishnaiah, Technical Member retired. No Member has yet been appointed. This Tribunal is not working at its full strength. We, therefore, informed the counsel that it would be necessary to wait for the appointment of a third Member. Mr. Ramachandran, learned counsel for Respondent No.1 – M.P. Biomass Energy Developers Association pointed out that Respondent No.1 has filed execution petition praying for execution of the judgment dated 20/03/2017. Counsel submitted that if the review petition is kept pending, the execution petition will not be heard. Mr. Kaurav, learned senior advocate appearing for Madhya Pradesh Power Management Company Limited (“**MPPMCL**”), the Review Petitioner in Review Petition No.4 of 2017 (Original Respondent NO.2) and Mr. Venkatesh, learned counsel appearing for the Review Petitioner – Madhya Pradesh

Electricity Regulatory Commission (“**the State Commission**”) in Review Petition No.5 of 2017 also urged that the review petition may be heard by this bench because there is no certainty that Members’ appointments will be made in near future. Counsel submitted that ordinarily, the review petition must be heard and disposed of by the same bench which passed the original order. But, in case of extra ordinary circumstances, such as death or retirement of the Member, rule of necessity springs up. Counsel submitted that in such a case, the available Members must decide the review petition.

3. We find substance in the contention of the counsel. In this connection, we may refer to the judgment of the Privy Council in **Maharajah Moheshur Sing v. Bengal Government**¹ where the doctrine of necessity is emphasized. Following is the relevant extract.

“Their Lordships added:

We do not say that there might not be cases in which a review might take place before

¹ [1857-60] 7 MIA 283

another and a different Judge; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it; but we do say that such exceptions are allowable only ex necessitate. We do say that in all practicable cases the same Judge ought to review; ...”

4. In view of this legal position, we proceed to deal with these review petitions.

5. Before dealing with the review petitions, background of the case must be stated. Respondent No.1 had filed Appeal No.211 of 2015 against the State Commission’s order dated 13/08/2015. The said appeal was disposed of by this Tribunal (Justice Surendra Kumar, the then Judicial Member and Shri Munikrishnaiah, the then Technical Member) by its judgment dated 04/05/2016. The bench determined the GCV of biomass and Station Heat Rate (“**SHR**”) and directed the State Commission to redetermine tariff. Pursuant to the remand order, the State Commission by order dated 30/11/2016, fixed the tariff subject to following conditions (a) to (f).

- (a) *This tariff shall be applicable till 31.03.2017 or the new tariff order is issued, whichever is earlier.*
- (b) *The projects for more than 2 MW are subjected to the ‘scheduling’ and ‘merit order dispatch principles’ in terms of the para 8.10 of the tariff order dated 02.03.2012 since date of commissioning.*
- (c) *This tariff order is applicable to the projects using rice husk, wheat husk, mulberry and coal (limited to 15% of the total fuel on annual basis) only as a fuel based on which GCV has been decided by the Hon’ble APTEL in its Judgment dated 04.05.2016.*
- (d) *This tariff shall be applicable for the projects for which Power Purchase Agreement has already been executed at the time of commissioning of the project.*
- (e) *The M.P. Power Management Co. Ltd., Jabalpur shall submit, the draft of the Power Purchase Agreement to be executed, if any, with the developer of biomass based power projects to be commissioned after the date of this order, for approval of the Commission.*
- (f) *The developers shall have to submit monthly information, as required under para 8.25 of the tariff order dated 02.03.2012, to the M.P. Power Management Co. Ltd., Jabalpur by 10th day of each month following the month of information failing which action as per the provisions of para 8.26 of the tariff order dated 02.03.2012 must be ensured by the M.P. Power Management Company Limited.”*

6. As stated above, aggrieved by some of the above conditions, Respondent No.1 filed Appeal No.338 of 2016. By judgment dated 20/03/2017 of which review is sought in the instant review petitions, the larger bench of this Tribunal set

aside conditions (a), (b), (c) and (d) mentioned in paragraph 15 above and disposed of the appeal.

7. Basic contentions of Mr. Kaurav and Mr. Venkatesh learned counsel for the Review Petitioners are summarized in Paragraphs (A), (B), and (C) of the Review Petition No.5 of 2017. They read as under:

“A. *BECAUSE it is submitted that Clause 9 of the MPERC Regulations, 2010 gave Renewable generators including biomass a ‘Must Run’ status. However, an Amendment dated 20th April, 2012 to the 2010 Regulations came into effect whereby the ‘must run’ status in the existing Regulation 9 was substituted and the ‘must run’ status was removed. Further, the Hon’ble Tribunal in passing the Impugned Order at Para 15.10 has given a specific finding erroneously that the Central Commission amongst all sources of renewable energy has kept only solar and wind energy under scheduling and merit Order principles because of their unpredictable nature of electricity generation and therefore the Hon’ble Tribunal has conjointly read the Regulation 9 of MPERC 2010 Regulations to hold that ‘Biomass Projects’ must be given ‘Must Run’ status, which is not correct. The relevant extracts of the Judgment are being reproduced as follows:-*

