Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal Nos. 159 of 2005, 162 of 2005 and 167 of 2005

Dated: October 31 , 2007.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Shri H.L. Bajaj, Technical Member

Appeal No. 159 of 2005

North Eastern Electric Power Corporation Ltd.
Brookland Compound, Lower New Colony
Shillong-793003, Meghalaya ....Appellant

versus

1. Assam State Electricity Board,
   Bijulee Bhawan, Paltan Bazar
   Guwahati, Assam

2. Meghalaya State Electricity Board
   Meter Factory Area ,Integrated Office Complex
   Meghalaya

3. Department of Power
   Government of Arunachal Pradesh
   Itanagar-791111

4. Electricity Department
   Government of Manipur
   Imphal-795001

5. Power & Electricity Department,
   Government of Mizoram
   Aizwal-796001

6. Department of Power
   Government of Nagaland
   Kohima

7. Department of Power
   Government of Tripura
   Agartala

8. Central Electricity Regulatory Commission
   Through its Secretary
   6th floor, Core-3,SCOPE Complex
   New Delhi .....Respondents

Appeal No. 162 of 2005.

North Eastern Electric Power Corporation Ltd.
Brookland Compound, Lower New Colony
Shillong-793003, Meghalaya ....Appellant

Versus

1. Assam State Electricity Board,
   Bijulee Bhawan, Paltan Bazar
   Guwahati, Assam

2. Meghalaya State Electricity Board
   Meter Factory Area ,Integrated Office Complex
   Meghalaya

3. Department of Power
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   Government of Mizoram
   Aizwal-796001

6. Department of Power
   Government of Nagaland
   Kohima

7. Department of Power
   Government of Tripura
   Agartala

8. North Eastern Regional Electricity Board
   Shillong-793003

9. North Eastern Regional Dispatch Centre
   Shillong-793006

10. Central Electricity Regulatory Commission
    Through its Secretary
    6th floor, Core-3,SCOPE Complex
    New Delhi .....Respondents

Appeal No. 167 of 2005

North Eastern Electric Power Corporation Ltd.
Brookland Compound, Lower New Colony
Shillong-793003, Meghalaya ....Appellant

Versus

1. Assam State Electricity Board,
   Bijulee Bhawan, Paltan Bazar
   Guwahati, Assam

2. Meghalaya State Electricity Board
   Meter Factory Area ,Integrated Office Complex
   Meghalaya

3. Department of Power
   Government of Arunachal Pradesh
   Itanagar-791111

4. Electricity Department
   Government of Manipur
   Imphal-795001

5. Power & Electricity Department,
   Government of Mizoram
   Aizwal-796001

6. Department of Power
   Government of Nagaland
   Kohima

7. Department of Power
   Government of Tripura
   Agartala

8. North Eastern Regional Electricity Board
   Shillong-793003

9. North Eastern Regional Load Despatch Centre
   Shillong-793006

10. Central Electricity Regulatory Commission
    Through its Secretary
    6th floor, Core-3,SCOPE Complex
    New Delhi .....Respondents

Counsel for appellant:	Mr. M.G. Ramachandran,Advocate Mr. Anand K. Ganeshan, Advocate Ms. Swapna Seshadri,Advocate Mr. Debjani Dey, DGM, NEEPCO Ms Cathleen Rance, DM(F) MEEPCO Ms. Taruna Singh Baghel,Advocate Mr. P.K. Bora Mr. R.Mallik Mr. S.S. Bhattacharya
Counsel for respondents:	Mr. Amit Kapoor,Advocate for ASEB Ms. Namrata Kapur,Advocate Mr. Avijeet K. Lala, Advocate for ASEB Mr. Rajnish Ranjan, Advocate Ms. Minu Rani for Resp.1, ASEB Mr. Memanta Madhab Sharma Resident Engineer for ASEB Ms Poonam Verma, Advocate Mr. H.M. Sharma, RE,ASEB Mr. M.R. Karmakar, ED, NEEPCO Mr. P.K. Borak, GM, NEEPCO Mrs. D.Dey,DGM, NEEPCO

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member

In all the three appeals the appellant North Eastern Electric Power Corporation Ltd. (NEEPCO in short) has challenged three different orders passed by the Central Electricity Regulatory Commission (CERC or the Commission in short) and some of the issues involved in these appeals are

common. Therefore, we have taken these appeals together in this judgment.

Appeal No. 159 of 2005

2. In appeal No. 159 of 2005 the appellant has challenged the Commission's order dated August 16, 2005 passed in petition No. 36 of 2003 whereby the Commission had determined the tariff applicable to 250 MW Kopli Hydro Electric Power Project (KHEPP in short) for the period April 1, 2001 to March 31, 2004.

3. Whereas the present appeal was filed on October 3, 2005, the appellant had already filed a Review Petition No. 113 of 2005 before the Commission. The appeal was adjourned sine die by this Tribunal pending decision in the Review Petition. The Review Petition was decided by the Commission on June 2, 2006 wherein it had addressed some of the grievances of the appellant. The following issues still survived:

(i) Capital cost calculation
(ii) Computation of interest on loan
(iii) Wrong rate of interest for calculation of working capital.

4. The appellant in its written submission dated July 9, 2007 has given up the issue at item (iii) above dealing with the wrong rate of interest on working capital. In view of this issues that finally survive in this appeal are;

(i) Capital Cost Calculation

(ii) Computation of Interest on Loan

Appeal No. 162 of 2005

5. In appeal No. 162 of 2005 the appellant has challenged the Commission's order dated August 22, 2005 passed in petition No. 33 of 2003 whereby the Commission had determined the tariff applicable to Assam Gas Based Station (AGBS in short) for the period April 1, 2001 to March 31, 2004.

6. Whereas the present appeal was filed on October 6, 2005, the appellant had already filed a Review Petition No. 115 of 2005 before the Commission. The appeal was adjourned sine die by this Tribunal pending decision in the Review Petition. The Review Petition was decided by the Commission on

December 14, 2006 wherein it had addressed some of the grievances of the appellant. The following issues still survived:

(i) Computation of interest on loan
(ii) Disallowance of financing charges for the calculation of interest
(iii) Wrong rate of interest for calculation of working capital.
(iv) Depreciation on spares

7. The appellant in its written submission dated August 17, 2007 has given up the issue at item (iii) & (iv) above dealing with the wrong rate of interest on working capital and depreciation on spares.

8. The issues that now survive in this appeal are at (i) and (ii) above namely: Computation of Interest on Loan and Disallowance of Financing Charges for the calculation of interest.

Appeal No. 167 of 2005

9. In appeal No. 167 of 2005 the appellant has challenged the Commission's order dated September 09, 2005 passed in petition No. 32 of 2003 whereby the Commission had

determined the tariff applicable to Agartala Gas Turbine Power Project (AGTPP in short) for the period April 1, 2001 to March 31, 2004.

