

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.316 OF 2018

Dated: 28.08.2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

PUNJAB STATE POWER CORPORATION LIMITED

The Mall, Patiala, Punjab – 147001

Through its Chief Managing Director

... Appellant

Versus

**1. PUNJAB STATE ELECTRICITY
REGULATORY COMMISSION**

SCO: 220-221, Sector 34-A,

Chandigarh – 160022,

Through its Secretary

2. M/S. ABUNDANT ENERGY PRIVATE LIMITED

#74-A, Taylor Road Amritsar, District Amritsar

Punjab - 143001

Through its Director

Sh. Ranbir Singh Chhina

3. PUNJAB ENERGY DEVELOPMENT AGENCY

Plot Nos. 1-2, Sector-33, Chandigarh – 160020

Through its Director

... Respondents

Counsel for the Appellant(s)

:

Suparna Srivastava

Tushar Mathur for App.1

Counsel for the Respondent(s)

:

Sakesh Kumar for Res. 1

Tajender K. Joshi for Res.2

Aadil Singh Boparai for Res.3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. This appeal is directed against the order dated 21.05.2018 passed by the 1st respondent Punjab State Electricity Regulatory Commission (hereinafter referred to as "the Commission") in review petition No.04/2017 thereby reviewing / reversing its order dated 14.02.2017 passed in petition No.25/2016 filed by 2nd respondent M/s Abundant Energy Private Limited under Section 86(1)(f) of the electricity Act, 2003 read with Regulations 69, 71 and 73 of the Punjab State Electricity Regulatory Commission (Code of Business) Regulations, 2005 as well as other relevant Regulations seeking extension of the date of commissioning of its solar power project from 31.01.2016 to 31.08.2016.

2. The appellant Punjab State Power Corporation Limited (in short "PSPCL") is a distribution utility in the State of Punjab and is performing the function of distribution as well as supply of electricity to various classes of consumers across the state. For the purpose of undertaking such distribution of supply of electricity, it procures and purchases electricity from various sources such as state owned generating stations as well as independent power projects including renewable energy power projects established in the State.

3. The 3rd respondent Punjab Energy Development Agency (in short "PEDA") is the designated nodal agency under the New and Renewable

Sources of Energy Policy 2012 of the Government of Punjab for promoting and facilitating the development of renewable energy-based power projects in the State. As such, it is enjoined upon to undertake the process of inviting and approving projects and their implementation and enter into contractual arrangement for the same.

4. The 2nd respondent M/s Abundant Energy Private Limited (in short “AEPL”) is a generating company which has set up a Solar PV Power Project of 1MW capacity at Village *Chinna Bidichand*, District *Tarn Taran* in the State of Punjab after having emerged as the successful bidder under a competitive bidding process undertaken by the 3rd respondent for grid connected Solar PV Power Projects (Phase-II) of total capacity of 250MW in the State of Punjab. It has also set up a 2MW Solar PV Power Project around the same area and power generated there from is being purchased by the appellant as per the tariff determined by the Commission under the contractual arrangement between the parties.

5. Being the successful bidder for the above noted 1MW Solar PV Power Project in Village *Chinna Bidichand*, District *Tarn Taran*, Letter of Award (LoA) was issued to the 2nd respondent by the 3rd respondent on 25.02.2015 for implementation of the project. The LoA envisaged that the 2nd respondent was required to commission the allotted capacity in all respects within 10 months from the date of signing of Power Purchase Agreement (PPA) failing which the 3rd respondent was entitled to encash the Performance Bank Guarantee (PBG) furnished to it. Further, any delay in project commissioned beyond 12 months from signing of the PPA was to result in imposition of liquidated damages by the appellant on the 2nd respondent.

6. In furtherance to the said LoA an Implementation Agreement (IA) was signed between the 2nd respondent and the 3rd respondent on 19.03.2015 wherein it was agreed:-

- (i) The 2nd respondent would sell power generated at the said project at a tariff of Rs.7.68/kWh.
- (ii) If the project commissioning crosses beyond 31.03.2016, the said agreed tariff would cease to exist and the tariff was liable to be redetermined by the Commission.
- (iii) The 2nd respondent would enter into a PPA with the appellant for a period of 25 years for sale / purchase of power generated in the project.
- (iv) The project has to be commissioned within 10 months from the date of signing of PPA with the appellant.
- (v) In case the commissioning of the project was delayed beyond 10 months, liquidated damages were to be levied by the appellant on 2nd respondent, recoverable through power purchase bills.

