

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

(APPELLATE JURISDICTION)

**REVIEW PETITION NO. 18 OF 2015 &
IA NO. 251 OF 2015 IN IA NO.187 OF 2015 IN
APPEAL NO. 21 OF 2014**

Dated: 21st November, 2017

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

In the matter of:-

**1.INDIAN WIND ENERGY)
ASSOCIATION)
Through its Secretary,)
Shri Manish Kumar Singh)
Having its registered office at:)
PHD House, 3rd Floor,)
Opp. Asian Games Village,)
August Kranti Marg,)
New Delhi – 110016)**

**2.INDIAN WIND TURBINE)
MANUFACTURERS' ASSOCIATION)
(IWTMA))
Through its Authorised Representative,)
D.V. Giri, Secretary General,)
Suite No. A2, OPG Towers, 74 (Old No.)
133))
Santhome High Road,)
Chennai – 600 004)**

) ... Review Petitioners

AND

1. **GUJARAT ELECTRICITY REGULATORY COMMISSION,**)
Through its Secretary,)
1st Floor, Neptune Tower,)
Opposite Nehru Bridge,)
Ashram Road,)
Ahmedabad – 380 009)
Gujarat – India)
)

2. **GUJARAT ENERGY DEVELOPMENT AGENCY**)
4th Floor, Block No. 11 & 12,)
Udyogbhavan, Sector 11,)
Gandhinagar – 382 017)
)

3. **GUJARAT URJA VIKAS NIGAM LIMITED,**)
Sardar Patel Vidyut Bhavan,)
Race Course Circle,)
Vadodara – 390007)
Gujarat, India)
)

4. **MADHYA GUJARAT VIJ CO. LTD.,**)
Sardar Patel Vidyut Bhavan,)
Race Course Circle,)
Vadodara– 390007)
Gujarat, India)
)

5. **DAKSHIN GUJARAT VIJ CO. LTD.,**)
Kapodara Char Rasta,)
Surat – 395006)
)

6. **UTTAR GUJARAT VIJ CO. LTD.**)
Corporate Office,)
Mehsana-Visnagar Highway,)
Mehsana – 384001)
)

7. **PASCHIM GUJARAT VIJ COMPANY LTD.**)
)

- Nanamava Road,)
Laxminagar,)
Rajkot – 360004)
8. **TORRENT POWER LTD.,**)
AHMEDABAD,)
Torrent House,)
Off Ashram Road,)
Ahmedabad – 380009)
9. **TORRENT POWER LTD. SURAT,**)
Electricity House,)
Station Road, Surat – 395003)
10. **KANDLA PORT TURST**)
Nisomess Development Cell,)
P.O. Box No. 50,)
Administrative Building,)
Gandhidham,)
Kutch (Gujarat) – 370201)
11. **MPSEZ UTILITIES PVT. LTD.**)
Adani House,)
Near Mithakhali Circle,)
Navrangpura,)
Ahmedabad – 380009)
12. **M/S JUBILANT**)
INFRASTRUCTURE PVT. LTD.)
24-25/39-40, 1st Floor,)
Shri Rang Palace, Rang Multiplex,)
Zadeshwar Road,)
Bharuch – 392012)
13. **M/S ASPEN INFRASTRURE LTD**)
Survey No. 26, Village Pipaliya,)
Taluka Waghodia,)
Dist. Vadodara – 391760 (Gujarat))
14. **M/S TORRENT ENERGY LTD.,**)
Dahej SEZ, Dahej – 392130)

15. **GREEN ENERGY ASSOCIATION**)
Through its Secretary,)
Shri Prafulla Premchand)
Khinvasara,)
Having its registered office address)
at: Sagam Retailers Pvt. Ltd.,)
Taqdir Terrace,)
Shop No. 4,5, 6,)
Plot NO. 143, Dr. E. Borjes Road,)
Near Shirodkar High School, Parel,)
Mumbai – 400 012) ... **Respondent(s)**