10. Whereas the present appeal was filed on October 6, 2005, the appellant had already filed a Review Petition No. 132 of 2005 before the Commission. The appeal was adjourned sine die by this Tribunal pending decision in the Review Petition. The Review Petition was dismissed by the Commission vide order dated June 06, 2006. The appellant has challenged the Commission's order on the following issues:

(i) Capital cost calculation
(ii) Computation of interest on loan
(iii) Calculation of interest on working capital
(iv) Calculation of depreciation
(v) Calculation of energy/variable charges.

11. In his written submission dated July 09, 2007 the appellant has given up the issues relating to calculation of interest on working capital and calculation of energy variable charges at (iii) and (v) above. Therefore, the issues that now survive in this appeal are as under:

(i) Capital cost calculation

(ii) Computation of interest on loan
(iii) Calculation of depreciation

12. Respondents in these three appeals have challenged the maintainability of the appeals in this Tribunal. Mr. Amit Kapur, learned counsel appearing for the first respondent vehemently questioned the maintainability. He contended that the Commission disposed of the three Review Petitions, thus modifying the impugned orders and, therefore, these stand vacated and merged into the new review orders and, therefore, the impugned orders do not survive. In support he cited the following rulings of the Hon'ble Supreme Court and said that the present appeals are infructuous as the appellant has not challenged the review orders till date:

(I) Sushil Kumar Sen v/s State of Bihar,
AIR 1975 SC 1185 .

(II) Rekha Mukherjee v/s Ashish Kumar Das & Ors.
(2005) 3 SCC 427

13. It will be pertinent to extract the relevant paragraphs of the abovementioned two judgments on which reliance has been placed by the respondent.

(I) Sushil Kumar Sen versus State of Bihar

AIR 1975 SC 1185

"2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see Nibaran Chandra Sikdar v. Abdul Hakim,AIR (1928) Cal 418 Kanhaiya Lal v. Baldeo Prasad: AIR(1906) 28 AII 240, Brijbasi Lal v. Salig Ram: AIR (1912) 34 AII 282 and Pyari Mohan Kundu V Kalu Khan: ILR (1917) 44 Cal 1011: 41 IC 497.

3. The respondent did not file any appeal from the decree dated 18-8-1961 awarding compensation for the land acquired at the rate of Rs. 200 per katha. On the other hand, it sought for a review of that decree and succeeded in getting the decree vacated. When it filed appeal No. 81 of 1962, before the High Court, it could not have filed an appeal against the decree dated 18-8-1961 passed by the Additional District Judge as at that time that decree had already been superseded by the decree dated 26-9-1961 passed after review. So the appeal filed by the respondent before the High Court could only be an appeal against the decree passed after review. When the High Court came to the conclusion that the Additional District Judge went wrong in allowing the review, it should have allowed the cross-appeal. Since no appeal was preferred by the respondent against the decree passed on 18-8-1961 awarding compensation for the land at the rate of Rs. 200 per katha, that decree became final. The respondent made no attempt to file an appeal against that decree when the High Court found that the

review was wrongly allowed on the basis that the decree revived and came into life again".

4. The High Court should have allowed the cross appeal; and dismissed the appeal, which was, and could only be against the decree passed on September 26, 1961, after the review. We therefore set aside the judgment and decree passed by the High Court and allow the appeal. The effect of this judgment would be to restore the decree passed by the Additional District Judge on August 18, 1961. We make no order as to costs.

Krishna Iyer, J.(concurring)- I concur regretfully with the result reached by the infallible logic of the law set out by my learned brother Mathew, J. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justice where the tragic sequel otherwise would be wholly inequitable. In the present case, almost every step a reasonable litigant could take was taken by the state to challenge the extraordinary increase in the rate of compensation awarded by the civil court. And, by hindsight, one finds that the very success, in the review application, and at the appellate stage has proved a disaster to the party. Maybe, Government might have successfully attached the increase awarded in appeal, producing the additional evidence there. But maybes have no place in the merciless consequence of vital procedural flaws. Parliament, I hope, will

consider the wisdom of making the judge the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious, sounding in procedural law. Justice is the goal of jurisprudence- processual, as much as substantive. While this appeal has to be allowed, for reasons set out impeccably by my learned brother, I must sound a pessimistic note that it is too puritanical for a legal system to sacrifice the end product of equity and good conscience at the altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. The wages of procedural sin should never be the death of rights.

Appeal allowed."

(2) Rekha Mukherjee V/s Ashis Kumar Das and Ors. (2005) 3 SCC 427

"17. The suit filed by the respondents for grant of specific performance of contract was dismissed. The said decree although was appealable but in view of the order dated 15.7.2002, the said decree in its entirety ceased to operate. Order 47 Rule 1 CPC postulates filing of an application by a person considering himself aggrieved, by a decree or order from which an appeal is allowed but from which no appeal has been preferred, to file an application if he desires to obtain a review from a decree passed against him. An appeal during the pendency of the review petition was, therefore, not maintainable. In terms of Order 47 Rule 4, the court may either reject or grant an application for review. In case a review is rejected, the order would not be appealable whereas an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Rule 8 of order

47 CPC postulates that when an application for review is granted, a note thereof shall be made in the register and the court may at once rehear the case or make such order in regard to the rehearing as it thinks fit."

23. An appeal preferred against the said order dated July 15, 2002 by the appellant herein was maintainable in terms of Order 47 Rule 7 CPC. However, no cross-objection was maintainable at the instance of the respondents.

24. The respondents did not file any application for withdrawing the review petition before the High Court. Had such an application been filed, the High Court would have applied its mind as regards existence of the grounds therefore. Such application of mind on the part of the High Court was imperative as in the meantime a third-party interest was created.

25. In K.S. Bhoopathy, (2000) 5 SCC 458 (2000) 3 SCR 1168 this Court held: (SCC pp. 464-65, para 13).

" 13. The provision in order 23 Rule 1 CPC is an exception to the common-law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a part with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from

the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under order 23 Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order 23 Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the

present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases".

26. Before the High Court, the cross-objection filed by the respondents was not pressed. The appeal preferred by the appellant herein was allowed. It was, therefore, stricto sensu not a case where a prayer was made for withdrawing the application for review so as to render the decree wide open to challenge in an appeal under Section 96 CPC. A respondent may concede that the appeal filed by the appellant may be allowed or his cross-objections may be dismissed but if he intends to withdraw his suit or review application and that too at the appellate stage, he must make out proper grounds therefore so as to enable the court to apply its own mind thereupon. Order 23 Rule 1 CPC confers a discretionary jurisdiction on the court. Although Order 23 Rule 1 ipso facto is not applicable to a review petition, the principles analogous thereto would be, in terms whereof an order directing withdrawal of such a suit or abandonment of part of claim may be allowed only when the court is satisfied that one or the other conditions specified in sub-rule (3) of Rule 1 are satisfied. In terms of sub-rule (4) thereof, the plaintiff shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

27. Such an application in the peculiar facts and circumstances of the case even might not have been entertained by the High Court.

