

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

REVIEW PETITION NO. 3 OF 2019

Dated: 24th July, 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

- 1. GUJARAT URJA VIKAS NIGAM LIMITED**
Having its Registered Office at
Sardar Patel Vidyut Bhavan
Race Course Circle
Vadodara – 390007
Gujarat
- 2. MADHYA GUJARAT VIJ COMPANY LIMITED**
Sardar Patel Vidyut Bhavan
Race Course Circle
Vadodara – 390007
Gujarat
- 3. UTTAR GUJARAT VIJ COMPANY LIMITED**
Visnagar Road
Mehsana 384001
Gujarat
- 4. PASCHIM GUJARAT VIJ COMPANY LIMITED**
Off. Nana Mava Main Road
Near Bhaktinagar Railway Station
Laxminagar, Rajkot – 360004
Gujarat
- 5. DAKSHIN GUJARAT VIJ COMPANY LIMITED**
Nan Varachha Road, Kapodara
Surat 395006
Gujarat

.....Applicants/Review Petitioners

VERSUS

- 1. RENEW WIND ENERGY (RAJKOT) PRIVATE LIMITED**
Through its Managing Director,
138, Ansal Chamber – II
Bikaji Cama Place
New Delhi – 110066
- 2. WIND INDEPENDENT POWER PRODUCERS ASSOCIATION**
Through its Managing Director,
6th Floor, Block 4- A, DLF Corporate Park,
Mehruali-Gurgaon Road,
Gurgaon – 122002, Haryana
- 3. GUJARAT ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
6th Floor GIFT ONE,
Road 5-C Zone 5, GIFT CITY,
Gandhinagar – 382 355
Gujarat
- 4. WISH WIND INFRASTRUKTURE LLP**
Through its Managing Director,
A-71, 7th Floor, Himalaya House
23, KG Marg, New Delhi – 110001

....Respondents

Counsel for the Appellant : Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya
Mr. Pulkit Agarwal
Mr. Arvind Kumar Dubey

Counsel for the Respondent (s) : Mr. S. Venkatesh for R-1 & R-2
Mr. Vishal Gupta
Mr. Abhishek Raj
Mr. Paras Choudhary
Mr. Sumeet Sharma for R-4

ORDER

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Review Petition No.03 of 2019 has been filed by the Review Petitioners namely - Gujarat Urja Vikas Nigam Limited, Madhya Gujarat Vij Company Limited, Uttar Gujarat Vij Company Limited, Paschchim Gujarat Vij Company Limited, Dakshin Gujarat Vij Company Limited under Section 111 and 120 of the Electricity Act, 2003 for review / rectification of the Judgment dated 06.12.2018 passed by this Tribunal, in Appeal No. 209 of 2015 in pursuance of the order of the Hon'ble Supreme Court dated 15.02.2019 passed in Civil Appeal No.1253 of 2019.
 - 1.1 The Appeal No. 209 of 2015 was filed by the Applicant/Appellants before this Tribunal against the decision dated 01.07.2015 passed by the Gujarat Electricity Regulatory Commission (herein after referred to as the '**State Commission**') in Petition No. 1363 of 2013 filed by the Respondent No. 1 and 2 herein.
2. **The Review Petitioner/Appellant has prayed for the relief as follows:-**
 - (a) admit the present petition and rectify & review the Order dated 6.12.2018 passed by the Tribunal in Appeal No. 209 of 2015 in regard to the limited aspect as mentioned herein.
 - (b) set aside the Order of the State Commission dated 01.07.2015 on the ground that the State Commission has no competence to reopen the PPA and vary its terms;

- (c) set aside the Order of the State Commission dated 01.07.2015 to the extent it modifies the fixed tariff of Rs 2.64/KwH as applicable for the entire duration of the PPAs;
- (d) set aside the Order of the State Commission dated 01.07.2015 to the extent it modifies clause 5.2(b) of the PPA granting option to either party;
- (e) set aside the Order of the State Commission dated 01.07.2015 to the extent it applies its Order in rem;
- (f) pass any such further order or orders as this Tribunal may deem just and proper in the circumstances of the case.