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Kumar
Mr. Nishant Kumar

Counsel for the Respondent(s): Ms. Suparna Srivastava
Ms. Sanjana Dua for R.1

Mr. M.G. Ramachandran
Ms. Deepa Chawan
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Ms. Neha Garg
Ms. Rhea Luthra for R.8 & 9

Mr. Ruchir Mishra
Mr. Sanjeev Saxena for R.10

ORDER

1. In this Review Petition, the Review Petitioners are seeking review of Order dated 14.05.2015 passed by this Tribunal in Appeal No 21 of 2014.

2. The Gujarat State Electricity Regulatory Commission (**the State Commission**) notified the Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2010 (**RE Regulations**) specifying the minimum quantum of purchase from renewable energy sources to be fulfilled by the obligated entities in FYs 2010-11 to 2012-13. The State Commission by its Order dated 17/08/2012 permitted the distribution licensees to carry forward their Renewable Purchase Obligation (RPO) of FY 2011-12 to FY 2012-13. Appeal was filed against this Order dated 17/08/2012 before this Tribunal by the Wind Energy Project Developers. This Tribunal by Judgment dated 25/04/2014 partly allowed the appeal and gave some directions to the State Commission to be followed in future. In the meanwhile, Gujarat Urja Vikas Nigam Limited (GUVNL-Respondent No. 3 herein) which is responsible for procurement of power for the four State distribution licensees, filed a petition before the State Commission under Regulation 4.2 of the RE Regulations, seeking waiver of the shortfall in meeting the RPO by its distribution licensees in FY 2012-13. Similar petition was filed by Torrent Power Ltd, Ahmadabad and Surat (Respondent Nos. 8 and 9 herein), the distribution licensees, seeking revision

of RPO in view of supply constraints and other factors beyond the control of the licensee.

3. The State Commission by its order dated 08/08/2013 revised/exempted the RPO of the obligated entities of the State for FY 2012-13 by exercising its power under Regulation 4.2. and 12.1 of the RE Regulations. Aggrieved by this order Indian Wind Power Association filed Appeal No.258 of 2013 in this Tribunal. Aggrieved by the same order Indian Wind Power Association, Green Energy Association and Indian Wind Turbine Manufactures Association filed Appeal No.21 of 2014 in this Tribunal.

4. By its Judgment dated 16/04/2015, this Tribunal disposed of the appeals. The matters were remanded to the State Commission to reconsider the whole issue afresh in light of findings in the judgment within three months from the date of the judgment. Following is the summary of this Tribunal's findings and directions.

“71. Summary of our findings:

(i) The National Tariff Policy and the Regulation of the Central Commission and the State Commission recognize REC as valid instrument for fulfilling Renewable Purchase Obligation cast upon the obligated entities under Section 86(1)(e) of the Electricity Act, 2003. Purchase of REC would be deemed as purchase of energy from renewable energy source for fulfilling RPO obligation. When a legal fiction has been created by a statute, the same should be given full effect.

(ii) An obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. However, a distribution licensee has to exercise the option based on economic principles. An obligated entity other than the distribution licensee may also opt for purchase of REC for fulfilling its RPO obligation to avoid the issues involved in banking, open access, sale of surplus power, etc., or if the RPO requirement is too small.

(iii) Renewable energy generators like conventional generators have been given freedom under the Electricity Act in respect of choice of site, choice of counter-party buyer, freedom from tariff regulation when the generating company supplies to a trader or directly to a consumer. So far, the renewable energy generators were not able to exercise this freedom due to various constraints. The REC A.No.258 of 2013 and A.No.21 & IA No.28 of 2014 Page 54 of 57 mechanism has opened up the market for renewable energy generators helping in expeditious exploitation of renewable energy potential in

the country thus, serving the object of the Electricity Act, 2003. Thus, REC mechanism has to be encouraged. By treating REC as a valid instrument for discharge of mandatory RPO as set out in the Regulations, the State commission has only followed the mandate of the Electricity Act, 2003 under Section 86(1)(e) for promotion of renewable sources of energy in the State.

