

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

Review Petition No. 16 of 2016
IN
Appeal No. 48 of 2015

Dated: 10th October, 2017

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

In the matter of :-

M/s Maithon Power Ltd.
Jeevan Bharti, 10th Floor,
Tower I, 124, Connaught Circus,
New Delhi – 110 001

**...Review Petitioner/
Appellant**

Versus

- 1. Central Electricity Regulatory Commission
3rd and 4th Floor, Chander lok Building,
36, Janpath, New Delhi – 110 001.**
- 2. Tata Power Delhi Distribution Limited
33 kV Grid Sub Stateion Building, Hudson Lane,
Kingsway Camp, New Delhi – 110 009**
- 3. Damodar Valley Corporation
DVC Headquarters, DVC Towers,
VIP Road, Kolkata – 700 054.**
- 4. West Bengal State Electricity Distribution Co. Ltd.
Vidyut Bhavan, Bidhannagar, Sector-11,
Kolkota – 700 091**

5. **Tata Power Trading Co. Ltd.**
Corporate Centre, 'A' Block, 34,
Sant Tukaram Road, Carnac Bunder,
Mumbai – 400 006

... Respondent(s)

**Counsel for the Review Petitioner/
Appellant(s)**

**Mr. Amit Kapur,
Mr. Vishal Anand
Ms. Pallavi Mohan
Ms. Aparajita Upadhyay
Mr. Akshat Jain**

Counsel for the Respondent(s):

**Mr. Sethu Ramalingam
Mr. J.B. Ravi for R-1**

**Ms. Ranjana Roy Gawai
Mr. Ravi Sharma
Mr. Alok Shankar
Ms. Vasudha Sen
Mr. Vivek Kumar
Mr. Mangesh Krishna for R-2**

ORDER

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

1. This Review Petition is being filed by M/s Maithon Power Ltd. (hereinafter referred to as the "Review Petitioner/Appellant") under Section 120(2)(f) of the Electricity Act, 2003 read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908, for review of the judgment dated 10.05.2016 ("Impugned

Judgement”) of this Tribunal passed in Appeal No. 48 of 2015 filed by the Appellant on the following issues.

- a) Issue 1: Disallowance of Interest During Construction (IDC) of Rs. 98.99 Cr. due to time overrun of 2.3 months in achieving Commercial Operation Date (COD) of Unit-1 and 3.3 months in achieving COD of Unit-2.
 - b) Issue 2: Disallowance of cost of Light Diesel Oil (LDO) which has been used in addition to the Heavy Fuel Oil (HFO) as Secondary Fuel Oil for start up and shut down of the units.
2. This Tribunal vide judgement dated 10.5.2016 in Appeal No. 48 of 2015 has upheld the order dated 19.11.2014 (Impugned Order) passed by the Central Electricity Regulatory Commission (hereinafter referred to as the “**Central Commission**”) in Petition No.274 of 2010 regarding approval of capital cost and determination of generation tariff for the period from the date of commercial operation of Unit No.1 and Unit No.2 of the Maithon Right Bank Thermal Power Plant (Project) of the Review Petitioner.
 3. The Review Petitioner for review of the Impugned Judgement on the ground of ‘*sufficient reason*’ has placed reliance on judgement of Hon’ble Supreme Court in case of Board of Control for Cricket in India vs. Netaji Cricket Club &Ors. (2005) 4 SCC 741.

4. On the issue of maintainability of the Review Petition, the Review Petitioner has relied on the judgements of Hon'ble Supreme Court in case of Commissioner of Sales Tax, J&K v. Pine Chemical Ltd. (1995) 1 SCC 58 regarding passing of judgement in variance with the earlier decisions passed by a coordinate bench and in case of Commissioner of Excise, Hyderabad v. Associated Cement Co. Ltd. (2011) 11 SCC 420 regarding passing of an order ignoring the statutory provision.