3. **The learned senior counsel, Mr. M.G. Ramachandran, appearing for the Petitioner, has made following submissions/ arguments for our considerations:-**

3.1 The petition has been filed in pursuance to the Order dated 15.02.2019 passed by the Hon'ble Supreme Court in Civil Appeal No. 1253 of 2019 which is as under:-

"Heard learned counsel for the appellants and perused the relevant material.

It is contended by the learned counsel for the appellants that an issue had been raised before the Appellate Tribunal for Electricity (APTEL) that the State Regulatory Commission was not competent to reopen the PPA. In this regard, averments made before the APTEL in the memo of appeal has been read out to us. Without expressing any opinion on the question as to whether the issue had been raised before the APTEL and if so, the merits thereof, we permit the appellants to move the APTEL for rectification/ review of the order, if so advised.

With the above terms, we dispose of the civil appeal by making it once again clear that we have not made any observation on the merits of the case between the parties. In the event, it becomes necessary, leave is granted to the appellants to approach this Court once again."

3.2 In the above order the reference is to the competency of the Gujarat Electricity Regulatory Commission (**State Commission**) to re-open the Power Purchase Agreement dated 29.3.2012 {hereinafter the PPA} entered into by Gujarat Urja Vikas Nigam Limited (**GUVNL**)

with the Respondent Renew Wind Energy (Rajkot) Private Limited (**Renew Power**) and other similarly placed wind energy developers.

3.3 The decision of this Tribunal dated 06.12.2018 passed in Appeal No. 209 of 2015 is in regard to two issues framed by the Tribunal at Para 8.1 which is as under:

“Issue No. 1:

Whether the State Commission is correct in reopening the PPA executed between the Appellant and the Respondents, thereby granting relief in tariff as well as other associated conditions?

Issue No. 2:

Whether the State Commission is right in holding that the Respondents /wind generators were to agree to the terms and conditions of the PPA on account of the Appellant having unequal bargaining power?

3.4 The analysis and findings of the Tribunal on the first issue is at Pars 9.8 and 9.9 as under:

“9.8 We have carefully considered the submissions of the learned counsel for the Appellants and the learned counsel for the Respondents. It is relevant to note that the PPA was executed at APPC for the previous year as stipulated at Clause 5.2 of the PPA which clearly shows that the Appellant had agreed to sale power at APPC of the previous year and not at a price which was lower to the APPC of the previous year. Admittedly, the tariff was agreed at Rs.2.64 per unit at fixed rate but simultaneously, it was linked to the APPC which is dynamic in nature and varies from year to year as determined by the State Commission. As the State Commission is empowered under the Statute, to regulate tariff for the distribution licensees for procurement as well as supply of electricity in the State, it determines the APPC for year on year basis and thus, any tariff based on APPC cannot be treated as fixed or static in nature as being contemplated by the Appellants herein.

9.9 Regarding other aspects like wheeling and transmission of the power from wind generators, payment of CSS, injection of surplus power, option to switch over after 10 years of operation etc, we hold that the State Commission has decided the issues as per its relevant Regulations as well as having regard to various decisions of the Apex Court and this Tribunal. Accordingly, we hold that the findings of the State Commission its impugned order on this issue are just and right without any ambiguity or perversity.”

3.5 The findings of the Tribunal on the Issue No. 2 is at Para 9.19 is as under:

“9.19 We have carefully considered the rival contentions of both the parties on this issue and also took note of the cited decisions / judgments of the Hon'ble Supreme Court and this Tribunal. Based on our critical analysis of the material placed before us, we note that the core issue in the present appeal is not only limited to the coercion or duress but to whether there can be a tariff between a generating company and a distribution licensee in a PPA which is not in accordance with the Regulations and Tariff Orders issued by the State Commission. The State Commission after careful consideration of the submissions made by both the parties and after due analysis of the available material on record has recorded its findings in the impugned order that the conditions envisaged in the PPA relating to the tariff and other associated conditions appeared to be one sided in favour of the Appellants and accordingly concluded the case of coercion or duress and unequal bargaining power between the parties being responsible for executing an Agreement full of unjustness and perversity. In view of these facts, we hold that the State Commission has analysed this issue rightly in accordance with law and passed the order assigning cogent reasoning. Thus, we do not find any material case or ground for our interference in the matter.”