7. Article 10 of the implementation agreement is *force majeure* clause and specifies the political as well as non-political events which qualify as *force majeure* events. Article 10.4 specifies the period within which notice of *force majeure* was to be given by the affected party and Article 10.5 lays down the obligations of the parties in case of *force majeure* event. Clauses (iii) and (ix) of Article 10.5 are relevant for the disposal of this appeal and are reproduced hereunder: -

“10.4 Notification obligations

If a party is affected by any force Majeure event, the affected party shall give the other parties written notice describing the particulars of the Force Majeure event as soon as reasonably practicable after its occurrence but not later than five days after the date on which such party knew of the commencement of the Force Majeure event or of its effect on such party.”

“10.5 Obligations of the parties in case of Force Majeure Event:

...

(iii) In case a Non-political force majeure event necessitates extension of time for the Project implementation both the parties will duly accept it.”

...

(ix) In case the commissioning of the project is delayed due to force majeure conditions stated above and the same are accepted by the competent authority, the due dates for encashment of performance security and imposition of liquidated damages shall be extended accordingly. In case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall as determined by PSERC.”

8. On 31.03.2015, PPA was entered into by the 2nd respondent with the appellant for sale of power generated from the project at a tariff of Rs.7.68 per unit as discovered under the competitive bidding process, which tariff

was to remain constant throughout the tariff of 25 years following the year of commissioning.

9. Article 10 of the PPA prescribed the commissioning schedule for the project and the same is quoted hereinbelow: -

“10.0.0 COMMISSIONING OF GENERATING FACILITY

*10.1.0 The Generating Company shall commission the Generating Facility (which shall be Scheduled Date of Commercial Operation) and synchronize with the PSPCL/PSTCL's Grid within 10 months from the Effective Date i.e date of signing of this PPA which is **31st March, 2015**. Therefore, the scheduled date of commissioning for this project is **30th January, 2016**.*

*In case of delay after the scheduled date of commissioning within grace period of further two months i.e 12 months from the date of signing of PPA, with forfeiture of performance B.G. by PEDDA, the commissioning date for the project shall be **30th March, 2016**.*

In case of further delay in commissioning beyond 12 months but within 15 months from the date of signing of PPA, with applicable liquidated damages payable to

*PSPCL as per Clause 10.1.1, the revised commissioning date of the project shall be **30th June, 2016.***

10.1.1 In case there is delay in commissioning of project beyond 12 months from the effective date then the project developer shall pay to PSPCL the liquidated damages @ 20,000/- (Rupees Twenty Thousand Only) per MW per day for delay in such capacity which is not commissioned. The amount of liquidated damages worked out as above shall be recovered by PSPCL from the payments due to the Project Developer on account of sale of solar power to PSPCL. The liquidated damage will be applicable without prejudice to any other penalty imposed for delay in commissioning. In case, the Commissioning of the Project is delayed beyond 15 months from the date of signing of PPA, the PPA capacity shall stand reduced / amended to the Project Capacity Commissioned and the PPA for the balance Capacity will stand terminated and shall be reduced from the selected Project Capacity. The LoA & IA shall also stand terminated for the balance un-commissioned capacity.

10.1.2 This PPA will remain valid for the capacity commissioned within 15 months from the effective date and the capacity for the purpose of this PPA will stand revised accordingly.”

10. Thus, the project was scheduled to be synchronized with the PSPCL grid on 30.01.2016 (i.e. within 10 months from the date of signing of the PPA i.e. 31.03.2015). Undisputedly, the project was not ready for commissioning by the said date 30.01.2016. While the project was still under implementation and the commissioning had got delayed, the 2nd respondent filed a petition No.25/2016 before the 1st respondent Commission seeking extension of the date of commissioning of the project from 31.01.2016 to 31.08.2018 and for maintaining *status quo* in terms of the applicability of tariff agreed between the parties i.e. Rs.7.68/kWh. It also sought direction to the respondents in the petition namely PSPCL and PEDDA not to take any coercive measures such as termination of Implementation Agreement and PPA as well as encashment of PBG during the pendency of the petition.