28. In Sushil Kumar Sen,(1975) 1 SCC 774: (1975) 3 SCR 942, Mathew, J. considered the effect of allowing an application for

review of a decree holding that the same would amount to vacating the decree passed, stating: (1975) 1 SCC pp. 776, paras 2-3)

"2. It is well settled that the effect of allowing an application for review of a decree is to vacate the decree passed. The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one (see Nibaran Chandra Sikdar v. Abdul Hakim,AIR (1928) Cal 418: 107 IC 751, Kanhaiya Lal v. Baldeo prasad, ILR (1906) 28 ALL 240: 1905 AWN 265, Brijbasi Lal v. Salig Ram, ILR (1912) 34 ALL 282: 9A 11 LJ 183 and Pyari Mohan Kundu v Kalu Khan, ILR (1917) 44 Cal 1011: 41 IC 497)."

"3. The respondent did not file any appeal from the decree dated 18-8-1961 awarding compensation for the land acquired at the rate of Rs. 200 per katha. On the other hand, it sought for a review of that decree and succeeded in getting the decree vacated. When it filed appeal No. 81 of 1962, before the High Court, it could not have filed an appeal against the decree dated 18-8-1961 passed by the Additional District Judge as at that time that decree had already been superseded by the decree dated 26-9-1961 passed after review. So the appeal filed by the respondent before the High Court could only be an appeal against the decree passed after review. When the High Court came to the conclusion that the Additional District Judge went wrong in allowing the review, it should have allowed the cross-appeal. Since no appeal was preferred by the respondent against the decree passed on 18-8-1961 awarding compensation for the land at the rate of Rs. 200 per katha, that decree became final. The respondent made no attempt to file an appeal against that decree when the High Court found that the

review was wrongly allowed on the basis that the decree revived and came into life again".

29. Our attention has been drawn to the following regretful concurring opinion of Krishna Iyer, J. by Mr. Sanghi: (1975) I SCC p. 777, para 6).

" 6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. In the present case, almost every step a reasonable litigant could take was taken by the state to challenge the extraordinary increase in the rate of compensation awarded by the civil court. And, by hindsight, one finds that the very success, in the review application, and at the appellate stage has proved a disaster to the party. Maybe, Government might have successfully attached the increase awarded in appeal, producing the additional evidence there. But maybes have no place in the merciless consequence of vital procedural flaws"

but this court is bound by the ratio decidendi of a decision and not mere observations.

30.It is interesting to note that although the learned judge hoped that Parliament would consider the wisdom of making the judge, the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious sounding in procedural law but Parliament has failed to respond thereto.

31.The doctrine of eclipse has no application in a case of this nature. An appeal preferred in terms of Section 96 CPC must conform to the requirements contained in order 41 thereof. An appeal at the time of its filing would either be maintainable or would not be. The High Court, with respect, was not correct in holding that such an appeal could be filed in anticipation. If such a procedure is contemplated in the law the respondents herein might not have filed the substantive appeal or would have prayed for withdrawal of the review application before the trial court itself. Having filed a review application on legal advice and having succeeded therein in part, it was not open to it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The respondents could have only preferred appeal only from that part of the decree in respect whereof review was not granted. In a suit for specific performance of contract, a prayer in the alternative is ordinarily made to the effect that in the event the court declines to grant a decree for specific performance of contract, it may direct refund of the earnest money with interest.

32.The right of review is a statutory right. Such right can be invoked if the conditions therefore are fulfilled. So is a right of appeal. A right of review and right to appeal stand on different footings although some grounds may be overlapping. If a review is granted, the decree stands modified but such modification of a decree is not an ancillary or a supplemental proceeding so as to be revived upon setting aside the decree granting review.

33.In Varikapatti Veeraya, (1957) SCR 488: AIR 1957 SC 540, this Court held: (SCR p.547)

"Considering the question on principle, an appeal is a proceeding by which the correctness of the decision of an inferior court is challenged before a superior court. A right of appeal therefore can arise by its very nature only when a decision by which a litigant is aggrieved is given, and it sounds paradoxical to say that it arises even before judgment in the case is pronounced"

34.In Gour Krishna Sarkar, (1922) 36 Cal LJ 484: 31 Bom LR 137, Asutosh Mookerjee, J. speaking for a Division Bench opined that the court is competent to determine whether when a review is granted, the case should be reopened in part or in its entirety, and that the review cannot be supported on principle that whenever an application for review is granted, the entire case must of necessity be reopened and reconsidered. It was observed that when a review is made, the original decree ceases to exist as a result of the decision of the judge to grant the application for review.

35.We are, therefore, of the opinion that the High Court was not correct in holding that the first appeal filed by the respondents was maintainable. This order may cause injustice to the respondents but it is their own creation. This court despite sympathy, as was in the case of Sushil Kumar Sen5 cannot hold in their favour ignoring the binding precedents.

36.The respondents herein cannot take advantage of their own mistake. They had furthermore been taking inconsistent and contradictory stands. They had claimed possession of the suit premises as a tenant in furtherance of a part-performance of contract in terms of Section 53-A of the Transfer of Property Act and also the title having vested in the State of West Bengal in terms of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981.

37.For the views we have taken, it is not necessary for us to go into the larger question as to whether the suit itself could have been dismissed in terms of Order 12 Rule 6 CPC or not.

Execution case.

38.In view of the aforementioned findings, the decree passed in Title Suit No. 49 of 1990 having regard to our decision in Rekha Mukherjee v. Ashish Kumar Das, (2004) 1 SCC 483 has become enforceable. The submission of Mr. Sanghi to the effect that the undertaking given by the respondents has revived is stated to be rejected. The undertaking given by the appellant is analogous to an interlocutory injunction restraining her from executing the decree till the respondents' suit for specific performance was decided by the trial court as this court held that the said undertaking cannot be revived after the party giving it has been released therefrom. (see Cutler V. Wandsworth Stadium Ltd, (1945) IAIIER 103 (CA)."

14. Per contra Mr. M.G. Ramachandran, learned counsel appearing for the appellant contended that Section 94 of The Electricity Act, 2003 provides for exercise of the power of review by the Commission and states that the Central Commission shall have the same powers as are vested in the civil court under the Code of Civil Procedure, 1908 and that, accordingly, the effect of the review order has to be considered in the light of the provisions of the Code of Civil Procedure, 1908 dealing with review. He cited that judgment of the full bench of the Hon'ble Supreme Court in M/s Thungabhadra

Industries Ltd. V. Government of AP, AIR 1964 SC 1372, while considering the issue of filing of review petition and appeal simultaneously, has in para 8 held as under

> *"(8) Order XLVII R. 1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order from which an appeal is allowed but for which no appeal has been preferred". In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this court and therefore the terms of O. XLVII R. 1(1) did not stand in the way of the petition for review being entertained learned counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the terms of O. XLVII R.1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the court hearing the petition for review to dispose of the application on merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end".*

15. Mr. Ramachandran contended that in view of the above decision of the apex court an appeal can be filed after the filing of the Review Petition and such an appeal is maintainable. He further submitted that the decision of the Hon'ble Supreme

Court in Rekha Mukherjee v. Ashish Kumar Das (2005) 3 SCC 427 containing the observation that "an appeal during the pendency of the Review Petition was, therefore, not maintainable (para 17) cannot be considered out of context to be interpreted to mean that no appeal can be filed pending the decision in the review. He asserted that in any event, the later decision in Rekha Mukherjee case is by two Hon'ble Judges and the earlier decision in Thungabhadra's case is by three Hon'ble Judges and, therefore, decision in Thungabhadra's case will prevail over the observation made in Rekha Mukherjee case. He pleaded that position is further fortified by the fact that Order XLVII Rule 7 of the Code of Civil Procedure, 1908 specifically provides that an order rejecting a review is not appealable as it reads "an order of the court rejecting the application (review) shall not be appealable". Moreover, he asserted, that filing of Review Petition does not also extend the limitation for filing an appeal and that if during the Review Petition, filing of an appeal is held to be barred, after rejection of the review petition there would be no remedy whatsoever to the person concerned and that this

could not have been the intention of the legislature and, therefore, the appellant was entitled to file the appeal against the main order passed by the Commission.

