

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

R.P. No. 06 of 2016 in
Appeal No. 184 of 2013

Dated: 4th April, 2018

Present: Hon'ble Mr. I. J. Kapoor, Technical Member
Hon'ble Mr. Justice N.K. Patil, judicial Member

In the matter of :-

Bhaskar Shrachhi Alloys Limited
8/1, Middletown Row, 3rd Floor,
Kolkata-700 071

...Review Petitioner

Versus

- 1. Central Electricity Regulatory Commission**
3rd and 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110 001
...Respondent No.1
- 2. Damodar Valley Corporation**
DVC Towers, VIP Road,
Kolkata-710 054
...Respondent No.2
- 3. Department of Power, Government of**
West Bengal, New Secretariat Building
7th Floor, 1, Kiran Sankar Road,
Kolkata-700 001
...Respondent No.3
- 4. Department of Power, Government of**
Jharkhand
Nepal House, Doranda,
Pin 834 002, Ranchi
...Respondent No.4
- 5. West Bengal State Electricity Distribution**
Co. Ltd., Vidyut Bhavan, Bidhan Nagar,
Kolkata-700 091
...Respondent No.5

6. **Jharkhand State Electricity Board
Engineering Building HEC Dhurwa
Ranchi-834 004** ...Respondent No.6
7. **Ministry of Power, Government of India
Shram Shakti Bhavan, New Delhi-110 001** ...Respondent No.7
8. **Jai Balaji Industries Limited
5, Bentinck Street
Kolkata-700 001** ...Respondent No.8
9. **Shyam Ferro Alloys Limited
Vishwakarma, 86-C, Topsia Road,
2nd Floor, Kolkata-700 071** ...Respondent No.9
10. **Cosmic Ferro Alloys Limited
4/1, Middleton street 4th Floor,
Kolkata-700 001** ...Respondent No.10
11. **BDG Metal and Power Limited
4, Fairlie Place, 5th Floor,
Kolkata-700 001** ...Respondent No.11
12. **Lalwani Ferro Alloys Limited
32, Jawaharlal Nehru Road,
Kolkata-700 017** ...Respondent No.12
13. **Howrah Gases Limited
1, Crooked Lane
Kolkata-700 069** ...Respondent No.13

**Counsel for the Appellant(s) : Mr. Rajiv Yadav
Mr. Usman Khan
Mr. Aamir Z. Khan**

**Counsel for the Respondent(s) : Mr. K.S. Dhingra for R-1
Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. Shubham Arya for R-2**

ORDER

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. M/s. Bhaskar Shrachhi Alloys Limited (hereinafter referred to as the "Review Petitioner") has filed the present Review Petition under Section 120(2) of the Electricity Act, 2003 seeking review of judgment dated 19.02.2016 passed by this Tribunal in Appeal No. 184 of 2013, disposing thereby the Tariff Order dated 22.4.2013 passed by the Central Electricity Regulatory Commission (hereinafter referred to as the "Central Commission") in respect of Damodar Valley Corporation (hereinafter referred to as the "Respondent No.2") Mejia TPS Unit – 4 for the period from 13.2.2005 to 31.3.2009.

2. It has been submitted by the Petitioner that a perusal of the judgment dated 19.2.2016 of this Tribunal reveals that the issue of 'Contribution to Pension and Gratuity Fund' has been decided on the basis of a factually incorrect assumption as the Review Petitioner had impugned the allowance of pension and gratuity contribution, inter alia, on the ground that the actuarial valuation undertaken by the Respondent No.2 appointed actuary had not undertaken 'activity-linked segregation' of employees working in

Respondent No.2's diverse divisions. The said contention was recorded by this Tribunal in its judgment dated 19.2.2016 and the relevant extract is reproduced below;

“12.1 The contention of the Petitioner/Appellant is that the Central Commission, while allowing P&G Fund of Rs.169.90 Crore did not consider the interest accrued on the investment of P&G Fund in the approved securities. Further, the Central Commission determined the Tariff without going through the actual number of employees assigned to the power business of DVC and without prudence check on the details of the report submitted by the Actuary.