“15.10 According to CERC’s Amendment, the wind generation and solar generation are mostly dependent on climatic conditions and geographical conditions. The power from the wind and solar renewable energies is not firm and are not predictable and energy injected to the system in variable in nature. In view of this there is a possibility of grid disturbance due to sudden injection of power from these renewable sources. Hence the Central Commission suggested scheduling of power injection to the grid from these energy renewable sources. The

energy from the biomass power plants are not related to climatic conditions and the power from the biomass power plants are constant in nature depends upon the availability of raw material. According to clause 3(xv) : Renewable energy sources means renewable sources such as small hydro, mini hydro, wind, solar, biomass, biomass fuel cogeneration, urban/municipal waste and such other sources as approved by MNRE.

The Central Commission out of all the above sources of renewable energy, chooses only wind and solar energy sources to be kept under scheduling and merit order principles because of their unpredictable nature of electricity generation.

Thus, according to clause 9 of the MPERC (Cogeneration and generation of electricity from renewable sources of energy) (Revision-I) Regulations 2010, the generation from cogeneration and renewable source of energy (in this case energy from Biomass power plants) are excluded from the ambit of merit order dispatch principles.”

- B. *BECAUSE in arriving at the above finding the Hon’ble Tribunal has incorrectly noticed the CERC (IEGC)(3rd Amendment) Regulations, 2015. However, with utmost humility and respect it is submitted that the Hon’ble Tribunal has arrived at a legally incorrect finding as in terms of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (“**CERC Renewable Regulations, 2010**”) Biomass above 10 MW and Co-gen Plants have been specifically removed from the ‘Must Run’ status and have been made subject to scheduling and Merit Order principles. These are the only two sources of renewable generation who as per the Central Commission’s Regulations are compulsorily required to be generated in terms of ‘Scheduling and Dispatch’ conditions. The relevant extracts of the CERC Renewable Regulations, 2012 are being reproduced as follows:-*

“11. Despatch principles for electricity generated from Renewable Energy Sources:

*(1) All renewable energy power plants **except for biomass power plants with installed capacity of 10 MW and above, and non-fossil fuel based cogeneration plants shall be treated as ‘MUST RUN’ power plants and shall not be subjected to ‘merit order despatch’ principles.***

[(1a) The Municipal Solid Waste and Refuse Derived Fuel based power projects shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles]11

(2) [The biomass power generating station with an installed capacity of 10 MW and above, non fossil fuel based co-generation projects, municipal solid waste and refuse derived fuel shall be subjected to scheduling and despatch code as specified under CERC (Indian Electricity Grid 3 Code) Regulations, 2010 and Central Electricity Regulatory Commission (Unscheduled Interchange and related matters) Regulations, 2009 including amendments thereto.] 12

(3) Wind power generation plants where the sum of generation capacity of such plants connected at the connection point to the transmission or distribution system is 10 MW and above and connection point is 33 KV and above shall be subjected to scheduling and despatch code as specified under Indian Electricity Grid Code (IEGC) -2010, as amended form time to time.

(4) Solar generation plants with capacity of 5 MW and above and connected at the connection point of 33 KV level and above shall be subjected to scheduling and dispatch code as specified under Indian Electricity Grid Code (IEGC) – 2010, as amended form time to time.”

C. *BECUAUSE from the perusal of the above quoted relevant extracts of the CERC Renewable Regulations, 2012 it is abundantly clear that Central Commission has kept all biomass project above 10 MW outside the purview of 'Must Run'. Hence, the finding of the Hon'ble Tribunal in Para 15.10 is an error apparent on the face of record and for which Review Jurisdiction must be exercised.”*

8. Counsel submitted that giving must run status to biomass based generation is contrary to the Regulations and legally unsustainable. Counsel submitted that the impugned

order suffers from error apparent on the face of record warranting exercise of review jurisdiction by this Tribunal. Mr. Ramachandran, learned counsel for Respondent No.1 has on the other hand submitted that in the garb of review petition, the Review Petitioners are trying to challenge order dated 20/03/2017. The Review Petitions are appeals in disguise. There is no error apparent on the face of record and, hence, review petitions be dismissed.

9. Scope of a review petition is limited. In **Meera Bhanja v. Nirmala Kumari Choudhury**², the Supreme Court described the nature of review proceedings as under:

“The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 CPC. The review petition has to be entertained only on the ground of error apparent on the fact of the record and not on any other ground. An error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The limitation of powers of courts under Order 47 Rule 1, CPC is

² (1995) 1 SCC 170

similar to the jurisdiction available to the High Court while seeking review of the orders under Article 226.”