11. The 2nd respondent contended in the petition that the commissioning of the project has got delayed due to occurrence of following *force majeure* events.

“(i) unrest in the State of Punjab on account of desecration of Holy Shri Guru Granth Sahib at various places and imposition of Section 144 Cr.P.C. in the State from 14.10.2015 to 22.10.2015;

(ii) Jat agitation in the State of Haryana which turned violent around 20.2.2016 and ended on 24.2.2016 which caused curfew at the entry and exit points of the State;

(iii) pen down strikes by the staff of Revenue Department of the State of Punjab in different spans of time;

(iv) shortage of solar equipment in the market since December, 2015 causing price hike due to currency fluctuation;

(v) non-disbursement of loan by IREDA for the reason that the agreements of Respondent No.2 with the Appellant and Respondent No.3 needed extension of time; and

(vi) marriage of daughter of the Director of Respondent No.2 company causing financial burden leading to non-fulfillment of commitments for the project.”

12. Needless to say, that the appellant as well as the 3rd respondent sternly refuted the *force majeure* claim of the 2nd respondent before the Commission on the ground that events stated to constitute *force majeure* were vague, technically incorrect and did not fall into the *force majeure* clause of PPA. It was contended that the delay in commissioning of the project was solely attributable to the 2nd respondent and hence, it did not deserve any extension of time for commissioning of the project.

13. The petition was disposed off by the Commission vide order dated 14.02.2017 thereby rejecting the *force majeure* claims of the 2nd respondent and holding that the delay in commissioning of the project was to the account of the 2nd respondent. The relevant findings of the Commission in this regard are reproduced hereunder: -

“VIII. ... The Commission is of the considered opinion that the delay in the execution of the project is to the

account of the petitioner. The petitioner did not award the EPC contract till 05.01.2016 and did not execute the loan agreement till 03.02.2016 with IREDA though the loan was sanctioned on 06.11.2015 and the petitioner was invited to execute the same by 04.12.2015 or earlier. The project was incomplete as per PEDDA's report dated 28.03.2016 and important equipment like solar PV modules & inverter etc. had not reached the site and other important works including cabling were pending. The petitioner did not approach PSPCL for allowing it to evacuate power through the existing line till June 2016. The disturbances took place in January 2016 and the independent 11 kV line could have been constructed earlier since the land for the project had been purchased by the petitioner in June 2015 and grid feasibility clearance granted by PSPCL in July 2015.

As the project was not completed till 30.06.2016, forfeiture and encashment of performance bank guarantees amounting to ₹ 40 lakh is warranted in terms of IA/PPA for delay upto 31.03.2016, out of which ₹ 12 lakh has already been encashed by PEDDA. Accordingly, the stay on forfeiture and encashment of PBGs granted by the Commission earlier is hereby vacated.

Further, due to the delay in completion of the project, it could not contribute towards procurement of sufficient

power from solar projects by PSPCL which remained deficit of the same to the tune of 77.41 MU for meeting solar Renewable Purchase Obligation for FY 2015-16 as per details furnished in petition no.61 of 2016 filed by PSPCL. This tantamounts to a loss to PSPCL. Accordingly, PSPCL is entitled to levy liquidated damages for 3 months delay from 01.04.2016 to 30.06.2016 in terms of IA/PPA.

The Commission further notes that the project was commissioned on 24.08.2016 and the tariff was valid till 31.03.2016 in terms of the Order of the Commission dated 11.05.2015 in petition no. 21 of 2015 and the IA/PPA. Therefore, the entitlement of the petitioner to the tariff of ₹ 7.68 per kWh no longer remains valid. ... ”

14. The Commission, then, reworked the tariff for the power project of the 2nd respondent as Rs.5.39/kWh to be payable by PSPCL.

15. A review petition bearing No.04/2017 came to be filed by the 2nd respondent before the Commission on 17.04.2017 seeking review of the said order dated 14.02.2017 on the ground that (i) there are certain mistakes or errors apparent on the face of record and (ii) some *force majeure* events could not be mentioned in the petition.