12.14 Another plea of the Petitioner is that the Central Commission has not properly accounted regarding number of employees who are actually working with the power business and the apportionment of Head Office & general expenses towards power business.”

The above contention of the Review Petitioner has been rejected by this Tribunal with the following reasons;

“12.15 We do not agree with this. The Central Commission while working out the Tariff determination have gone through the report submitted by the Actuary towards total contributions required for pension and gratuity towards generation, transmission and distribution and the Commission deducted the liability of Distribution Organisations (The Distribution Tariff is determined by the respective State Commission) and considered the contribution for the employees of generation and transmission.”

3. The Review petitioner further submitted that the actuarial report did not specify contributions required towards generation, transmission and distribution, as has been observed by this Tribunal in its judgment in the above quoted extract. Further the Central Commission had specifically observed in its order that the actuarial valuation is inclusive of all activities of the Respondent No.2. Further the subject actuarial report, itself, dispels any notion of activity-linked segregation by stating in paragraph-2 that it covers “employees who were on the roll on the Effective date 31.3.2006 and eligible for Pension”. Such employees are, admittedly, not confined to Respondent No.2’s power business and instead, all the

eligible employees on Respondent No.2's roll on 31.3.2006 have been considered for the purpose of actuarial valuation. Based on the actuarial projections, 98.8% of Respondent No.2's entire liability was loaded on power business by Respondent No.2, and the same was accepted by the Central Commission without any prudence check.

4. As evident from above, the Review Petitioner has alleged that its above contentions have not been addressed by this Tribunal presumably because it proceeded upon the premise that the actuarial report provided for pension and gratuity liability attributable to Respondent No.2's generation, transmission and distribution business which was factually erroneous and therefore, the judgment of this Tribunal suffers from an error apparent on the face of record. Further, the Review Petitioner stated that since the passing of the judgment, the Review Petitioner has discovered new and important evidence which was neither within its knowledge previously nor could have been obtained with exercise of due diligence, and the same may, therefore, kindly be considered by this Tribunal . Respondent No.2 has filed affidavit dated 23.2.2016 in Appeal Nos. 33 of 2014 and batch; the contents whereof are relevant insofar as they purport to provide the basis for allocation of 98.9% of

Respondent No.2's pension and gratuity. Prior to filing of the said affidavit by Respondent No.2, the Review Petitioner had no means to determine the basis of such allocation.

5. The Review Petitioner praying the following relief as follows;
 - a) Review the judgment dated 19.2.2016 in light of the submissions in the present application, and remand the matter to Central Commission with a direction to ensure that the liability on account of contribution to pension and gratuity fund is allocated to power business after exercise of due prudence check and after granting an opportunity of being heard to the appellant on the said submissions;
 - b) Pass such other order(s) as this Tribunal may deem fit and proper in the facts and circumstances of the case.

6. The learned Counsel for the Respondents have stated that the Review Petition is not maintainable. There is no error apparent on the face of record in the judgment dated 19.2.2016 and there is no mistake or discovery of new and important matters or evidence produced by the Review Petitioner or any other sufficient reasons. They have further stated that the judgment of this Tribunal dated

19.2.2016 has dealt with all the aspects and on its merits. They have also drawn our attention to following paragraphs of the judgment dated 19.2.2016 which are reproduced hereunder; wherein all the issues raised by Review Petitioner in its Appeal have been addressed and decided on merits in the Tribunal judgment dated 19.2.2016;

“12.1 The contention of the Petitioner/Appellant is that the Central Commission, while allowing P&G Fund of Rs.169.90 Crore did not consider the interest accrued on the investment of P&G Fund in the approved securities. Further, the Central Commission determined the Tariff without going through the actual number of employees assigned to the power business of DVC and without prudence check on the details of the report submitted by the Actuary.

12.2 The main contention of the Petitioner is that the Central Commission failed to take the interest accrued from the P&G deposits made by the Trust in the approved securities.