10. Keeping the above judgment of the Supreme Court in mind, we will examine whether there is any apparent error on the face of the record for us to review the judgment dated 20/03/2017. From the grounds, which we have reproduced hereinabove, it is clear that the contention of the review petitioners is that the finding in paragraph 15.10 of the judgment quoted hereinabove, is an error or mistake apparent on the record. We are unable to agree with the review petitioner. The issue discussed in paragraph 15.10 was in respect of the Central Commission's fourth amendment to the India Electricity Grid Code Regulations, 2010 by which wind and solar energy generators were being subjected to scheduling. We agree with Mr. Ramachandran, learned counsel for Respondent No.1 that the reading of the said paragraph along with the preceding and succeeding paragraphs will clearly show the context in which the above said observation has been made. This Tribunal was

considering the issue of scheduling and merit order in the context of the Regulations of the State Commission and CERC Regulations in the context of solar and wind power, which are uncertain powers dependent on DNI and wind velocity and not in the context of Biomass and other renewable sources. The main issue being considered by this Tribunal was whether as per the State Commission's Regulations and Orders, merit order dispatch could be applied to biomass energy generators to stop purchasing power from them and whether such a condition could have been imposed in remand proceedings when all the State Commission had to do was re-compute the tariff as per the GCV and SHR determined by this Tribunal. This Tribunal came to a conclusion that such a condition could not be imposed in the Original Tariff Order dated 02/03/2012 since it was against the express provisions of Regulation 9 of the Madhya Pradesh Electricity Regulatory Commission (Co-generation and generation of electricity from renewable source of energy) Revision 1, Regulation 2010. We agree with Mr. Ramachandran that when the above Regulations were substituted in 2012 and 2014, it does not

mean that merit order dispatch could be applied to biomass plants. It only meant that wind and solar energy generators became subjected to scheduling as per the CERC Regulations. We have also noticed that the Review Petitioner in Review Petition No.4 of 2017 is not even paying the fixed costs.

11. An issue is raised by Review Petitioner in Review Petition No.4 of 2017 that there is no PPA between it and Arya Energy Limited whereas this Tribunal has recorded in paragraph 17 that a PPA has been entered into under protest. Mr. Ramachandran, counsel for Respondent No.1 contended that this stand of the Review Petitioner lacks bonafides and is not only incorrect but also misleading.

12. It is pointed out that Arya Energy Limited was supplying power to the Review Petitioner under LoIs dated 19/09/2013 and 11/10/2013 which was to operate till a PPA is entered into between the parties. Despite several letters, the Review Petitioner could not give a draft PPA to Arya Energy.

13. The Review Petitioner vide letter dated 16/11/2016 unilaterally terminated the LoI effectively from 30/11/2016. This was the date of the impugned Tariff Order. Arya Energy approached the High Court of Jabalpur which stayed the termination and directed Oriental Green Power Co. Ltd. to act on the letters of Arya Energy. Thereafter, a draft PPA was sent vide letter dated 14/01/2017 by MPPMCL. In protest, Arya Energy wrote letters dated 17/01/2017 and 18/01/2017 raising the issue of merit order dispatch along with other issues. In response, the Review Petitioner vide letter dated 17/01/2017 took the position that no clause is negotiable and Arya Energy executed the PPA under protest on 18/01/2017. When the matters stood thus, the Review Petitioner (MPPMCL) once again vide letter dated 28/02/2017 terminated the LoI with effect from 14/01/2017 stating that Arya Energy had not come forward to sign the PPA, which was challenged by Arya Energy before the High Court. By order dated 15/05/2017, the High Court set aside the termination and has restored status quo ante and revived the LoI.

14. The Review Petitioner (MPPMCL) signed the PPA with Arya Energy on 18/01/2017 and suddenly decided to approach the State Commission. According to Respondent No.1, the general condition mentioned in paragraph 15(e) of the Oder dated 30/11/2016 as upheld by this Tribunal in the judgment under review does not even apply to the Respondents and is for future projects to be commissioned in the State of Madhya Pradesh. According to Respondent No.1, the tariff was settled by this Tribunal and the plant of Arya Energy is already commissioned and, therefore, the above condition (e) is not applicable to Arya Energy. The Merit Order Dispatch has been set aside by this Tribunal. We find substance in this submission of Respondent No.1.

15. Having considered the submissions advanced by both sides, we are of the opinion that the impugned order does not suffer from any error apparent on the face of the record. The

review petitions are, therefore, liable to be dismissed and are dismissed as such.

16. Pronounced in the open court on **2nd day of August, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]