(iv) The State Commission can revise the RPO before or during a year or after passing of year under Regulation 4.2 of RE Regulation 2010 as explained under paragraphs 47 to 51 above. If the distribution licensee has not made efforts to procure requisite renewable energy to fulfill the RPO and also has not procured REC, the State Commission should not revise RPO under Regulation 4.2. However, while revising the RPO targets, the State commission has to ensure that such revision should not defeat the object of the Electricity Act and the Regulations.

(v) If the RPO targets are revised under Regulation 4.2 due to inadequate capacity addition in a resource rich State, such reduction has to be uniform for all the entities.

(vi) Under 5th proviso to Regulation 9, if the Commission is convinced that the obligated entity has faced genuine difficulty in meeting the RPO due to non-availability of power from renewable sources or the A.No.258 of 2013 and A.No.21 & IA No.28 of 2014 Page 55 of 57 REC, it may allow carry forward the compliance requirement to the next year. However, before exercising power order Regulation 9, the State Commission has to satisfy itself

that there was difficulty in meeting the RPO from purchase of REC. Therefore, non-availability of REC is a pre-condition for carry forward under Regulation 9.

(vii) Admittedly there was substantial reduction in capacity addition of wind energy and other sources of renewable energy in the State during FY 2012-13 due to reasons beyond the control of the distribution licensee. Under such a condition the State Commission can reduce RPO targets for the wind energy and other energy. However, such reduction due to capacity constraints has to be uniform for all the obligated entities in the State.

(viii) In the present case, the State Commission has revised the RPO targets for various distribution licensees as per the actual. This way the State Commission has set up different RPO targets for four States owned distribution license, Torrent Power Surat and Ahmedabad at different levels for the same reason of inadequate capacity addition. This is not permissible. The State Commission has incorrectly revised the RPO for the deemed distribution licensees to zero or nearly negligible amount due to financial impact, low energy consumption, nascent stage of operation etc., in contravention to the Regulations. A.No.258 of 2013 and A.No.21 & IA No.28 of 2014 Page 56 of 57.

(ix) We find that RPO compliance of GUVNL for wind energy was satisfactory but compliance of biomass and other non-solar energy was quite low due to which there was default in fulfilling the nonsolar RPO. Thus, during FY 2012-13 there appeared to be inadequate generation of biomass and other non-solar energy sources in the

State. The State Commission has to examine the reasons for the same and take necessary measures for accelerating capacity addition of biomass and other sources of renewable energy in the State.

(x) We remand the matter to the State Commission to reconsider the whole issue afresh in light of our findings in this judgment. The State Commission is empowered to reduce the RPO targets for all the entities uniformly in view of reduction in capacity addition of wind energy and other sources in the State during the FY 2012-13. However, the consequences of shortfall with respect to the revised RPO for different distribution licensees/deemed distribution licensees has to be decided by the State Commission according to Regulation 9.

(xi) We do not find any infirmity in the State Commission relaxing the RPO for those deemed distribution licensees who purchase energy from GUVNL/distribution licensees at retail supply tariff and their consumption is included in determining the RPO of the supplying distribution licensee. A.No.258 of 2013 and A.No.21 & IA No.28 of 2014

(xii) In the circumstances of the case, we do not want to interfere with the decision of the State Commission to set off the shortfall in non-solar energy purchase with excessive solar energy procured during FY 2012-13. However, we have given certain directions in this regard for future in paragraph 68 above.

(xiii) As regards public hearing for review of RPO, we have already given the necessary directions in our

judgment in Appeal No. 24 of 20013 which have been reproduced under paragraph 27.

71. In view of the above, the Appeal is allowed in part as indicated above and the State Commission's order is set aside to that extent. The State commission is directed to pass consequential order as per the findings in this judgment within three months of the date of this judgment. No order as to costs."