12.3 Normally, the Trust will administer the P&G funds in a judicial manner. The Trust will work out the yearly contributions required for the liability of Pensioners and accordingly works out and informed to the organisations towards amount of contribution per year. Further, the Trust also invests the fund available with them in approved securities and the interest amount earned from these investments will be taken into consideration for annual subscription/contribution.

12.4 Thus, the interest accruing on the investments made is accumulated in the Trust and the Trust will workout the subsequent years contributions to be made by the DVC. The Respondent No.2, DVC does not get any revenue from such investments and the interest earned on P&G funds does not belong to the R-2, DVC.

12.5 Let us discuss various types of funds maintained for the Terminal benefits of the retired employees and the existing employees working with the organisation for the Terminal benefits:

- (a) Pension and Gratuity Fund
- (b) General Provident Fund (GPF)
- (c) Contributory Provident Fund (CPF)

12.6 For those employees, for whom Pension & Gratuity Fund applies, the CPF does not apply and vice versa. The instant Appeal of the Petitioner is with respect to the consideration of interest accrued towards investment of P&G Fund in the approved securities. The Central Commission failed to consider the interest accrued on P&G fund investment.

12.7 The Respondent No.2, Damodar Valley Corporation established a Trust called Pension & Gratuity Trust for payment of Pension of the retired employees and existing employees for the period after the retirement that come under the Scheme. The main objective of the Trust is to protect the welfare of the employees towards timely payment of Pension and calculation of annual contribution to be made by DVC.

The total administration of the Fund management is done by the Trust.

12.8 *In order to assess the contributions required to be made for the discharge of the Pension liabilities and also to arrive at future fund contributions, DVC appointed a reputed Actuary for actuarial valuation, Shri Behudev Chatterjee a reputed Actuary. The Actuary worked out the actuarial valuation for the period on 31.3.2006 and also submitted the report considering the 6th Pay Commission as on 31.3.2009. A report was submitted towards Actuary valuation as on 1.4.2009.*

12.9 *This Tribunal in its judgment dated 23.11.2007 in Appeal No. 271 of 2006 in the case of M/s Demodar Valley Corporation vs. Central Electricity Regulatory Commission (CERC) & Ors., observed as under. The relevant paragraphs are quoted below:*

“D.1 DVC has submitted that based on the actuarial valuation, entire funds need to create the Pension and Gratuity Contribution Fund should be allowed to be recovered through the process of determination of tariff. The Central Commission in its Order has worked out that a sum of Rs. 1534.49 crore is required to create such a fund. The Commission has held that entire burden for creation of the fund should not be passed on to the consumers and accordingly directed that 60% be recovered through the tariff from the consumers and 40% be contributed by the DVC. We find that this decision is not backed by any justification given in the order. We feel the claim of the Appellant to recover the entire cost for creation of the fund through tariff is justified provided the recovery is staggered in a manner that it does not create tariff-shock to consumers.

D.2 The huge liability for the fund has arisen as earlier DVC was adopting the policy of "pay as you go". A major part of the liability pertains to previous years.

71. It is noticed that the Appellate Tribunal while agreeing with the order of the Commission allowing transition period for two years to the petitioner, has, however rejected the non-allowance of 40% of the pension contribution and observed that the petitioner is entitled to recover the entire amount of pension fund from its consumers, provided that such recovery was staggered and do not create tariff shock to the consumers.

72. It could be observed from the books of accounts of the petitioner that the petitioner had generated a surplus amount of Rs 79487 lakh during the year 2004-05 and Rs. 188634 lakh during the year 2005-06. After adjustments on account of taxes and prior period, the surplus amount was Rs. 69044 lakh for year 2004-05 and Rs.108282 lakh for the year 2005-06. Considering the equity worked out in terms of the direction of the Appellate Tribunal and the additional capitalization allowed, the Return on equity at the rate of interest @ 14% works out to Rs.17700 lakh for 2004-05 and Rs.18000 lakh for 2005-06.