5. We have heard at length the learned counsel for the Review Petitioner and learned counsel for the Respondents and considered their arguments and written submissions. Gist of the same is discussed hereunder;
 - a) On Issue 1 i.e. disallowance of IDC due to time overrun in achieving COD of Unit 1 & Unit 2, the Review Petitioner has submitted that while deciding the Appeal this Tribunal has inadvertently not considered several aspects which establishes that delay in achieving COD of the units was beyond the control of the Review Petitioner. Even otherwise, IDC has been wrongly calculated and disallowed by the Central Commission.

 - b) The Review Petitioner has further argued this issue by subdividing it into three parts i.e. delay in transfer of land in favour of the Review Petitioner, delay in availability of construction power to the Project and computation of IDC.

- c) On the issue of delay in transfer of land in favour of the Review Petitioner while quoting the extracts from the Impugned Judgement and Impugned Order, the Review Petitioner has argued that this Tribunal as well as the Central Commission has not appreciated the fact that the Review Petitioner and Damodar Valley Corporation (DVC) are two different entities. The delay in transfer of land by DVC cannot be attributed to the Review Petitioner. Under the DVC Act, 1948, only DVC has the power to acquire the land. Despite having power to acquire land, DVC is required to follow the procedure and perform the necessary duties to acquire the land. There was also need for necessary concurrence of participating Governments i.e. Govt. of India/ Govt. of West Bengal/ Govt. of Jharkhand. It is incorrect to conclude that Review Petitioner could have possibly accelerated the process of land acquisition for the Project with the help from DVC.
- d) The Review Petitioner has submitted that even though the Raiyati Land (non-contiguous 565 acre) was transferred in the name of DVC in 2003-04 by Govt. of Jharkhand, DVC could not take physical possession of land as the area was inhabited by large number of families and there was no Resettlement & Rehabilitation (R&R) package approved Govt. of Jharkhand (GoJ) and acceptable to project affected people. Although the Review Petitioner and DVC took up the matter with GoJ for approval of R&R package, it was only on 7.9.2007 GoJ permitted the Review Petitioner to adopt the DVC policy on R&R. The delay in finalisation in R&R

package is not attributable to the Review Petitioner as it was due to political uncertainties in the State of Jharkhand and R&R agreement was signed between Review Petitioner and R&R Committee only on 31.3.2008. After signing of this agreement the Review Petitioner could get physical possession of the land in March, 2008. On this issue the Review Petitioner has placed reliance of this Tribunal's judgement dated 15.5.2015 in case of Power Company of Karnataka Ltd. Vs. CERC &Ors.

- e) On the issue of delay in availability of construction power to the Project, the Review Petitioner has submitted that as per the feasibility studies conducted by DVC there was forest land and river in the proposed route. In view to avoid forest area, thereafter the Review Petitioner conducted survey for alternate route with the help of TSC wing of DVC and could get final approval from DVC only on 20.2.2009 for construction of 33 kV power supply line on the alternate route. While executing this line the Review Petitioner faced several obstructions from local people that delayed final charging of the lines. There was no laxity on part of the Review Petitioner or DVC to execute the construction of power supply line to the Project site. To ensure early construction of the Project, the Review Petitioner has also made alternate arrangement for construction power from Jharkhand State Electricity Board but the power supply was unreliable with 2-8 hours of daily power cuts that affected critical tasks during initial phase of project construction.