16. Mr. Ramachandran submitted that on the issue of the effect of the subsequent order passed in the Review Petition, the respondents have referred to and relied on the decision of the Hon'ble Supreme Court in Sushil Kumar Sen V. State of Bihar, (1975) 1 SCC 774 and Rekha Mukherjee V. Ashis Kumar Das (2005) 3 SCC 427. He contended that these decisions of the Hon'ble Supreme Court do not lay down the proposition which the respondent contends that if the Review Order modifies or confirms the main order, the appeal filed against the main order and pending before the superior court on the date of the review order is passed ceases to be maintainable. He urged that the facts in the above two cases are clearly distinguishable, namely; that no appeal was filed before the Appellate Court and was pending as on the date of the Review Order and, in Sushil Kumar Sen's case (supra), the Hon'ble Supreme Court has specifically recorded in para 3 of

the judgment "the respondent did not file any appeal from the decree dated August 18,1961……". He maintained that the decision in para 2 of the above judgment wherein it is stated that the effect of allowing an application for review of a decree is to vacate the decree passed and the decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed is a new decree superseding the original one is to be understood in the above context and not devoid of the factual position mentioned in para 3 of the judgment.

17. Mr. Ramachandran stated that similarly, in Rekha Mukherjee's case (supra), the Hon'ble Supreme Court has again dealt with the situation where the appeal was filed only after the decision in Review Petition. Para 11 of the said decision states as under:

> *"Mr. Santanu Mukherjee, learned counsel appearing on behalf of the appellant, in assailing the judgment and order dated 14.10.2004 in Civil Appeal No. 39 of 2005, would submit that the High Court committed a serious error in entertaining the respondents' first*

> *appeal inasmuch as at the time of filing thereof, the original decree stood modified in terms of the order passed in the review petition" (emphasis supplied).*

18. Learned Advocate for the appellant stated that even otherwise, it would be hyper-technical and would serve no purpose if an appeal validly filed and pending has to be dismissed as not maintainable due to a subsequent order passed by a subordinate court and the appellant is required to file an appeal against the review order on matter on which the review order stands rejected against the person who has filed the appeal or also when the review order does not deal with such issues at all. He submitted that it is also pertinent to mention that scope of review is limited and can never be equated with the scope of challenge available in appeal and that on the other hand, if the appeal is not filed and the review order modifies it, there is justification for saying that the decree or order as modified by the review order should be challenged and not the decree or order as originally passed.

19. Having heard both the appellant and the respondents, submissions made by them and keeping in view various judgments they have cited, we proceed to consider the issue of maintainability in its entirety. Aggrieved by orders of the Commission the appellant had taken two remedial actions available to it under The Electricity Act, 2003 (Act in short). Under Section 94 of the Act, the Commission is vested with the power to review its own decisions, directions and orders. The Commission, under the Act, has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908. The appellant when aggrieved had also the recourse of filing an appeal available to him under Section 111 of the Act. It is a well settled law that power of review can be exercised only for corrections of a patent error of law or fact which stares in the face without any elaborate arguments being needed for establishing it. Order No. XLVII of the Code of Civil Procedure, 1908 sets out a limited redressal avenue as given below:

> *Application for review of judgment. (1) Any person considering himself aggrieved-*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.

(b) By a decree or order from which no appeal is allowed, or

(c) By a decision on a reference from a Court of Small Causes,

And who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

20. Section 111 sub Section 2 of The Electricity Act, 2003 requires the aggrieved party to file an appeal within a period of 45 days from the date on which a copy of the order made by the adjudicating officer or the appropriate Commission is received by the aggrieved person. As per regulation 103 of CERC (Conduct of Business) Regulations, 1999 application for review can be filed within a period of 60 days. The appellant had first filed review petition to the Commission. After the review petition had been filed appellant also filed appeals in this Tribunal so that the appeals are not barred by limitation and also to address the substantive issues for appeal where

review would not have been of any help. The appellant disclosed that the review petition filed in the Commission had still not been decided. Till such time the review applications were disposed of by the Commission, no decision on the appeals filed by the appellant was taken.

21. It would be seen that on the date when the application for review was filed before the Commission the appellant had not filed appeal in this Tribunal and, therefore, the conditions of orders No. 47(1)(1) did not stand in the way of petition for review being entertained. Hon'ble Supreme Court has ruled in case of Tungbhadra Industries Ltd. V/s Government of A.P. (Supra) that if on the date of filing the review petition, no appeal has been filed, it is for the court hearing the petition for review to dispose of the application on merits notwithstanding the pendency of the appeal, except only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end.

22. We also note that the appellant has given up such of those issues on which the Commission has given its decisions in the review petition.

23. It is well settled that the effect of the allowing of an application for review of decree is to vacate the decree passed. The decree that is subsequently passed on review, modifies, reverses or confirms the decree originally passed, is a new decree superceding the original one. In the present appeal, effectively the appeals that had been filed in this Tribunal and the subsequent submissions made by the appellant giving up several issues is as good as filing an appeal against the orders modified by the Commission in the review petition made by the appellant. We will not allow technicalities to bog us down and prevent us from doing justice in the matter.

24. Keeping in view the rival contentions of the parties, various decisions of the Hon'ble Supreme Court and our

aforesaid discussions we decide that the present appeals are maintainable.

25. Having decided on the issue of maintainability we now advert to the various issues given below that survive in each of the present appeals:

Appeal No. 159 of 2005

(i) Capital cost calculation

(ii) Computation of interest on loan

Appeal No. 162 of 2005

(i) Computation of interest on loan

(ii) Disallowance of financing charges for the calculation of interest.

Appeal No. 167 of 2005

(i) Capital cost calculation

(ii) Computation of interest on loan

(iii) Calculation of depreciation

Appeal No. 159 of 2005

i) Computation of interest on loan

26. On the issue of computation of interest on loan which is common in all the three appeals, Mr. M.G. Ramachandran, learned counsel for the appellant contended that the Commission had wrongly decided on the computation of interest on loan capital by applying the formula of actual repayment or normative repayment whichever is higher and that the application of this formula is wholly inappropriate and inequitable and that the Commission ought to have adopted one method of computation of interest, namely either based on actual repayment or on the basis of normative repayment. He submitted that as a result of the application of this formula the appellant will not recover part of the interest on loan.