73. Accordingly, in compliance with the directions contained in the judgment of the Appellate Tribunal, it has been decided to stagger the balance 40% of the pension fund over a period of five years during the tariff period 2009-14, without any revision in the pension fund allocated in tariff for the period 2006-09. Based on the above, calculations have been made and the amount to be recovered in five installments during the tariff period 2009-14 is Rs. 61379.60 lakh, with an annual installment of Rs. 12275.92 lakh.

12.10 Further this Tribunal's judgment dated 10.5.2010 in Appeal No.146 of 2009 in the case of M/s Demodar Valley Corporation vs. Central Electricity Regulatory Commission

(CERC) & Ors. had decided on the Pension & Gratuity Contribution as under:

"105(6) In regard to the Pension and Gratuity Fund, the specific direction had been issued by the Tribunal in the Remand Order to consider the same after giving a finding that the claim of the Appellant to recover the entire cost of creation of the fund through the tariff is justified. However, under this direction, the Central Commission has to ensure that the recovery is staggered in a manner that it does not give tariff shock to the consumers. Accordingly, the Central Commission has considered this direction and passed the order staggering over a specific period. Though the liability of the Appellant to pay the pension and gratuity fund is to be staggered over a period of 13 years from 2006 to 2019, the Central Commission has staggered the liability only up to the year 2014 in order to avoid tariff shock. This staggering is in consonance with the directions of this Tribunal."

12.11 After going through the submissions, we have noticed the P&G claim as follows:

- (a) Total Pension & Gratuity Liability as per Actuarial Valuation dated 31.03.2006 **=Rs.169,015 Lakhs**
- (b) Total Pension & Gratuity Liability for the period 2006-09 as per Actuarial Valuation dated 31.03.2009 **=Rs.320,094 Lakhs**

The Central Commission allowed recovery of the Pension Liability from the consumers as computed below. The relevant part of the Impugned Order dated 22.4.2013 in Petition No.279 of 2010 is quoted below:

(Rs.in Lakh)

	Amount
<i>Pension liability allocated to power business</i>	169015.00
<i>Less liability to Distribution system</i>	614.00

<i>Less Liability pertaining to 4th unit of MTPS</i>	<i>14952.00</i>
<i>Net amount</i>	<i>153449.00</i>
<i>Less 40% to be borne by the utility</i>	<i>61380.00</i>
<i>Balance 60% recoverable from consumers</i>	<i>92069.00</i>
<i>Amount of each instalment (total 3 instalments)</i>	<i>30690.00</i>

“59. For the purpose of the present Petition, we allow the Petitioner to recover an amount of Rs.8971 lakh, being 60% of Rs.14952 lakh towards Pension and Gratuity Fund in respect of the Generating Station along with tariff for the period 2006-09. The remaining 40% that is, Rs.5981 lakh shall be recovered in five equal yearly instalments along with the tariff for the period 2009-14 in line with the Commission’s order dated 6.8.2009 in Petition No.66/2005. However, the increase in actual liability on account of revision of pay consequent to implementations of recommendations of the 6th Pay Commission in respect of the Generating Station during the period from 1.1.2006 to 31.3.2009 is recoverable by the Petitioner to the extent of 60% during 2006-09 and the balance 40% shall be recovered during the period 2009-14 along with the P&G liability to be re covered during the period 2009-14, in line with the decision of the Tribunal.”

12.12 We are of the opinion that the Central Commission has correctly considered the adjustment of P&G/Terminal benefits while determining the O&M expenditure tariff.

12.13 Further, the Petitioner contended that the Commission accepted the plea of the Respondent that the income accrued is used on the welfare activities of the employees without going into the details of the adjustment of interest earned from P&G fund. In our opinion, the funds are administered by the Trust and the Trust will take care of the

welfare of the retired employees towards timely payment and calculation of yearly contribution to be made by the Damodar Valley Corporation. The Commission took the Actuary Report while working out the Pension & Gratuity Fund during the determination of the tariff for Mejja Unit No.4. We agree with the submission of the Counsel representing Central Commission regarding the Foot Note to the audited accounts that the interest earned on investment of securities out of P&G Fund is credited to the fund itself and is not flown back to the accounts of DVC.