3.6 The other paragraphs of the Order, namely, Paras 9.1 to 9.7 and 9.10 to 9.18 are record of the submissions raised by the respective parties and not either analysis or findings recorded.

3.7 The aspects which relates to the competency of the State Commission dealt in Paras 9.8, 9.9 and 9.19 of the decision relate to the reopening of the PPA :-

- (a) to change the tariff contained in the PPA, namely, Rs 2.64/kWh or lower (Clause 5.2 of the PPA) and increase them to the level of the average power purchase cost prevalent on year on year basis;
- (b) setting aside the option provided for in Clause 5.2 (b) of the PPA to either party at the end of 10 years to convert the PPA to be governed by preferential tariff instead governed by the

REC Mechanism Regulations notified by the Central Commission;

- (c) holding that the conditions envisaged in the PPA relating to tariff and other associated conditions are not valid as they are one sided in favour of GUVNL.

3.8 The primary submission in the review petition filed by GUVNL is that the Order suffers from an error apparent on the face of the record as it proceeds to hold that the State Commission is empowered under the Electricity Act, 2003 to regulate and change the tariff and terms and conditions in the PPA. The tariff and terms and conditions in the PPAs have been agreed to and are in accordance with the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (herein after referred to as the '**REC Regulations, 2010**'). It is not as per any regulations of the State Commission. The reopening of the PPA on tariff terms and conditions mutually agreed to at the time of the signing of the PPA in accordance with the said REC Regulations, 2010 of the Central Commission is not permissible in exercise of the regulatory powers by the State Commission or otherwise.

3.9 The competency of the State Commission, in the humble submission of GUVNL, does not exist to reopen the PPA and vary the tariff terms and conditions of the PPAs and also to hold the PPA to be one sided, in the present case as the State Commission does not have the jurisdiction, briefly stated, for the following reasons:

- a. the PPAs were entered in terms of the REC Regulations 2010 which is framed by the Central Commission and is within the exclusive jurisdiction of Central Commission;
- b. the PPAs signed were consistent with the REC Regulations 2010 which is also demonstrated by the fact that the generator had in fact already registered under the REC mechanism and has taken advantage of the same;
- c. there is no Regulations of the State Commission or otherwise any power available with the State Commission to entitle the State Commission to reopen such PPAs;
- d. the PPA cannot be said to be and is not inconsistent with any Regulations of the State Commission;
- e. the State Commission has otherwise no power to unilaterally reopen or amend or vary the terms of the PPA. Even if the State Commission can consider the terms of the PPA, the State Commission cannot force the parties to implement such altered or varied terms;
- f. the State Commission is required to protect consumer interest and cannot reopen a PPA to give higher tariff to a generator at the cost of consumer interest;
- g. there is no Regulation of the State Commission prohibiting the term being incorporated in the PPA granting an option to the Party to switch from REC Mechanism to Preferential Tariff Mechanism;
- h. there is no coercion or duress or otherwise any lack of free will in the execution of the PPAs by the Respondent;
- i. there cannot be any consideration of unreasonableness or unjustness or unequal bargaining power or perversity or one sidedness in commercial contracts; and

- j. even assuming but not admitting that there was any coercion or duress or unjustness or perversity etc. the only relief is for the contract to be vitiated/voided at the option of the Respondent and State Commission has no power to alter the terms of the PPA on the above grounds.