27. This Tribunal in appeal nos. 96 and 94 of 2005 held “that the central Commission is required to adopt normative debt repayment methodology for working out the interest on loan liability…..”

28. In view of our earlier decision we hold that the Commission ought to have adopted normative debt repayment formula for determining interest on loan capital.

Capital Cost Calculation:

29. In the grounds of appeal the appellant had submitted that the Commission had acted contrary to Tariff Regulations, 2001 and erred in not allowing the actual capital expenditure incurred by NEEPCO, namely the amount of Rs. 259.80 crores as part of capital cost on which tariff needs to be calculated was the total expenditure. It is pointed out that the amount of Rs. 242.24 crores mentioned in the affidavit of the appellant dated March 25, 2004 was the capitalized expenditure, whereas the total capital expenditure actually incurred, which forms a part of the gross cost, was Rs. 259.80 crores as detailed in the affidavit dated November 7, 2003. During the proceedings the learned counsel for the appellant, Mr. M.G. Ramachandran conceded that the capital cost on which the tariff is to be determined is “the capitalized expenditure” as

per the Commission's Regulations notified on March 26, 2001. Learned counsel also stated that the difference of Rs. 259.80 crores and Rs. 242.24 crores was the non-capitalized expenditure and the same has been capitalized as additional capital expenditure during the tariff period. Learned counsel contended that the Commission has not allowed the additional capitalization for the period April 1, 2001 to March 31, 2004 on the plea that the expenditure is less than 20% of the approved capital cost of the generating station.

30. It will be pertinent here to extract the relevant portion of Commission's Regulations and ruling of the Commission vide its order dated August 16, 2005 in petition No. 36 of 2003.

" Chapter I Preliminary………."

1.10 Tariff revisions during the tariff period on account of capital expenditure within the approved project cost incurred during the tariff period may be entertained by the Commission only if such expenditure exceeds 20% of the approved cost. In all cases, where such expenditure is less than 20%, tariff revision shall be considered in the next tariff period.

Ruling of the Commission:

" Additional capitalization (1.4.2001 to 31.3.2004)

Para 1.10 of the notification dated 26.3.2001 provides that tariff revisions during the tariff period on account of capital expenditure within the approved project cost incurred during the tariff period may be entertained only if such expenditure exceeds 20% of the approved cost. In all cases, where such expenditure is less than 20% tariff revision shall be considered in the next tariff period."

The petitioner has indicated an expenditure of Rs. 3.84 crores during 2001-02 on raising of height of Umong dam. As the expenditure is less than 20% of the approved capital cost of Kopili generating station, this has not been considered for additional capitalization"

31. Mr. Amit Kapur, learned counsel appearing for the first respondent, Assam State Electricity Board (ASEB) alleged that the appellant in the present appeal has deliberately concealed certain vital material facts which have to be considered in adjudicating upon this appeal. Appellant has failed to refer to "The National Thermal Power Corporation Limited, The National Hydroelectric Power Corporation Limited and the North Eastern Electric Power Corporation Limited (Acquisition and Transfer of Power Transmission System) Act, 1993 ("Act 1993)" whereunder, Mr. Kapur contended, that the appellant was required to transfer the entire power transmission

system to the M/s Power Grid Corporation of India Ltd. (M/s PGCIL) w.e.f. 01-04-1992 and that in lieu of such transfer, the Central Government was required to pay the appellant an amount equal to the book value of all the assets and properties after the deduction of liabilities (other than contingent liabilities) given in the audited statement of accounts of such of the three companies as of March, 1992 and that this position is also reflected in the Annual Report for FY 1991-92 of the M/s PGCIL.

32. Learned counsel submitted that subsequent to the transfer of the assets by the appellant to M/s PGCIL, M/s PGCIL has been operating and realizing revenues on those assets. It has not been revealed by the appellant as to whether pursuant to the transfer of the assets, the value of the assets has been de-capitalized from appellant's Net Asset Value for the project. It is apprehended and it appears prima facie, he said, that the consumers are being subjected to higher tariff burden by paying tariff to both generation as well as the transmission companies for the same asset and that

generation tariff is being earned by the appellant for the assets, which are now shown by M/s PGCIL as their assets, against which M/s PGCIL is also earning the transmission tariff.

33. Learned counsel for the first respondent prayed that in view of the material concealment by the appellant pertaining to transfer of the power transmission system to M/s PGCIL, it is in the interest of justice that the capital cost be reconsidered.

34. Mr. M.G.Ramachandran, learned counsel for the appellant vehemently refuted the allegations of ASEB and stated that the appellant had at no point of time included, directly or indirectly, the transmission assets in its capital cost before the Commission and that the capital cost claimed by the appellant relates only to the generating station of Kopli Hydro Electric Project. In this regard an affidavit dated August 01, 2007 was also submitted by the appellant. The relevant extracts of the affidavit are given below:-

Affidavit on behalf of the appellant in reply to the Affidavit dated July 23, 2007 filed by the respondent No.1.

I, Ms Debjani Dey, W/o Mr. Smarajit Dey, aged about 42 years, presently working at North Eastern Electric Power Corporation Ltd. U.G. Floor, 15 NBCC Towers, Bikaji Cama Place, New Delhi-110066, do hereby solemnly affirm and state as under:

1. *That I am the Deputy General Manager of the appellant Corporation (hereinafter called the NEEPCO) and I am conversant with the facts deposed herein.*
2. *That I am filing the present affidavit in reply to the affidavit dated 23.7.2007 filed by the Assam State Electric Board, Respondent No. 1 herein (hereinafter called the 'ASEB') whereby ASEB has alleged NEEPCO of malafide concealment of facts before the Central Electricity Regulatory Commission (hereinafter called the Central Commission) and also before this Hon'ble Tribunal. The ASEB has alleged NEEPCO of earning tariff on the transmission assets transferred by NEEPCO to M/s Power Grid Corporation of India Ltd. pursuant to the enactment of the National Thermal Power Corporation Limited, The National Hydroelectric Power Corporation Limited and the North Eastern Electric Power Corporation Limited (Acquisition and Transfer of Power Transmission Systems) Act, 1993*

(hereinafter called the Act 1993') for the Kopli Hydro Electric Project (hereinafter called KHEP) of NEEPCO.