- f) On the issue of IDC, the Review Petitioner has submitted that there is an error apparent on face of record in calculation of IDC by the Central Commission as Rs. 99 Cr. for 170 days (2.3 months for Unit 1 & 3.3 months for Unit 2) as the actual IDC incurred was only Rs. 4.30 Cr. The error has occurred as there was no disbursal of loan during 25.10.2007 (Zero date of the Project) till 2.3.2008 due to delay in finalisation of R&R package. Accordingly, there had been no impact on the beneficiaries on account of IDC from 25.10.2007 to 2.3.2008. In this regard the Review Petitioner relied on the judgement of this Tribunal in case of PGCIL Vs. CERC &Ors. 2012 ELR (APTEL) 0352.
- g) On Issue 2 i.e. disallowance of cost of LDO which was used in addition to the HFO as Secondary Fuel Oil for start up and shut down of the units, the Review Petitioner has submitted that this Tribunal has failed to consider that the cost of Secondary Fuel Oil is allowed in terms of Regulation 20 of the CERC (Terms and Conditions of Tariff) Regulations, 2009 (Tariff Regulations, 2009). This Tribunal erroneously relied on Regulation 18 of Tariff Regulations, 2009 which is applicable only with respect of calculation of Interest on Working Capital which is a different element of Tariff as compared to cost of Secondary Fuel Oil. This Tribunal also failed to consider that the Review Petitioner is constrained to use HFO and LDO as Secondary Fuel Oil for the purpose of start up and shut down activities of both units after COD.

- h) Regulation 20 of the Tariff Regulations, 2009 uses the term weighted average landed price of secondary fuel oil for the year and has no link to the landed price of main Secondary Fuel Oil in Regulation 18 of the Tariff Regulations, 2009 which is used for computation of Interest on Working Capital. As per Regulation 20, the weighted average landed price of Secondary Fuel Oil for the year include landed price of both HFO & LDO. Accordingly, the interpretation provided by the Central Commission in the Impugned Order is misplaced.
- i) The learned counsel for the Central Commission has submitted that the submissions made by the Review Petitioner related to delay in transfer of land does not fall under the scope of power to review as per the judgement of Hon'ble Supreme Court in case of Kamlesh Verma v. Mayawati & Ors. (2013) 8 SCC 320. This judgement has been relied upon by this Tribunal in number of judgements including judgement dated 22.3.2017 in RP 3 of 2017 in Appeal No. 185 of 2014. On the issue related to delay in availability of construction power, this Tribunal in the Impugned Judgement has dealt the matter on merits and affirmed the views of the Central Commission. The Review Petitioner is trying to re-argue the case. The Review Petitioner has also relied on some documents placed on records in this Review Petition. These documents were not referred to or were part of the petition before the Central Commission. These documents have been produced for the first time. On the issue of error in computation of IDC the Review Petitioner is seeking review by alleging an error

committed by the Central Commission whereas review is maintainable only when the Impugned Judgement of this Tribunal has error apparent on face of it.

- j) On the issue of disallowance of cost of LDO in addition to HFO for start up and shut down of the units the counsel for the Central Commission has submitted that this Tribunal has also dealt the issue in detail in the Impugned Judgement.
 - k) The Respondent(s) categorically denied the contentions and allegations of the Review Petitioner and submitted that there is no error apparent in the Impugned Judgment and the issues raised by the Review Petitioner have no merit and do not fall within the scope of Review Jurisdiction.
6. After having a careful examination of all the aspects brought before us in this Review Petition and perusal of Impugned Judgment dated 10.5.2016, we find that all the issues brought before us in this Review Petition have been dealt with in detail in our judgment dated 10.5.2016 and the Review Petitioner is trying to seek re-hearing/re-argue the original matter.
7. The Review Petitioner has also relied on various judgements of Hon'ble Supreme Court and this Tribunal. We have gone through the said judgements and we find that the judgements quoted by the Review Petitioner do not have relevance in this matter.

8. Accordingly, the Review Petitioner has failed to establish any error apparent on the face of record or any sufficient reason necessitating the review of the Impugned Judgment. Hence, it is not possible for us to entertain this Review Petition. Accordingly, the Review Petition is dismissed.

9. Pronounced in the Open Court on this **10th day of October, 2017.**

(I.J. Kapoor)
Technical Member

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(Mrs. Justice Ranjana P. Desai)
Chairperson

REPORTABLE/NON-REPORTABLE

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