5. An application being IA No. 87/2015 was filed by Torrent Power Limited, Surat, Respondent No. 9 herein for clarification of the direction contained in the Judgment dated 16/04/2015 to the extent it refers to uniform reduction for all the entities in view of reduction in capacity addition of wind energy and other sources in the State. This Tribunal by its Order dated 14/05/2015 disposed of the said application. This Tribunal made it clear that once a court gives a judgment, it becomes *functus officio*. This Tribunal observed however that where it had described various conditions under which the commission may revise RPOs targets, it is necessary to give the clarification regarding implementation of the judgment without changing the findings in the judgment. This Tribunal in the circumstances clarified that in case the State Commission decides to revise

targets due to inadequate capacity addition in the State, the same may be done keeping in view availability of renewable sources in the State and other relevant factors and after hearing all concerned and not merely on the basis of actual RPO achievement by the various entities. Relevant portion of the said order could be quoted.

“3. Once the court gives a judgment, it becomes functus officio. Therefore, we do not want to change or in any way dilute the judgment dated 16.04.2015. However, in the present case the Tribunal while interpreting the regulations has also discussed the various conditions under which the State Commission may revise the RPO targets after the completion of the financial year under Regulation 4.2 due to supply constrains or factors beyond the control of the licensee. The Tribunal has held that if RPOs are revised due to the inadequate capacity addition in the State, the same percentage will be applicable to all the obligated entities.

4. We feel that in the present case where we have described various conditions under which the Commission may revise RPOs targets, it is necessary for us to give the clarification regarding implementation of the judgment without any way changing the findings in the judgment. We, therefore, clarify that in case the State Commission decides to revise targets due to inadequate capacity addition in the State the same may be done keeping in view overall availability of renewable energy resources in the State and other relevant factors and after hearing all concerned and not merely on the basis of actual RPO achievement by the

various entities. With this clarification the application is disposed off.”

The Review Petitioners have sought review of this order. Review Petitioner No.1, Indian Wind Energy Association was Respondent No.15 in Appeal No.258 of 2013. Review Petitioner No.2 Indian Wind Turbine Manufactures Association was Appellant No.3 in Appeal No.21 of 2014.

6. We have heard Mr. Sanjay Sen, learned Senior Advocate appearing for the Review Petitioners. We have perused the submissions filed on behalf of the Review Petitioners. Gist of the submissions is as under:

- a) The clarificatory Order dated 14/05/2015 dilutes/modifies the main order dated 16/04/2015 and takes away the intent of the main order as the same envisages revision in RPO targets under Regulation 4.2 of the RE Regulations without mentioning consideration of Renewable Energy Certificates (RECs).

- b) The impugned clarificatory order is *per incuriam* because vide a clarification the main order cannot be diluted/modified. That could only have been done under a review. It is *per incuriam* also because the impugned clarification is against Regulation 4.2 of the RE Regulations.
- c) The term 'renewable capacity addition in the State' would also mean REC capacity as RECs have been repeatedly held as deemed renewable sources of energy for fulfilment of RPO. The term 'inadequate capacity addition' would always include inadequate RECs since this Tribunal has at several places in the main order held that RECs are deemed renewable energy source for RPO fulfilment and as such when renewable capacity addition is talked about the same cannot be *de hors* the deemed renewable energy source (which is the RECs).

- d) The impugned clarificatory order is '*per incuriam*' on account of the fact that it misses out the word 'RECs' when in paragraph 4 of the said order it is observed that the State Commission may revise RPO targets due to inadequate capacity addition keeping in view overall availability of RE sources and other relevant factors. This has created ambiguity and it leads to a conclusion as argued by the Respondents that RPO norms can be revised without at all considering the availability of the RECs.
- e) The main order dated 16/04/2015 passed in Appeal No. 21 of 2014 has also been relied upon by a Full Bench of this Tribunal in the Judgment dated 20/04/2015 in O.P. No. 1 of 2013 and batch, before passing of the impugned clarificatory order. The findings of the main order therefore acquired the flavour of the larger Bench which could not have been altered by the

impugned clarification issued by a Division Bench of this Tribunal.