3. *I say in the outset that the allegations made by ASEB in the said affidavit dated 23.7.2007 are totally baseless, without any merit, false and misleading. All the allegations of malafide concealment of facts and misleading this Appellate Tribunal and the Central Commission are uncalled for, made with an ulterior motive and concealing the records of the case as filed with the Central Commission and as available with the ASEB.*

4. *I say that at no point of time has NEEPCO claimed any part of the transmission assets to be included in the computation of its tariff before the Central Commission. The capital cost taken for the purposes of tariff does not include directly or indirectly any part of the Transmission System transferred from NEEPCO to Powergrid Corporation of India. The capital cost is restricted to those relating to the generation station.*

5. *I say that the KHEP project was funded by the North Eastern Council (NEC), a body constituted under the Ministry of Home Affairs, Government of India. The Ministry of Home Affairs, while according sanction for the KHEP (150 MW) vide letter dated 1.10.1991, clearly stated as under:*

> *"I am directed to refer to MHA's letter No. III-14013/26/77-NE.II dated the 6th March 1987 conveying the sanction of the president for the revised estimated cost of Rs. 212.00 crores for the GENERATION PART OF THE KOPILI HYDRO ELECTRIC PROJECT (2X25 MW + 2X50 MW) IN ASSAM. The project work has since been completed except a few residuary works. Taking into account that actual expenditure on various items and anticipated expenditure on the residuary works, sanction of the President is hereby conveyed for Rs. 243.82 crores (Rupees two hundred and forty three crores and eighty two lacs only) being the final completion cost of the GENERATION PART OF THE KOPILI HYDRO ELECTRIC PROJECT (2x25 mw + 2x50MW) in ASSAM which has been executed by North Eastern Electric Power Corporation Limited (NEEPCO) under the NEC Plan"*
>
> (emphasis supplied)

The above letter dated 1.10.1991 was filed by NEEPCO with the Central Commission alongwith the petition for determination of tariff and has also been otherwise available with ASEB. A copy of this letter has also been filed by NEEPCO before this Hon'ble Tribunal (page 47 of the Memorandum of Appeal). A copy of the said letter dated 1.10.1991 is also attached herewith and marked as Annexure A.

6. I say that the above decision by the Government of India while sanctioning of the revised cost estimate of

Rs. 243.82 crores for the KHEP (150 MW), clearly stated that the cost was with respect of only the generation part of the KHEP. In the circumstances, ASEB's contention that project cost include any part of the Transmission Assets transferred to M/s Power Grid Corporation of India Ltd. is wrong and baseless.

7. *I say that affidavit dated 25.3.2004 filed by NEEPCO before the Central Commission was in response to the clarifications sought by the Central Commission and a copy of the said affidavit was served on the ASEB. The impugned order was passed by the Central Commission only on 16.08.2005, after about 17 months of the affidavit filed by NEEPCO. It was for ASEB to place on record any objections that ASEB had to the affidavit filed by NEEPCO. The contention of ASEB that no opportunity was provided to ASEB to rebut the submissions filed by NEEPCO in the said affidavit dated 25.3.2004 is misplaced. If ASEB did not file any objections in the 17 months between the affidavit dated 25.3.2004 and the impugned order dated 16.08.2005, it is therefore not correct on the part of ASEB to state that no opportunity was provided to object to the affidavit dated 25.3.2004 filed by NEEPCO.*

8. *ASEB has chosen to make these frivolous allegations against NEEPCO in the appeal filed by NEEPCO, ASEB*

did not close to file any objections before the Central Commission on the issue, ASEB did not file any review before the Central Commission nor has ASEB filed any appeal against the order of the Central Commission.

9. *I say that the management of NEEPCO is pained by the unwarranted and serious allegations of "deliberate concealment", "malafide" etc. made by the ASEB in the circumstances that (a) the records of the case itself show that the cost of transmission system transferred to Powergrid has not been included; (b) ASEB ought to have respected a public utility controlled by the Central Government and whose accounts are audited by Comptroller and Auditor General of India cannot and will not make such claim as alleged by ASEB; and (c) there was no way the Central Commission scrutinizing the petition of the NEEPCO would have overlooked such blatant claims if there was any truth.*

Sd/ Deponent.

Analysis and decision.

35. We observe that the Commission in its order has allowed the capital cost of Rs. 242.24 crores which is not being now contested by the appellant. It is the additional capitalization during the period April 1, 2001 to March 31, 2004 that the

appellant has prayed for. This Tribunal vide its order dated July 7, 2006 in Appeal No. 36 of 2006, UP Power Corporation Ltd. V/s NTPC and Ors has decided as under:

> *" While placing heavy reliance on the said regulations Mr. Pradeep Misra pointed out that, there could be no revision of tariff during the tariff period whatever be the reason if the capital expenditure incurred is less than 20% of the approved project. We find there is force in this submission. The Regulation, which is a statutory in nature provides so and during the tariff period if the additional capitalization is less than 20% of approved cost there could be no increase in tariff whatsoever. Mr. M.G. Ramachandran appearing for first respondent sought to explain the contents of para 37 of the order appealed against and pointed out that it will be included in the next tariff period, which is being settled by CERC.*
>
> *When the regulation bars revision of tariff during the tariff period ending with 31.03.2004 it follows that there could be no revision of the tariff during the tariff period whatever may be the reason or justification when the additional expenditure is less than 20% of the approved project cost. There is no controversy in this respect. In the circumstances, the direction issued by CERC as set out in*

para 37 calls for modification. In fixing the tariff for the tariff period commencing 01.04.2004 the element of interest and investment of return on equity requires to be examined by CERC and included for the purpose of determining the tariff as rightly highlighted by Mr. Ramachandran on behalf of the appellant but there is no warrant to issue such a direction now. In the circumstances, we order deletion of para 37 of the order appealed against, while making it clear that it is well open to CERC to consider the element, namely additional capitalization return on equity, interest on borrowing, while determining the tariff for the next tariff period. The appeal is dismissed but with the above modification."

36. To facilitate reference para 37 of the Commission's order dated March 31, 2005 in Petition No. 139 of 2004 is given below:

" As there is nothing in the notification dated 26.3.2001 to deny the petitioner the reasonable return to service the capital expenditure incurred by the petitioner and found to be justified by us, we direct that the petitioner shall earn return on equity @ 16% on the equity portion of the additional capitalization approved by us. Similarly, the petitioner shall also be entitled to the interest on loan as applicable during the relevant period. Return on equity and interest shall be worked out on the additional capitalization of Rs. 4.521 crores approved by us from Ist April of the financial year following the financial year to which additional capital expenditure relates up

> *to 31.3.2004. The lump sum of the amount of return on equity and interest on loan so arrived at shall be payable by the respondents along with the tariff for the period 2004-09 to be approved by the Commission. The exact entitlement of the petitioner on this account shall be considered by the Commission while approving tariff for the period 2004-09."*

37. In the abovementioned judgment of this Tribunal we have held that since the regulations bar revision of tariff during the tariff period when the additional expenditure is less than 20% of the approved project cost, the same cannot be revised. However, the impact of additional capitalization in terms of allowing return on equity and interest on borrowings for the previous tariff period has to be given effect during the next tariff period. Accordingly, we decide in this appeal that the additional capitalization has to be considered during the next tariff period along with the elements of interests and the return on equity accrued for the period 2001-04.

Appeal No. 167 of 2005

ii) Computation of interest on loan.

38. We have already held (supra) that the Commission ought to have adopted normative debt repayment formula for determining interest on loan capital. The same view is reiterated.