3.10 The relevant provisions of the REC Regulations, 2010 dealing with the purchase of renewable power as was in existence at the time of the signing of the PPA dated 29.3.2012 is as under:

“5. Eligibility and Registration for Certificates:

(1) A generating company engaged in generation of electricity from renewable energy sources shall be eligible to apply for registration for issuance of and dealing in Certificates if it fulfills the following conditions:

- a. *it has obtained accreditation from the State Agency;*
- b. *it does not have any power purchase agreement for the capacity related to such generation to sell electricity at a preferential tariff determined by the Appropriate Commission; and*
- c. *it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, **at a price not exceeding the pooled cost of power purchase of such distribution licensee**, or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.*

Explanation.- for the purpose of these regulations ‘Pooled Cost of Purchase’ means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be.”

(Emphasis Supplied)

3.11 In terms of the above Regulation, Renew and other similarly placed energy developers voluntarily opted for sale of electricity to GUVNL at a price not exceeding Rs 2.64 per kWh which is the pooled cost of power purchase of relevant distribution licensee as envisaged in

Regulation 5 (1) (c) and not at the preferential tariff determined by the State Commission. The option being to sell the power in terms of Regulation 5 (1) (c) and thereby avail the benefit of the issue of Renewable Energy Certificate (**REC**) as envisaged in the opening part of the said Regulation, the jurisdiction in regard to the PPA, the tariff terms and conditions is controlled by the Regulations of the Central Commission. This is because the REC Mechanism is administered by the Central Commission and not by the State Commission and further the REC Mechanism envisage the ability to sell the REC in Power Exchange and derive monetary benefit as tariff. It is well settled that the transaction involving sale and purchase in Power Exchange is a collective transaction and the jurisdiction is of the Central Commission. The State Commission does not have the jurisdiction.

3.12 In terms of the above, the decision by Renew and other similarly placed developers was made to sign the PPA. Clause 5.1 and 5.2 of the PPA recognizing both the sale of power and REC reads as under:

*“5.1 **Monthly Energy Charges:** The GUVNL shall pay for the Delivered Energy as certified by the SEA OF Gujarat SLDC, for the Term of this Agreement from the Commercial Operation Date or signing of Power Purchase Agreement whichever is later, to the Power Producer every month. **The Tariff payable by GUVNL for energy purchased shall be as per clause 5.2 herein.***

*5.2 GUVNL shall pay a **fixed rate of Rs. 2.64 per kWh (Power Purchase Cost for previous FY i.e. 2010-11) during the term of this agreement** for delivered energy certified by Gujarat SLDC in the monthly State Energy Account (SEA).*

a) In case in any subsequent FY the APPC goes below the PPC for FY 2010-11, the applicable tariff for ensuring FY shall be such lower APPC of the previous year.

- b) *Power Producer and Power Procurer both have option to switch over from REC mechanism to preferential tariff after 10 years from commissioning of the 23.10 MW WTGS. In case either party exercises this option, the tariff shall be Rs. 3.56 per Kwh (as determined by GERC through Order No. 1 of 2010 dated 30.1.2010) for balance term of the agreement. Further, Power Producer shall submit documentary evidence to GUVNL for de-registration of wind project from REC mechanism in case either party exercise option to switch over from REC to Preferential tariff.”*

3.13 In the PPA, besides the clause dealing with the tariff (as quoted above) the term ‘average pooled power purchase cost’ has been defined as under:

“Average Power Purchase Cost” means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self generation, if any, in the previous year from all the energy suppliers long-term and short-term, but excluding those based on renewable energy sources, as the case may be. Further, for this agreement Average Power Purchase Cost for the term of the agreement shall be as per Article No. 5.2.

3.14 The competency of the State Commission to vary the tariff terms and conditions of the PPA has been raised by GUVNL both before the State Commission and before this Tribunal in the appeal based on the above. In so far as the PPA is concerned, there is no ambiguity or uncertainty as to the price admissible. The intention of the parties is clear and there can be no other interpretation to the PPA.