16. The additional *force majeure* events / issues which according to the 2nd respondent, contributed to the delay in commissioning of the project but

were not raised in the petition, find mention in Para Nos. 12(iii) and 12(iv) of the review petition which are quoted hereinbelow: -

“(iii) That is a pertinent to mention here that for the purpose of civil construction the EPC contractor brings labour and it lives at the site of the plant. The petitioner is having a house just adjoining the land in question and the Indo Park Border and he allowed the EPC contractor to put the labour in the said house. The EPC contractor started the construction work in the month of July, 2015 but on 27-7-2015 there was a terrorist attack at Dina Nagar Police Station in Gurdaspur District in which four police men and 3 civilians died besides three terrorists. After the Dina Nagar attack the Border Security Force was asked to increase vigil in the Border Area and on the same day the District Magistrate Tarn Taran passed order dated 27-7-2015 under section 144 Cr.P.C. and completely stopped all activities including walking etc. in the 500 meters area near the International Border from 5 pm to 7 am from 29-7-2015 to 24-9-2015. As the Border Security Forces started vigil in the border area and order was passed by the District Magistrate restraining all activities the Labourers left the plant site in fear and EPC contractor also refused to work in the absence of Labour. The restrictions imposed by the D.M. were extended and it Continued upto 12-7-2016 as one after another disturbing events happened. The D.C. Tarn Taran and

Commandant BSF has also issued letters showing all these issues. Copies of the orders and letters annexed as **ANNEXURE P-15 (Colly.)** and copy of the letter dated 2-8-2015 sent by the EPC contractor to the petitioner after the Dina Nagar Attack is annexed as **ANNEXURE P-16.**

(iv) That it is pertinent to mention here that the petitioner after receiving the above said letter from the EPC contractor talked telephonically with competent officials of the PEDDA and informed about the situation prevalent at the border and also informed them that the labour of the EPC contractor had run away and EPC contractor is not ready to complete the work. Officials of the PEDDA asked the petitioner to wait for some time and in case EPC contractor does not come back then to engage another EPC contractor. They also told the petitioner not to send any thing in writing showing border conditions otherwise no financial assistance to the petitioner. So the petitioner did not give anything in writing to the PEDDA as advised by official of PEDDA.”

(Emphasis supplied)

17. Despite vehement opposition from the appellant and 3rd respondent, the Commission allowed the review petition thereby overturning its previous order dated 17.02.2017. The reasoning of the Commission in allowing the review petition is contained in following Paragraphs of the impugned order:-

“After carefully considering the submissions of the parties, the Commission observes that the 1 MW Solar PV Power project of the petitioner is located in the close proximity to the Indo-Pak Border and due to incidents of terrorist attacks on Dina Nagar Police Station & Pathankot Airbase, section 144 of Cr.PC was in force from 27.07.2015 to 12.07.2016 for almost one year in the area including the area where petitioner’s project is located. The Commission notes that the petitioner has also submitted the documentary evidence of the same in the form of copies of the orders issued by the District Magistrate, Tarn Taran. The Commission specifically takes note of the D.O. letter dated 15.03.2017 and 16.03.2017 issued by Commandant, BSF and Deputy Commissioner, Tarn Taran. The Commandant, BSF in his letter has mentioned that the project is in the close vicinity of International border, which is even clearly visible from Zero line at the Indo-Pak Border. The area is highly sensitive from security point of view and inspite of all threats and challenges of anti-National elements, the power plant has been established for the benefit of local population residing in the remotest part of the Nation ahead of Army defences. It has been further mentioned that the plant has been established even during high alert and restricted movement at the border due to Dinanagar and Pathankot incident. The Deputy

Commissioner, Tarn Taran has mentioned in the letter that the project has been established just at stone's throw from LOC (Indo-Pak International Border) against heavy odds. It has been further mentioned in the letter that in the recent past the state of Punjab in general and the border villages of district Tarn Taran suffered a lot due to infiltration from Pak side and surgical strikes. ..."