Capital Cost Calculation

39. Gravamen of the grievance of the appellant in this appeal is that the Commission has determined the capital cost of Rs. 300.59 crores (including WCM) only on the basis that the time overrun of 26 months has not been considered by the Commission as beyond the control of the appellant. Learned counsel for the appellant stated that the exclusion of part of the capital cost has implications on the servicing of such capital cost in respect of interest on loan as well as return on equity.

40. Learned counsel submitted that in the impugned order, the Commission has held that the time over-run of 26 months should be taken to the account of the appellant and the same

cannot be passed on to the beneficiaries. He stated that the reasons given by the Commission, inter alia, in support of the above decision are:

(a) delay in commissioning of the project could have been avoided had the petitioner been diligent in pursuing the matter with BRTF (Border Road Task Force) and the state Government/Central Government for the speedy construction/strengthening of the enroute bridges/by-passes;

(b) the petitioner was expected to foresee the eventualities and ought to have taken advance action or chalked out contingency plan for timely completion of the generating station;

(c) the petitioner was well aware of the law and order situation and the weather conditions prevailing in the state of Tripura;

(d) further, the situation of adverse law and order had a cascading effect on the delay in the transportation of equipment to the site and construction of switch-yard. If the petitioner had maintained the original

schedule by organizing its affairs properly, the adverse law and order situation might not have been encountered.

41. Mr. Ramachandran submitted that the time over-run was on account of three factors namely:-

i) delay of 18 months due to transportation bottlenecks;
ii) delay of about eight months in the award of contract for switch-yard package and
iii) adverse law and order situation prevalent in the state of Tripura.

42. He submitted that the appellant had given adequate facts and circumstances for transportation bottlenecks being totally outside the control of the appellant and was a Force Mejeure and that these have been noted by the commission in paras 14 to 17 at pages 63 to 66 and that in the later part of para 17, the Commission had not disputed the factual position submitted by the appellant. He alleged that Commission has gone on certain surmises and holding that the appellant should have been diligent in pursuing the matters with

BRTF/the state Government/the Central Government for speedy construction/strengthening of en-route bridges/bypasses or that the appellant should have anticipated all the eventualities including the law and order. He submitted that the Commission has failed to appreciate that the construction of bridges, routes etc were being done by none other than BRTF, a Government body which is authorized to undertake the same and that there was no reason for either BRTF or for the state Government or for the Central Government to not to have taken appropriate precaution to construct the roads of the required specification. He pleaded that as there were unprecedented rains during the relevant time, it could not undertake various works. He contended that the Commission had adopted an unrealistic approach contrary to the facts and circumstances to record a conclusion based on certain assumptions.

43. He submitted that similarly, the law and order problem in the state of Tripura (North East) could not be under the reasonable control of the appellant and thus the reasons given

by the Commission for holding that the delay should be to the account of the appellant are erroneous, based on surmises and without considering the relevant factors besides adopting an unrealistic course.

44. The appellant has also placed on record the fact that even when the project was completed with the time over-run of 26 months the respondents were not in a position to evacuate power from the Bus-bar of the generating station to the North Eastern Grid and that the appellant was required to deliver power only at the Bus-bar. It is pleaded before us by the learned advocate that for the reasons mentioned above, the time over-run in the commissioning of the AGTP project cannot be held to be to the account of the appellant.

45. Learned counsel for the first respondent contended that the delay has mainly taken place due to NEEPCO changing its initial plan of airlifting the equipment. He stated that originally air transport was envisaged by NEEPCO as per Techno Economic Clearance (TEC) granted by CEA, instead of

sea-cum-road transport which lead to delay in commissioning the generating station. The TEC was granted based on the air transportation of equipment and timeliness by CEA in July, 1992 and that the change in mode of transport was planned by NEEPCO prior to project cost approval by the Central Government in 1994 though TEC variation was not sought. As a result of transportation by sea-cum-road, NEEPCO was required to take up the issue of construction of permanent bridges and strengthening of en-route with BRTF and there was a delay on the part of the NEEPCO in diligently pursuing the matter with BRTF and no timely actions was planned by NEEPCO for timely completion of the project and to forsee the contingencies/difficulties in transportation. Mr. Kapur contended that the commercial difficulties as faced by NEEPCO to overcome the time and cost overrun and delay of 26 months would not amount to any "supervening impossibility". He relied upon the Naihati Jute Mills Ltd. V/s Khyaliram Jagannath. 1968 SCR 821 where the exception was carved out only for-

- *The common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible except when it is found that owing to causes unforeseen and beyond the control of the parties intervening between the date of the contract and the date of its performance it would be both* unreasonable and unjust *to exact its performance in the changed circumstances.*
- *Where the parties made their bargain upon the basis that a particular thing or state of things would continue to exist but due to altered circumstances the bargain should no longer be held binding.*
- *Courts would infer that the foundation of the contract had disappeared either by the destruction of the subject matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed without any default of party.*

2. *Alopi Parshad & Sons Ltd. Vs Union of India: AIR 1960 SC 588 at para 21, wherein it was, inter-alia held that the Contract Act does not permit a party to claim payment of consideration for performance of a contract, one often faces, in the course of carrying it out, a turn of events which are not anticipated e.g. an abnormal rise or fall in*

prices, sudden depreciation of the currency, an unexpected obstacle to execution or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract has become onerous.

3. *Travancore Devaswom Board Vs Thanath International reported as (2004) 13 SCC 44, at para 13 wherein it was held that-*

> *".....merely because the performance had become more onerous would not be a ground for non-performance or for claiming enhancement of price. In this case the contract between the parties laid down the price. Clause 2 specifically provides that this price was to remain firm till may 1991. As stated above, the circumstances enumerated by the respondents were not such as frustrated the contract"*

4. *In "Tsakiroglou & Co. Ltd. Vs Noblee & Throl " reported as (1961) 2 All ER 179 (HL) it was held that the closure of the Suez Canal did not frustrate the contract for sale of groundnuts to be delivered in Hamburg, although, both parties expected the nuts to be shipped via the Suez Canal and although the contract did not so provide nor could any term be implied, the route being immaterial to the buyer.*

46. It is submitted that in view of the abovementioned judgments the commercial difficulties do not qualify to be 'supervening impossibility' and cannot be allowed to pass through in the tariff.

47. The aforesaid judgments relate to frustration of contract and do not relate to the position presented by the counsel.

48. Before we go into the details of the reasons for delay and whether or not it is justified to pass on the cost of delays to the beneficiaries it will be prudent to keep in mind that effectively the power purchased by the station has to be evacuated and has to reach the beneficiaries through transmission system. It has been submitted and placed on record the fact that even when the project was completed with the time overrun of 26 months the respondent was not in a position to evacuate power from the bus-bar and the generating station to the North Eastern Grid. Whereas the appellant was responsible only to deliver power at the power station bus-bar, it was for the beneficiaries to make arrangements of evacuation of power. In this view of the

matter, even if the delay has been caused by the appellant, no damage has been caused to the respondent.