- f) Regulation 4.2 of the RE Regulations states that revision of RPO targets can be done keeping in view 'supply constraints' or other factors beyond the control of the licensee. The terms 'supply constraints' or 'other factors' are very wide and would include RECs by which RPO can be fulfilled. Hence, in the event RPO norms have to be revised, the availability of RECs cannot at all be ignored. Reference may also be made to Regulations 5, 7 and 9 of the RE Regulations.
- g) If any clarificatory order touches the merits of the main order, then it is illegal/*per incuriam*. An order can be modified only in a review proceeding. (See: **State of Haryana and Ors. vs. M.P. Mohla¹, Ram Chandra Singh vs.**

¹ (2007) 1 SCC 457

Savitri Devi and Ors.², Ram Jethmalani and Ors. vs. Union of India and Ors.³ and Delhi Administration vs. Gurdip Singh Urban and Ors.⁴

- h) The term ‘*per incuriam*’ is explained by the Supreme Court in **State of U.P. and Anr. vs. Synthetics and Chemicals Ltd and Anr.⁵**
- i) The impugned clarificatory order leads to absurdity. Any interpretation (impugned clarification) which leads to absurdity has to be avoided. (See: **K.P. Varghese vs. ITO⁶, New India Assurance Co. Ltd. vs. Nusli Neville Wadia⁷**)
- j) The application for clarification filed by the Respondents was in the nature of a review

² (2004) 12 SCC 713

³ (2011) 9 SCC 751

⁴ (2000) 7 SCC 296

⁵ (1991) 4 SCC 139

⁶ (1981) 4 SCC 173

⁷ (2008) 3 SCC 279

petition and hence was not maintainable. The impugned clarificatory order is *per incuriam* hence it ought to be set aside or word RECs ought to be added in Paragraph 4 thereof so as to construe that for revision in RPO norms existence of RECs cannot be ignored. The power of review extends to correct all errors in order to prevent miscarriage of justice. (See: **Rajender Singh vs. Lt. Governor Andaman and Nicobar Islands and Ors.**⁸)

- k) In view of the above submissions, the review petition needs to be allowed.

7. We have heard Mr. Ramachandran, learned counsel appearing for Respondent Nos.8 and 9. We have perused the written submissions filed on behalf of Respondent Nos.8 and 9. Gist of the submissions is as under:

⁸ (2005) 13 SCC 289

a) A review petition is maintainable only on the ground of error apparent on the face of record. In this case, there is no such error requiring exercise of review jurisdiction by this Tribunal. In this connection, reliance is placed on the following judgments.

- i) Lily Thomas vs. Union of India⁹
- ii) Meera Bhanja vs. Nirmala Kumari Choudhury¹⁰
- iii) M/s Northern India Caterers (India) Ltd. vs. Lt. Governor of Delhi¹¹
- iv) Kamlesh Verma vs. Mayawati & Ors.¹²
- v) Sow Chandra Kante vs. Sheikh Habib¹³

b) The Review Petitioners are trying to re-agitate the issues settled by this Tribunal vide Judgment dated 16/04/2015 and clarificatory order dated 14/05/2015. It is, in fact, an appeal in disguise and hence should be dismissed. In this connection reliance is placed on **Kamlesh Verma**.

c) The State Commission has already implemented the Judgment dated 16/04/2015 in Appeal No.21 of 2014 read with clarificatory order dated

⁹ AIR 2000 SC 1650

¹⁰ (1995) 1 SCC 170

¹¹ 1980 (2) SCC 167

¹² 2013 (8) SCC 320

¹³ 1975 (1) SCC 674

14/05/2015. Hence, the review petition has become infructuous. On this ground also the review petition deserves to be dismissed.