18. Thereafter, the Commission held as under:-

"Keeping the above in view and the submissions made by the parties, the Commission notes that the petitioner has brought out the new facts such as imposition of Section 144 of Cr.PC from 27.07.2015 to 12.07.2016 alongwith border belt which included the area of the project site, after incidents of terrorists attack. The Commission further notes that the petitioner has submitted that it could not produce this fact in the petition due to reasons as submitted by the petitioner in detail in the foregoing paras. The Commission is of the view that it would be appropriate to review its order dated 14.02.2017 in Petition No. 25 of 2016 in the interest of justice and accordingly decides to review the said order.

The Commission observes that the project has been established against heavy odds near the Indo-Pak Border, although it has taken more time than the

scheduled commissioning on 30.01.2016. The project was commissioned on 24.08.2016. The Commission observes that the petitioner has submitted that from time to time it brought to the knowledge of PEDDA the peculiar circumstances prevailing in the area of project site which were causing hurdles in timely execution of the project. The Commission is of the view that the circumstances as detailed above were beyond the control of the petitioner due to which delay occurred in completion / commissioning of the project. The Commission notes that the said circumstances did not arise out of the fault of the petitioner and accordingly it is entitled to relief under Force Majeure in terms of provisions in the IA / PPA.

Keeping the above in view, the Commission allows extension of the scheduled date of commissioning of the project to 24.08.2016. It is further held that there shall be no change in the tariff of ₹7.68 per kWh as provided in the PPA for the project which is payable to the petitioner by PSPCL for purchase of electricity from the project.

PEDDA is directed to forthwith refund the amount of Rs. 40.00 lakh forfeited by it through encashment of PBGs submitted by the petitioner, within 7 days from the date of this Order, failing which PEDDA will be liable to pay penal interest on the said amount to the petitioner at the

rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days. There is no case for levy of any liquidated damages by PSPCL. If the liquidated damages have already been claimed / adjusted in the bills of the petitioner, the same shall be refunded to the petitioner along with arrears of tariff difference of Rs. 2.29 per kWh (Rs. 7.68 per kWh - Rs. 5.39 per kWh) for the power already supplied to PSPCL. The said arrears / amount of liquidated damages shall be payable to the petitioner within 7 days from the date of this Order, failing which PSPCL will be liable to pay penal interest to the petitioner at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days.”

19. Thus, vide the impugned order, the Commission allowed the *force majeure* claims of the 2nd respondent and also held it entitled to consequential benefits. The said order has been assailed before us by the appellant in this appeal.

20. Learned counsel for the appellant vehemently argued that the review petition filed by 2nd respondent was not maintainable against the previous order dated 14.02.2017 of the commission for the reason that the review petition neither disclosed any error apparent on the face of record nor any such new and important material / evidence which was not within the knowledge of 2nd respondent during the pendency of the original petition. It is argued that the terrorist attack at Airbase Station, Pathankot and the

restrictive measures under Section 144 CrPC imposed along the border belt after terrorist attack in *Dina Nagar*, District *Gurdaspur* were well within the knowledge of the 2nd respondent who consciously chose not to mention the same in the original petition, and therefore, review petition could not have been founded on such events. According to the learned counsel, the Commission while exercising the review jurisdiction has reappreciated the facts, evidence and submissions placed before it by the parties which is not permissible under law, and therefore, the impugned order cannot be sustained. Reliance is placed on the judgment of Hon'ble supreme Court in *S. Madhusudhan Reddy v. V Narayana Reddy & Ors.* 2022 SCC Online SC 1034.

21. On behalf of 2nd respondent, it was reiterated by its learned counsel that the *force majeure* events like terrorist attack at *Dina Nagar* and *Pathankot* Air Base were not mentioned in the original petition on the advise of the officials of 3rd respondent PEDDA as these may cause hurdles for it in obtaining financial assistance for the project. He would submit that other than such advice of PEDDA officials, there was no reason for the 2nd respondent to not mention these *force majeure* events in the petition which had caused huge delay in commissioning of the project. He further argued that order dated 27.07.2015 issued by the District Magistrate of *Tarn Taran* under Section 144 CrPC stopping completely all the activities near the International border from 29.07.2015 to 12.07.2016 and the order dated 04.11.2015 effecting the villages in the District from 04.11.2015 to 31.12.2015 were not available with the 2nd respondent at the time of filing of the petition. He submitted that the 2nd respondent obtained these orders after the petition was dismissed earlier by the Commission and accordingly

filed the same along with the review petition. He would argue that the review petition disclosed sufficient grounds for review of the order dated 17.02.2017, and therefore, there is no error or legal infirmity in the impugned order dated 21.05.2018 of the Commission. He relied upon the judgment of the Hon'ble Supreme Court in *Kamlesh Verma v. Mayawati & Ors.* (2013) 8 SCC 320.