49. We now proceed to examine as to whether or not the delay could have been averted or curtailed by the appellant. The main reason for the delay is changeover from airlifting to road transportation mode. In this regard records of the letters from Indian Embassy in MOSCOW to Department of Power, New Delhi quoting the cost of transportation by the Russian Cargo Air Crafts, estimated cost of the upgradation of the airstrip at Agartala Airport as prepared by Ministry of Civil Aviation, letter written by the Land Acquisition collector, Government of Tripura to the appellant etc. have been placed before us. It is difficult to conclude that whether or not the air transportation route could have been expeditious. No one could have predicted that the law and order problem would crop up after the decision of road transportation was taken by the appellant. It is well recognized that it is not difficult for anyone to suggest as to how the ship could have been saved after it has sunk. Decision by CERC has been taken on

various surmises and assumptions. In the compelling circumstances the appellant tried its best to avoid delays in the midst of law and order problem and heavy rain and floods. The appellant was dependent on various Government agencies and, therefore, no one can conclusive say that the delay can be attributed to the appellant.

50. In view of the aforesaid discussions and the fact that the beneficiaries themselves were not ready to evacuate power, it would be in the interest of justice that we allow the cost overrun. We order accordingly.

Depreciation:

51. The relief claimed by the appellant with regard to calculation of depreciation, being consequent to the relief claimed with regard to capital cost calculation, the same stands disposed of.

Appeal No. 162 of 2005

(i) **Computation of interest on loan.**

52. We have already held (supra) that the Commission ought to have adopted normative formula for determining interest on loan capital. We reiterate the same view.

(ii) **Disallowance of financing charges.**

53. Learned counsel for the appellant stated that in the calculation of interest, the financing charges relate to the charges paid by the appellant for refinancing of loans. He submitted that as per the Tariff Regulations, 2001, the appellants were not obliged to pass on the benefits of refinancing of loans to the beneficiaries and that the appellants chose, in the interest of the beneficiaries and the consumers, to pass on the benefits of refinancing of loans in the form of lower interest obligations to the beneficiaries. He contended that when the entire benefits of refinancing of loans has been passed on to the beneficiaries the Commission has not allowed the charges which were paid for the refinancing of loans to be passed on to the beneficiaries. He contended that Commission has allowed the same in the case of Kopili Hydro Electric Station of the appellant, however, in the present case,

the Commission has without any reason not allowed the financing charges to be passed on to the beneficiaries. He submitted that when the benefit of refinancing of loan amounting to more than Rs. 23 crores has been passed on to the beneficiaries, the associated costs (approximately Rs. 4 crores) should also be passed on to the beneficiaries through tariff.

54. Per contra Mr. Amit Kapur appearing for the respondent submitted that the appellant is not entitled to any financing charges as the Tariff Regulations, 2001 nowhere provide for the allowing of such charges to be passed through any tariff. He further submitted that in the present case on analysis of terms and conditions of the refinancing of loans, it is revealed that the total interest on loan after considering refinancing is lower than the total interest on loans without considering the refinancing. He contended that in accordance with the order dated December 13, 2002 in petition No. 94 of 2002 refinancing or substitution having floating rate of interest is

passed on to the beneficiaries only when a costlier loan is refinanced through cheaper loan with a fixed rate of interest.

Analysis and discussions:

55. From the aforesaid facts we notice that the benefit arising out on refinancing has been passed on to the beneficiaries and this is not being contested and, moreover, this benefit is passed on even when the appellant is not required to pass on the benefits to the beneficiaries. It is also not contested that the Commission allowed refinancing charges in case of Kopli Hydro Electric Station of the appellant. It is only just, fair and equitable that the associated cost of refinancing is also shared by the beneficiaries who, as a result of refinancing, gained the benefit of Rs. 23 crores which has not been contested. We order accordingly.

Capital Cost Calculation: Issue of alleged inclusion of cost of Transmission Assets Transferred to PGCIL.

56. In this appeal the respondent ASEB has raised the issue that the appellant is charging the beneficiaries through tariff

for the assets transferred to M/s PGCIL pursuant to the enactment of the National Thermal Power Corporation Ltd., The National Hydro Electric Power Corporation Ltd. and the North Eastern Electric Power Corporation Ltd. (Acquisition and Transfer of Power Transmission System) Act, 1993.

57. The appellant submitted that at no point of time had the appellant included any part of the transmission cost in the tariff petition filed before the Commission and that the issue of inclusion of transmission assets was never raised before the Commission at any point of time. The appellant had, from time to time, furnished to the Commission the details as required by the Commission for the determination of tariff for the Assam Gas Based Power Station of the appellant. He submitted that the present issue raised by the ASEB was at no point of time raised by the ASEB or any of the respondents. He submitted that the letter dated 28.5.1992 issued by the Government of India approving the revised cost estimate of Rs. 895.77 crores and interest during construction of Rs. 118.30 crores clearly states as under:

" To match the commissioning programme, the first phase of the associated transmission system would be commissioned by National Power Transmission Corporation by March 1994 and the entire transmission system by July, 1995. Approval of the revised cost of the associated transmission system would be issued separately in due course". (emphasis supplied)

58. He further submitted that the above letter along with the entire break up of the costs and assets of the appellant for the Assam Gas Based Power Project was filed with the Commission along with an affidavit on or about 23.11.2004 with a copy to all the respondents including ASEB on that ASEB did not at any point of time in the 9 months before passing of the impugned order dated 22.8.2005 raise any objections on the said issue.

59. Learned counsel for the appellant submitted that the NEEPCO is a public utility functioning in a transparent manner and that the accounts of the appellant are audited by the Comptroller and Auditor General of India and that it is extremely unfortunate and unbecoming of ASEB to accuse the

appellant of fraud or misleading, especially when the appellant had produced detailed information to the satisfaction of the Commission and the issue was never raised by the ASEB at any point of time before the Commission. He further submitted that ASEB at no point of time filed any appeal or a review petition against the order dated 22.8.2005 and that ASEB is raising such frivolous issues at the present stage only to prejudice the legitimate claims of the appellant in the appeal filed by the appellant and without challenging the order dated 22.8.2005 passed by the Commission.

Analyses and decision:

60. In our opinion it is amply clear, from the letter dated May 28, 1992 issued by the Government of India approving the revised cost estimates of Rs. 895.77 crores and interest during construction of Rs. 118.30 crores, that the approval of revised cost of the associated transmission system, to be constructed by the then National Power Transmission Corporation, was to be issued separately. In view of this, the contentions of the respondent that the appellant is earning tariff on transmission assets also has no basis. Therefore, we

hold that the cost of transmission assets which have been transferred to PGCIL have not been included by the appellant in their capital cost.

61. In the result, all the three appeals are allowed to the extent indicated above. The Commission is directed to redetermine the tariff, in six weeks, for the period April 1, 2001 to March 31, 2004 for the Kopli, Assam and Agartala stations according to our decision in these appeals.

(H.L. Bajaj)
Technical Member

(Anil Dev Singh)
Chairperson

GB
No. of corrections