12.14 Another plea of the Petitioner is that the Central Commission has not properly accounted regarding number of employees who are actually working with the power business and the apportionment of Head Office & general expenses towards power business.

12.15 We do not agree with this. The Central Commission while working out the Tariff determination have gone through the report submitted by the Actuary towards total contributions required for pension and gratuity towards generation, transmission and distribution and the Commission deducted the liability of Distribution Organisations (The Distribution Tariff is determined by the respective State Commission) and considered the contribution for the employees of generation and transmission.

12.16 We have noticed from the submissions of the Counsel for the Respondent No.2, DVC that the interest amount on P&G fund is not figured in the books of accounts of Damodar Valley

Corporation. The relevant extract of the details of interest on the Pension Fund provided by the Counsel is as under:

II. Miscellaneous

(a)	Interest on new Pension	-	19,179,946
(b)	Interest on CPF	-	9,169,540
(c)	Interest on CPF	-	539,552,383
(d)	Bonus on GPF		
	Deduct: Interest recoverable on interest	-	(370,246,449)
	Total: C(II) Other Charges		197,655,420
	Total: Other Charges		197,667,411
	Total: Overhead Charges		879,816,786

12.17 Thus, it clearly shows that the interest on P&G fund does not figure in the books of the Respondent No.2, DVC.

12.18 Thus, we do not find any perversity or infirmity in the Central Commission's Order on this issue. The Central Commission while arriving at the figures had rightly not considered the interest accrued from the investment of the P&G fund as the accrued interest amount is not the revenue of the Respondent No.2, DVC."

7. After having a careful examination of principle submissions of the rival parties on various issues raised in the instant Review Petition, our considered opinion is as follows;

8. The primary challenge in the Review Petition by the Review Petitioner is that the Appellate Tribunal has not made any decision on the specific contention of the Review petitioner as taken note of in Paragraphs 9.7 and 9.8 of the said decision which are reproduced below;

“9.7 That it may be noted that a large number of employees involved in setting up of new units of Chandrapur TPS, Koderma TPS, Mejia TPS, Durgapur Steel TPS etc., have been factored in while determining DVC’s Pension and Gratuity liability recoverable from command area consumers. Therefore, the Pension and Gratuity liability of employees engaged in Generating Stations not envisaged for the command area cannot be recovered as part of tariff applicable to command area consumers.

9.8 That the Central Commission ought to have directed DVC to submit details of employees in each of its specific activities. Furthermore, the DVC ought to have been required to furnish details of employees engaged in assets servicing the command area and those in respect whereof DVC has signed PPAs with licensees outside the command area.”

9. Thus, the contention of the Review Petitioner recorded at Paragraphs 9.7 and 9.8 of the Judgment dated 19.2.2016 and in the

written submissions filed in the review petition may be summarised as under:

- a) The Central Commission had factored the employees of number of generating stations for the purpose of considering the Pension and Gratuity Fund Contribution Liability whereas such contribution of employees engaged in the generating stations which are supplying electricity in the Command Area should only be considered and the generating stations supplying electricity outside the Command Area should not be considered;
- b) The Central Commission having directed DVC to submit details of the employees in respect of each of the specific activities, the Central Commission ought to have insisted on DVC furnishing such details;
- c) The Pension and Gratuity liability should have been considered in respect of the employees of DVC segregated and only related to the power business and not for the entire DVC's employees which had been taken into account in the actuarial

valuation. The actuarial valuation is inclusive of all activities of the DVC in addition to the power business;

- d) The employees engaged in DVC's under construction plant ought not to have been considered for the purpose of allowing contribution to the Pension and Gratuity Fund.

10. After hearing the learned counsel appearing for the Review Petitioner in the review petition, a specific reference was made to Paragraphs 12.14 of the Judgment dated 19.2.2016 (quoted above) and it was contended that the Central Commission had not properly accounted regarding the number of employees who are actually working with the power business excluding activities other than Power business namely such as irrigation and flood control and the apportionment of the head office and general expenses towards power business and that this plea of the Review Petitioner has not been considered in the judgment dated 19.2.2016.