22. Learned counsel for the 3rd respondent agreed with the submissions made by appellant's counsel and argued that the impugned order is totally erroneous which cannot be sustained.

23. We have considered the rival submissions made by the learned counsels and have perused the entire record including the order dated 14.02.2017 of the Commission as well as the impugned order dated 21.05.2018. We have also gone through the rival submissions filed on behalf of the parties.

24. At the outset, we may note that Section 114 of CPC is the substantive provision dealing with scope of review and is quoted below:

“114. Review.—Subject as aforesaid, any person considering himself aggrieved—

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

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.”

25. The grounds on which review of a judgment / order can be sought, have been specified in order XLVII of the CPC which are reproduced hereinbelow: -

“1. 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.”

(Emphasis supplied)

26. A bare reading of these relevant legal provisions would make it clear that an application for a review of a judgment / order is maintainable upon (i) discovery of a new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the review applicant or could not be produced by him when the judgment / order was passed and (ii) on account of some mistake or error apparent on the face of record or (iii) for any other sufficient reason.

27. The expression “error apparent on the face of record” used in Order XLVII Rule 1 indicates an error which is self-evident and staring in the eye. Any error or mistake which is not self-evident and has to be deducted from

a process of reasoning cannot be said to be an error apparent on the face of record justifying exercise of power of review. Power of review can be exercised only where a glaring omission or a patent mistake is found in the order under review. We may also note that the power of review can be exercised only for correction of a parent mistake but not to substitute a view for the reason that a review petition cannot be permitted to be an appeal in disguise.

28. In Chhajju Ram v. Neki Ram AIR 1922 PC 112, it was held that the words “any other sufficient reason” appearing in Order XLVII Rule 1 CPC must mean “a reason sufficient on grounds at least analogous to those specified in the rule”. This interpretation was approved by the Supreme Court in later judgment in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasium 1955 1 SCR 520. In Kamlesh Verma v. Mayawati & Ors. (2013) 8 SCC 320, Hon’ble Supreme Court has succinctly summarized the principles for exercising review jurisdiction as under:-

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

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” have been interpreted in Chhajju Ram v. Neki and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius 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 v. Sandur manganese & Iron Ores Ltd.

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 an erroneous decision is reheard 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.”*

29. We also find advantageous to quote here following Paragraphs of the judgment of the Hon'ble Supreme Court in S. Madhusudhan Reddy v. V. Narayana Reddy & Ors. (2022) SCC OnLine SC 1034:-

“31. As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court’s jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review

or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as “for any other sufficient reason”. The said phrase has been explained to mean “a reason sufficient on grounds, at least analogous to those specified in the rule” (Refer: *Chajju Ram v. Neki Ram and Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius*).

30. In the instant case, the 2nd respondent had sought review of the order dated 14.02.2017 of the Commission (vide which its petition seeking extension of date of commissioning of its solar power project from 31.01.2016 to 31.08.2016 was dismissed) on the ground that certain *force majeure* events had remained to be mentioned in the petition which also contributed significantly to the delay in commissioning of the project. These additional *force majeure* events which were not raised in the original petition have been stated as:-

- (i) On 27.07.2015 there was a terrorist attack at *Dina Nagar* Police Station in *Gurdaspur* District in which four policemen and three

civilians died besides three terrorists. After the said attack the Border Security Force (BSF) was asked to increase vigil in the border area and on the same day the District Magistrate *Tarn Taran* issued an order under Section 144 CrPC completely stopping all activities including walking etc. in the 500 meters area near the International Border from 5 pm to 7 am from 29.07.2015 to 24.09.2015. As the Border Security Forces started vigil in the border area, the Labourers left the plant site in fear. These restrictions imposed by the District Magistrate were extended and continued upto 12.07.2016 due to recurrence of such disturbing events.