- d) This Tribunal in its Judgment dated 16/04/2015 has deemed purchase of REC as purchase of energy from Renewable Energy Source for fulfilling RPO obligations. The Review Petitioners are now seeking to extend this interpretation to equate Renewable Energy Source with REC which would alter the basic fabric of the Judgment dated 16/04/2015.
- e) The clarification issued by this Tribunal merely explains the issue relating to implementation of Judgment dated 16/04/2015. It has no nexus with the contention of the Review Petitioners that REC can be equated with Renewable Energy and can be deemed to be Renewable Energy.
- f) There is no merit in the contention that the clarificatory Order dated 14/05/2015 has diluted the earlier Judgment dated 16/04/2015. This is clear from a careful reading of the said judgment, particularly Paragraphs 49 and 51 thereof.

- g) The clarificatory order cannot be read out of context. It does not alter the main judgment. The clarification is only in reference to the issue of “inadequate capacity addition”.
- h) The judgment of the Supreme Court in **State of U.P. and Anr. vs. Synthetics and Chemicals Ltd.**, is not applicable to this case. The doctrine of *per incuriam* cannot be applied to the present case since here this Tribunal has noted the terms of the relevant regulations.
- i) There is no error in the clarificatory Order dated 14/05/2015. Hence, the review petition will have to be dismissed. But without prejudice to the above, it is submitted that the Supreme Court has held that even a judgment erroneously appreciating or construing a binding precedent is not a *per incuriam* decision. (See: **U.P. Power Corporation vs. Rajesh Kumar and Ors.**)¹⁴
- j) In view of the above, there is no merit in the petition. The petition be dismissed.

¹⁴ (2012) 7 SCC 1

8. A review petition will be maintainable as is well settled, only when a) there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him, b) if there is mistake or error apparent on the face of the record or c) for any other sufficient reason. It would be advantageous at this stage to quote the relevant paragraphs of the Supreme Court's judgment in **Kamlesh Verma** where the Supreme Court has summarised the principles underlying the power to review.

“Summary of the Principles:

20. *Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*

20.1. *When the review will be maintainable:-*

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
- (ii) Mistake or error apparent on the face of the record;*
- (iii) Any other sufficient reason.*

The words any other sufficient reason has been interpreted in Chhajju Ram vs. Neki, 1922 AIR(PC) 112 and approved by this Court in Moran Mar BasseliousCatholicos vs. Most Rev. Mar Poulouse Athanasius & Ors., 1955 1 SCR 520, to mean a reason sufficient on grounds at least analogous to those specified in the rule. The same principles have been reiterated in

Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., 2013 8 JT 275.

20.2. *When the review will not be maintainable:-*

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
- (ii) Minor mistakes of inconsequential import.*
- (iii) Review proceedings cannot be equated with the original hearing of the case.*
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- (v) A review is by no means an appeal in disguise whereby on erroneous decision is re-heard and corrected but lies only for patent error.*
- (vi) The mere possibility of two views on the subject cannot be a ground for review.*
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”*

9. Examined in the light of the above principles, we are of the opinion that the present review petition will have to be dismissed as we are unable to find any mistake or error apparent on the face of record. We also do not find any other sufficient reason to review the clarificatory order dated 14/05/2015. We shall proceed to substantiate this conclusion of ours.

10. Pertinently the clarificatory order dated 14/05/2015 was issued after hearing the parties at length. This Tribunal has clarified therein that once a court gives a judgment it becomes *functus officio* and therefore this Tribunal did not want to change or in any way dilute the Judgment dated 16/04/2015. Being alive to this legal position, this Tribunal has observed that where it has described various conditions under which the Commission may revise RPOs targets, it is necessary to give clarification regarding implementation of the judgment without in any way changing the findings in the judgment. After so observing the impugned clarification is issued. It is clear therefore that it was not the intent of this Tribunal to touch the merits of the Judgment dated 16/04/2015 which is final nor did it not want to dilute the same. In our opinion the clarificatory order does not change, modify or dilute the Judgment dated 16/04/2015 but it is completely in sync with it.