3.15 The Tariff being not exceeding Rs 2.64 per kWh was duly agreed to at the instance and option of Renew and other similarly placed generator specifically to avail the REC mechanism formulated by the Central Commission. The other alternative which was available to Renew Power and other Wind Power Projects were to agree to the sale of wind generated electricity to GUVN Lat the preferential tariff

determined by the Gujarat Electricity Regulatory Commission (herein after referred to as the '**State Commission**') on 30.01.2010 in Order No. 1 of 2010, namely, Rs 3.56/KwH or to sell to any other licensee or consumer either at preferential tariff or at mutually agreed tariff. In such a sale to GUVNL at preferential tariff of Rs. 3.56/kWh, Renew Power (and similar Wind Power Developers) will not be entitled to the issuance of REC under the Central Commission's REC Regulations, 2010. Further, the distribution licensees in the State seeking electricity at the preferential tariff of Rs 3.56/KwH were entitled to utilize such purchase towards fulfillment of the Renewable Purchase Obligation (**RPO**) imposed on them under Section 86 (1) (e) of the Electricity Act, 2003. Whereas, in the case of purchase of electricity at the pooled power purchase cost as in the PPA dated 29.03.2012, the distribution licensees were not entitled to utilize such purchase towards the fulfillment of the RPO.

- 3.16 Thus, it was the option of the Wind Power Developers to either sell electricity generated from the Wind Power Projects to GUVNL at the preferential tariff of Rs 3.56/KwH in terms of the Order No. 1 of 2010 dated 30.1.2010 of the State Commission or to offer the sale of power at Rs 2.64/KwH in terms of the Central Commission's REC Regulations, 2010 and get the RECs. In the latter case, the Wind Power Developers could sell the RECs in the Power Exchange where the floor price at the relevant time was Rs 1.50 per certificate. In such a case the Wind Power Developers will get in aggregate Rs 2.64/KwH from GUVNL and Rs 1.50/KwH or more from Power Exchange by sale of REC, the aggregate of which was greater than Rs 3.56/KwH i.e. the preferential levelled tariff allowed to the Wind

Power Developers.

- 3.17 In terms of the above, the conditions regarding the average pooled power purchase cost and the scope, extent and application of the said terms were decided by the Central Commission in exercise of its functions under Section 79 of the Electricity Act, 2003 read with the other applicable provision and not by the State Commission of Gujarat. The State Commission of Gujarat had no power or function or authority to vary the tariff terms and conditions that maybe determined by the Central Commission for administering and implementing the sale of wind power under the REC Mechanism under Central Commission's REC Regulations, 2010.
- 3.18 The PPA was consistent with the Central Commission REC Regulation 2010 is evident from the fact that Renew successfully registered under the REC mechanism under Central Commission's REC Regulation 2010 based on such PPA. It has not been the case of Renew or any other Generator there were any issues with the registration under the Regulations. Thus, the PPA between GUNVL and Renew satisfied the conditions of Regulation 5(1)(c). If the PPAs were not consistent with the Regulation 5(1)(c), Renew and other generators would not have been eligible and would not have been registered. Once the registration under Regulation 5 of the Central Commission REC Regulation 2010 is complete, the rights and obligations of the Renew would crystalize and it would receive the REC certificate for the energy sold to GUVNL.
- 3.19 It is not the contention of Renew that it could not get RECs in respect of energy sold to GUVNL. This is clear from the fact that there was

no evidence placed by Renew or any other generator that their registration under REC mechanism or the eligibility to receive RECs was in any manner affected due to any of the term of the PPA either before or after the Second Amendment dated 11.07.2013. Renew Power and other similarly placed wind developers duly availed the benefits of REC under the REC Regulations, 2010.

3.20 The stipulation contained in Regulation 5 (1) (c) of the REC Regulations, namely the sale price not exceeding pooled power purchase cost is clear and unambiguous. It means that the seller and the purchaser can agree to a price less than the pooled power purchase cost. In terms of the above, GUVNL and Renew Power as well as other similarly placed wind developers had agreed at a fixed rate of Rs 2.64/kWh for the entire 25 years term of the agreement. Accordingly, so long the tariff of Rs 2.64/kWh does not exceed the pooled power purchase cost in any year, the agreement entered into is valid and effective.