- (ii) On 02.01.2016 there was a terrorist attack at Pathankot Air Force Station, part of the Western Air Command of the Indian Air Force and after the attack, again the vigil at the border area was increased.

31. Copies of the orders dated 27.07.2015 issued by the District Magistrate Tarn Taran under Section 144 CrPC stopping all activities completely near international border from 25.07.2015 to 12.07.2016 and order dated 04.11.2015 under Section 144 CrPC affecting the villages in the district from 04.11.2015 to 31.12.2015, were filed along with the review petition in support of the averments in this regard.

32. It was stated by the 2nd respondent / review applicant that these two *force majeure* events were not mentioned in the original petition as per the advice given by the officials of 3rd respondent PEDDA stating that if the same are taken, the financial institutions would not disburse the loan.

33. Admittedly, these two *force majeure* events sought to be agitated by way of review petition were not discovered by the 2nd respondent after the dismissal of its petition vide order dated 17.02.2017. These were known to it all along. A very strange and unbelievable reason has been given for not mentioning these events in the original petition which is the advice of the officials of 3rd respondent PEDDA who stated that if these two events are taken in the petition, financial institutions would not disburse the loan.

34. We are unable to comprehend as to where was the need for the 2nd respondent to take advice from the officials of PEDDA in this regard. We note that PEDDA was arrayed as 2nd respondent in the petition filed before the Commission. We note that prayer (ii) contained in the original petition is directed against the 2nd respondent PEDDA for a direction against it to release amount of Rs.12 lakh against the partial bank guarantee encashed by it. Therefore, it beats all imagination to say that a litigant would seek advice from its adversary against whom the proceedings are going to be initiated. We find the contentions of 2nd respondent in this regard not only unbelievable but also unconscionable and atrocious, to say the least.

35. We also note that PEDDA had emphatically denied that any such advice was given by its officials to the 2nd respondent. It appears that the Commission has, even in the wake of specific denial by the PEDDA, proceeded to believe the assertions of the 2nd respondent that it was misled by the advice of officials of PEDDA, without calling upon it to substantiate these assertions. We find that the 2nd respondent has nowhere disclosed the name and particulars of the officials of the PEDDA who gave such advice

to it. The Commission also did not find it necessary to issue such directions to the 2nd respondent to state the name & designation of the PEDDA official who gave said advice to it, in order to ascertain the correctness of these allegations. In fact, it is manifest that the Commission did not make any endeavor to ascertain the truthfulness of the allegations levelled by 2nd respondent against the officials of the PEDDA, which *ex-facie* appear to be vague and untrustworthy.

36. So far as the orders dated 27.07.2015 and 04.11.2015 issued by the District Magistrate *Tarn Taran* thereby imposing Section 144 CrPC in the district, are concerned, it is merely stated by the 2nd respondent that these were not available with it at the time of filing of the original petition. Nowhere it is stated in the entire review petition that these were not within the knowledge of the 2nd respondent or that these could not be obtained after exercise of due diligence.

37. Perusal of the impugned order would reveal that the Commission, upon noticing that the project has been established by the 2nd respondent near Indo-Pak border against heavy odds, got swayed by wave of sympathy in its favour and decided to review its previous order without having any regard to the grounds upon which an aggrieved party is entitled to seek review. The Commission needs to be reminded that the cases before the courts / tribunals / commissions are decided on the basis of settled legal principles and not merely on the basis of sympathy towards any of the parties. Mere sympathy cannot take place of law or legal principles.

38. We have already noted the legal position with regards to the review application. We may note at the cost of repetition that a judgment /order is open to review if there is a mistake or error apparent on the face of record or any new / important matter of evidence has emerged after passing of the judgment / order subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite exercise of due diligence and for any other sufficient reason. None of these grounds have been satisfied by the 2nd respondent in the present case. There is no finding of the Commission in the impugned order that its earlier order dated 17.02.2017 suffered from any error apparent on the face of record. Further, review of the order dated 17.02.2017 was not sought upon any new evidence that had come to the notice of 2nd respondent after the passing of the order or could not be produced by it during the proceedings of the original petition despite exercise of due diligence. There was no other sufficient reason also, justifying review of the order dated 17.02.2017. We note that the review petition had been filed on the basis of the facts and material which were already in the knowledge of the 2nd respondent during the proceedings of the original petition but were not consciously mentioned in the petition for one reason or the other.