11. Objection of the Review Petitioners is to the clarification issued in the impugned clarificatory order to the effect that “in case the State Commission decides to revise targets due to inadequate capacity addition in the State the same may be done

keeping in view overall availability of renewable energy resources in the State and other relevant factors and after hearing all concerned and not merely on the basis of actual RPO achievement by the various entities”. It is submitted that in Paragraphs 22,29 and 32 of the Judgment dated 16/04/2015, it is held by this Tribunal that RECs are deemed to be renewable sources of energy for the fulfilment of RPO norms. It is submitted that therefore inadequate or adequate “capacity addition” of renewable energy sources cannot be ascertained without keeping in mind the capacity addition of RECs. It is submitted that the Respondents are wrongly submitting that RPO can be revised without considering RECs. It is submitted that the Respondents are wrongly contending that RECs have to be left out while revising RPO norms based upon “inadequate capacity addition”. It is submitted that the impugned clarification has created ambiguity and diluted the Judgment dated 16/04/2015 and it is therefore necessary to either set aside the clarificatory order dated 14/05/2015 or insert the words “RECs/ Renewable Energy Certificates” in Paragraph 4 of the impugned clarificatory order. It is submitted that the

impugned clarification is against Regulation 4.2 of the RE Regulations and hence it is *per incuriam*.

12. In reply, on behalf of Respondent No.8 and 9, equally lengthy submissions have been made. It is submitted *inter alia* that this Tribunal has given a finding in the Judgment dated 16/04/2015 that in a resource rich State, the State Commission can revise the RPO targets by exercise of its power under Regulation 4.2 without any pre-condition of non-availability of RECs. Therefore, there is no dilution of the judgment dated 16/04/2015 by the clarificatory order.

13. We must first make it clear that this case is not covered by the doctrine of “*per incuriam*” and by the judgment of the Supreme Court in **State of UP & Anr. v. Synthetics and Chemicals Ltd. & Anr.** The impugned clarificatory order is not *per incuriam*. The doctrine of *per incuriam* is explained by the Supreme Court in **State of Orissa v. Mamata Mohanty**¹⁵. Following is the relevant extract.

“*PER INCURIAM – Doctrine:*

¹⁵ (2011) 3 SCC 436

64. “Incuria” literally means “carelessness”. In practice *per incuriam* is taken to mean *per ignoratium*. The Courts have developed this principle in relaxation of the rule of *stare decisis*. Thus the “quotable in law”, is avoided and ignored if it is rendered, in *ignoratium* of a Statute or other binding authority.

65. In *Mamleshwar Prasad & Anr. v. Kanahaiya Lal(Dead) by Lrs.*, AIR 1975 SC 907, this Court held:

“7.....Where by obvious **inadvertence or oversight** a judgment fails to notice a plain statutory provision or **obligatory authority running counter to the reasoning** and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission.”

(emphasis added)

14. We have viewed this case in the light of the above observations. It is not possible for us to say that the clarificatory order fails to notice the relevant regulation. There is a specific reference to Regulation 4.2 of the RE Regulations. It is in conformity with the Judgment dated 16/04/2015 as we shall soon see. Hence the submission that it is *per incuriam* will have to be rejected.