3.21 The expression 'not exceeding the pooled power purchase cost' used in Regulation 5.1 (c) of the REC Regulations as was in existence when the PPA was signed between GUVNL and Renew/other similarly placed wind developers. The said regulation was the applicable regulation.

3.22 The said regulation continued till 11.7.2013 when the Central Commission brought about the Second Amendment to the said regulation. By the second amendment, the Central Commission modified the conditions relating to the issue of REC registration to the following:

“(2) In sub-clause (c) of clause (1) of Regulation 5 of the Principal Regulations, the words "at price not exceeding the pooled cost of the power purchase of such distribution licensee" shall be substituted with the words "at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission".”

3.23 A comparison of the relevant Central Commission REC Regulations, 2010 before and after the second amendment are as under:

	REC REGULATION 2010 (prior to amendment dated 11.07.2013)	REC REGULATION 2010 (after amendment dated 11.07.2013)
5(1)	(c) it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, <u>at a price not exceeding the pooled cost of power purchase of such distribution licensee</u> , or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.	(c) it sells the electricity generated either (i) to the distribution licensee of the area in which the eligible entity is located, <u>at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission</u> or (ii) to any other licensee or to an open access consumer at a mutually agreed price, or through power exchange at market determined price.

3.24 In terms of the above in regard to the PPAs entered into during the period prior to 11.07.2013 (i.e. before the Second Amendment) the condition was clearly that the Wind Power Generator was to sell electricity generated to the distribution licensees of the area “..... At a price not exceeding the pooled power purchase cost of the distribution licensees”. Thus, the expression is ‘not exceeding’. There is no stipulation that the pooled power purchase cost was to be determined on year-on-year basis. There is a no bar in the

Regulation for parties to agree to a fixed price so long as the said price does not exceed the pooled power purchase cost.

In fact, the reference in the Regulation is to “a price” and similarly for sale of power to other licensees or open access customer, the reference is to “a mutually agreed price”. Therefore, the reference to a price can be a fixed price and it cannot be interpreted to mean that the price has to be dynamic or varied year on year. A price means a single price i.e. a fixed price.

Further the PPA was to be entered into on a long term basis i.e. for a period of 25 years. Thus, the pooled power purchase cost to be considered is on the date when the PPA is executed. So long the tariff on the date of the execution of the PPA is less than the pooled power purchase cost prevalent in the year, the subsequent increase in the pooled power purchase cost for the ensuing years had no implication.

3.25 The second amendment to the Central Commission REC Regulations, 2010 which came into effect on 11.7.2013 modified the above clause in Regulation 5 (1) (c) to substitute the following:

“at the pooled cost of power purchase of such distribution licensee as determined by the Appropriate Commission”.

3.26 The changes made, broadly stated, are as under:

(a) The term ‘Price’ used before the amendment stands substituted by the pooled cost;

(b) The following has been added –

‘as determined by the Appropriate Commission’.

3.27 The second amendment has not been given retrospective effect to apply to the PPAs entered into prior to 11.07.2013. The above stated position of non-application of the amendment Regulation to the PPAs entered into prior to 11.07.2013 has been clarified by the Central Commission itself (the Author of the Regulation) in the Statement of Reasons issued in the second amendment as under:

*“Some of the stakeholders have suggested to clarify as to whether the PPAs executed at price lower than APPC would become ineligible under REC Mechanism. It is felt that the tariff for electricity component lower or higher than APPC may lead to avoidable loss or profit to RE generator. **The Commission would like to clarify that the intention is not to debar the projects that have executed PPA at tariff lower than APPC. This amendment will apply prospectively and as such will not affect the already executed PPAs at lower than APPC.**”*

(Emphasis Supplied)

3.28 In fact, the intention of the Central Commission is not to affect existing contracts by way of promulgation of amendment to the REC Regulations is also clear from the Statement of Reasons for REC Regulations 2010/Principal Regulations also clarified that the Regulations do not intend for the parties to affect the existing contracts:

“3.5.2....As regard the eligibility for existing RE generators tied up under long term PPAs, the Commission would like to underscore that the regulation cannot make any provision which directly or indirectly encourages breach of existing contracts”

3.29 Therefore, when the Central Commission itself recognizes that it does not wish to reopen any PPA entered into before 11.07.2013

and in fact in general does not wish to encourage breach of existing contracts, the State Commission cannot, under the purported intention of implementing the Central Commission REC Regulations framed by Central Commission, seek to reopen the PPAs.