11. This Tribunal has in the judgment dated 19.2.2016 referred to the actuarial valuation undertaken by Mr. Basudev Chatterjee who had worked out the valuation for the contribution as on 31.3.2006 and 31.3.2009 taking into account the recommendations of the Sixth Pay

Commission. This Tribunal has further referred to the earlier judgement dated 23.11.2007 passed in Appeal No. 271 of 2006 and judgement dated 10.5.2010 passed in Appeal No. 146 of 2009 wherein the issue of the contribution to Pension and Gratuity Fund has been gone into in detail. The Pension and Gratuity Fund contribution has been apportioned from the beginning to various generating units of the DVC and the burden of such contribution in respect of those generating units and other power related activities of DVC for maintaining the supply of electricity in the DVC Command Area have alone been considered.

12. The apportionment cost of the Pension and Gratuity Fund to the generated units and/or generated stations which are not factored for maintaining the supply of electricity in the Command Area not considered for the purpose of tariff recovery from the consumers such as the Review Petitioner who are in the Command Area. Accordingly, the proportion of Pension and Gratuity Contribution which are not related to power business in the Command Area had not got been factored in the tariff applicable to the Command Area. The per unit tariff worked out for the generating stations from where the electricity is used for maintaining the supply of electricity to the consumers in the Command Area being alone considered and there

is no impact of the contribution of Pension and Gratuity Fund in respect of the generating stations or the generated units or otherwise in respect of other activities of DVC being factored in the tariff for the consumers in the Command Area. The Central Commission as well as the Appellate Tribunal has proceeded on the above basis and as per the actuarial valuation given by an actuary who is an expert.

13. The claim against the interest earned on the Pension and Gratuity Fund has also been considered by the Appellate Tribunal in Paragraphs 12.15 to 12.17. The Central Commission in its judgement dated 22.4.2013 passed in Petition No. 279 of 2010 had also considered in detail the issue of Pension and Gratuity Fund and recorded a specific funding.

14. The plea raised by the Review Petitioner in regard to the employees working in activities other than the power related activities has been considered and is countered by the fact that as per the decision dated 23.11.2007 passed by the Appellate Tribunal, the head office and corporate office expenses are to be considered for the purpose of power business and from the beginning the actuarial valuation to the extent of 98.90% is related to the employees working in the

power business. It has been stated that as against a total number of 11,211 employees as on 31.3.2017 working in DVC, only 24 employees, namely, a miniscule number is related to irrigation and flood control activities of DVC. The irrigation and flood control activities are undertaken by the Government of West Bengal and there is only a cost reimbursement to DVC without DVC engaging number of personnel for undertaking such activities. Accordingly, the proportion of the extent incurred in irrigation and flood control activities cannot be attributed to O&M Expenses.

15. The submissions that this Tribunal has not considered only the number of employees who are actually working with power business and their apportionment thereof cannot be accepted at this stage as the issue of apportionment of the number of employees related to actual power related activities where the generated units are used for maintaining the supply in DVC area had been consistently considered from the beginning i.e. with the judgment dated 23.11.2007 passed by this Tribunal based on actuarial valuation. The contents of para 12.14 of the judgment dated 19.2.2016 are required to be read in the context of the entire analysis in para 12.1 to 12.18 and reading together, it is clear that the Tribunal has followed the consistent practice as in the past and as approved in

the earlier orders of this Tribunal. Accordingly, these are not matters for the review petition. The review petition does not disclose any error apparent on the fact of the record in the judgment dated 19.2.2016 or otherwise there are any sufficient cause for review of the said judgment. There is therefore no merit in the review petition filed.

16. Accordingly, for the foregoing reasons as stated above, the Review Petitioner has failed to point out any error apparent on the face of record or any sufficient ground.

Hence, the instant Review Petition filed by the Review Petitioner is dismissed as devoid of merits.

No order as to costs.

Pronounced in the Open Court on this **4th day of April, 2018.**

(Justice N. K. Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member