15. In **State of U.P and Anr. v. Synthetics and Chemicals Ltd.** on which reliance is placed by the Review Petitioners the dispute was about levy of purchase tax on industrial alcohol. The High Court had held that the State legislature was competent to enact a law imposing purchase tax on it in exercise of power under Entry 54 of List II. But it struck down the levy as it would

disturb price structure regulated by the Central Government. It was held that control of alcohol industry having been taken over by Parliament, for purpose of regulation and development the State stood denuded of its taxing power under Entry 54 of List II to the extent the field of price fixation was covered by the price control order issued by the government. The High Court had in coming to this conclusion placed reliance on the Supreme Court's decision in **Synthetic and Chemicals v. State of U.P**¹⁶, where conclusion was drawn that "sales tax cannot be charged on industrial alcohol because under the Ethyl Alcohol (Price Control) order sales tax cannot be charged by the State on industrial alcohol." The Supreme Court observed that this conclusion was not preceded by any discussion. No reason or rationale could be found in the order. The Supreme Court observed that there was no reasoning, no arguments, no reference to relevant provision of law in the order. In the circumstances the Supreme Court held that the relevant portion of the said judgment drawing the aforementioned conclusion was *per incuriam*. This judgment cannot be made applicable to the present case because here we are concerned with an order which notes submissions of the

¹⁶ (1990) 1 SCC 109

counsel, refers to Regulation 4.2 of the RE Regulations and issues clarification in conformity with the Judgment dated 16/04/2015 regarding implementation of the Judgment dated 16/04/2015.

16. Clarificatory order dated 14/05/2015 has neither diluted judgment dated 16/04/2015 nor has it created any ambiguity. This is clear if it is read in the context of relevant paragraphs of the Judgment dated 16/04/2015. This can be illustrated by quoting Paragraph 49(iii).

“49. The State Commission may revise the targets after the completion of financial year under Regulation 4.2 due to supply constraints or factors beyond the control of the licensee which may be due to reasons such as

i) xxx

ii) xxx

iii) Inadequate capacity addition in the State and RECs could not be purchased due to non-availability of REC despite efforts made by the distribution licensees. In a resource rich State where the State Commission has set up RPO targets keeping in view the anticipated capacity addition in the State, the State Commission may also, revise the targets due to inadequate renewable capacity addition in the State.”

Paragraph 51 also needs to be quoted. It reads as under:

“51. We want to add that non-availability of REC may not always be a pre-condition for exercise of power to revise under Regulation 4.2. For example, if the distribution licensees had tied up adequate capacity at preferential tariff but due to actual generation being lower than the normative generation due to reasons beyond the control of the distribution licensee or there is natural calamity in the State and energy consumption in the State has gone down or renewable energy generation in the State has been affected due to natural calamity then shortage of REC may not be a pre-condition to revise RPO targets set up under Regulation 4.1. Further, if in a resource rich State the State Commission has set up RPO targets keeping in view anticipation of capacity addition in the State, the State Commission may also revise the targets due to inadequate capacity addition in the State due to reasons beyond the control of the distribution licensee.”

The clarificatory order is thus in tune with the judgment dated 16/04/2015. It is in conformity with the judgment dated 16/04/2015 and hence the contention that it is *per incuriam* deserves to be rejected.

17. Since the doctrine of *Per Incuriam* is relied upon by the Review Petitioners it is necessary to refer to the judgment of the Supreme Court in **U.P. Power Corporation V. Rajesh Kumar** where the Supreme Court has gone on to hold that a judgment erroneously appreciating a binding precedent is not a *per incuriam* decision. The present case therefore would certainly not be covered by the doctrine of *Per Incuriam* as the order in

question is merely clarificatory and is in consonance with the main judgment.

18. The Review Petitioners are in our opinion trying to re-agitate the issues which are already settled. The review petition is in fact an appeal in disguise. It is therefore not necessary for us to deal with the rival contentions as if we are dealing with an appeal as that would amount to rewriting the original judgment. Suffice it to conclude that in this case there is no error apparent on the face of record warranting exercise of review jurisdiction. There is no substance in the contention that the clarificatory order dated 14/05/2015 is *per incuriam*. The review petition is therefore dismissed. Needless to say that all pending applications stand disposed of.

19. Pronounced in the Open Court on this **21st day of November, 2017.**

I.J. Kapoor
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]