39. It was not open to the Commission to review its well-reasoned order dated 17.02.2017 when it did not find any error apparent on the face of record and the material / evidence on the basis of which a review was sought, was neither new nor unknown to the 2nd respondent during the

proceedings of the original petition. The fresh material / evidence submitted along with review petition was also not of the kind which could not have been obtained by the 2nd respondent upon exercise of due diligence. What the Commission has done is that it proceeded to reappraise the entire material / evidence on record, which is not permissible in the review proceedings.

40. Further, the Commission has otherwise also faltered in granting relief to the 2nd respondent on account of these two *force majeure* events namely terrorist attack at Dina Nagar Police Station on 27.07.2015 followed by imposition of restrictions under Section 144 CrPC by the District Magistrate and terrorist attack at Pathankot Air Force Station on 02.01.2016. Firstly, for the reason that the 2nd respondent has not served any notice regarding these *force majeure* events upon the appellant as well as 3rd respondent, which is envisaged under Article 19.2 of the PPA dated 31.03.2015 executed between the parties. We may quote that Article 19 of the PPA, which is the *force majeure* clause, hereunder: -

“19.0.0 FORCE MAJEURE

19.1.0 If any party hereto shall be wholly or partially prevented from performing any of its obligations under this Agreement by reason of or on account of lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest, riot, epidemic, explosion, the order of any court, judge or civil authority, change in applicable law, war, any act of God or public enemy or any other

similar cause or reason reasonably beyond its control and not attributable to any negligent or intentional act, error or omission, then such party shall be excused of its obligations / liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.

19.2.0 The party invoking this clause shall satisfy the other party of the existence of any Force Majeure event and give written notice within seven (7) days of the occurrence of such Force Majeure event to the other party and also take all reasonable and possible steps to eliminate, mitigate or overcome the effect and consequence of any such Force Majeure event.

19.3.0 In the event of a Force Majeure event or conditions, any payment due under this Agreement shall be made as provided herein and shall not be withheld.

19.4.0 This clause as provided in the PPA will be operative after the project achieves COD. For force majeure events occurring during the commissioning period of the project, provisions of IA will be applicable.

(Emphasis supplied)

41. Perusal of this *force majeure* clause of the PPA reveals that the party invoking the clause was required to serve a written notice of the *force majeure* events upon the other party within 7 days of the occurrence of the *force majeure* events. Concededly, no such notice has been issued in the present case by the 2nd respondent to either the appellant or the 3rd respondent, and therefore, it was precluded from claiming relief for such *force majeure* events.

42. Secondly, clause 19.4 of the PPA provides that in case of *force majeure* events occurring during the commissioning period of the project, the provisions of Implementation Agreement (IA) will be applicable. We have already noted Article 10.5 of the IA in Para 7 hereinabove. As per clause (ix) of Article 10.5 of the IA, in case the delay in commissioning the project happens due to *force majeure* conditions and the date of commissioning gets extended to the next Financial Year, then the tariff payable shall be as determined by the PSERC i.e. the 1st respondent. Therefore, in view of this mandatory provision in the IA, as reiterated in the PPA, since the date of commissioning in the instant case has got extended beyond 31.03.2016 i.e. into the next Financial Year, the 2nd respondent was not entitled to tariff determined in the IA as well as PPA, and the tariff payable was to be determined by the Commission. This exactly was done by the Commission in the order dated 14.02.2017. Therefore, the Commission erred in reversing the said order by allowing review petition vide impugned order dated 21.05.2018.

43. Hence, in view of the above discussion, we are of the firm opinion that the impugned order of the Commission cannot be sustained in the eyes of law. The same is totally perverse and erroneous, and is hereby set aside. The appeal stands allowed. As a sequitur, the review petition No.04/2017 filed by the 2nd respondent before the Commission stands dismissed and order dated 14.02.2017 passed in the original petition gets restored.

Pronounced in the open court on this the 28th day of August, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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