3.30 In view of the above, one of the principal contentions of the Review Petitioner in the Appeal had been that the State Commission had no jurisdiction to re-open the PPA dated 29.03.2012 which incorporates the tariff provision in terms of the Central Commission REC Regulations, 2010. In this regard the applicant would crave reference to the Appeal filed by the applicant challenging the Order dated 01.07.2015 of the State Commission.

3.31 Further it is a settled law that where the tariff terms and conditions are within the jurisdiction of the Central Commission, the State Commission has no jurisdiction to vary, amend or modify the same. In this regard Rule 8 of the Electricity Rules, 2005 provides as under:

“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of subsection (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”

3.32 In the review proceedings before this Tribunal, the issue was raised as to Rule 8 of the Electricity Rules, 2005 pleaded by GUVNL. Rule 8 was referred to as a statutory rule supporting the case of GUVNL that when the jurisdiction is of the Central Commission, the State

Commission has to decide only on the procurement of power and not on other aspects. The basic aspects on the competency of the State Commission had been raised by GUVNL duly both before the State Commission and in the Appeal filed before the Tribunal as mentioned above.

3.33 In view of the above, it is respectfully submitted that the Order dated 06.12.2018 passed by this Tribunal in Appeal No. 209 of 2015 upholding the Order of the State Commission on the ground that the State Commission is right in modifying terms of the PPA to allow the tariff based on the average pooled power purchase cost prevalent on year to year basis is wrong and is liable to be rectified/modified.

3.34 The Clause granting such option to be exercised by either of the parties is valid as per the decision of the Hon'ble Supreme Court in the following cases:

- a) Central Bank of India v. Hartford Fire Insurance Co. Ltd
AIR 1965 SC 1288;
- b) Her Highness Maharani Shantidevi P Gaikwad v. Savjibai Haribai Patel and Ors (2001) 5 SCC 101

3.35 The commercial contract entered into voluntarily between the parties cannot be varied except by a statutory regulation (**Reference PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603**). There is no provision in any of the Regulations of the State Commission empowering the State Commission to vary or modify the PPA dated 29.03.2012 entered into between GUVNL and Renew Power.

3.36 The sanctity of the contract is required to be maintained as held in the following cases:

- a. Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182

In the said judgment, the Hon'ble Court had upheld that the Generator has a freedom of contract but once the PPA is entered into the freedom is extinguished.

- b. Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat Pvt) Ltd and Ors (2017) 16 SCC 498

In the said Judgment, the Hon'ble Court has held that the parties were bound by the terms and conditions of the PPA and the State Commission and the Tribunal cannot go beyond the said terms and conditions.

- c. Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498.

In the said Judgment, the Hon'ble Supreme Court has held that the State Commission cannot under its inherent powers alter the terms and conditions of the contract entered into between the parties.

3.37 The terms and conditions of the PPA are not entirely statutory as held by the Hon'ble Supreme Court in the case of India Thermal Power Corporation Limited v State of Madhya Pradesh & Ors. (2000) 3 SCC 379.

3.38 It is also a settled principle that the State Commission cannot compel a distribution licensee to enter into a particular agreement. If the

terms and conditions of the PPA are modified to provide for increase in the tariff payable by GUVNL to Renew Power and other Wind Power Developers, GUVNL should have the option not to proceed with the contract. The State Commission has no jurisdiction to compel GUVNL to continue to perform its part of the obligation but at an increased tariff than what was duly and validly agreed to and incorporated in the PPA. It is well settled principle that the Courts cannot create a contract between parties. Reference may be made to Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power (India) P Ltd (2017) 16 SCC 498.

Thus, even assuming but not admitting that the State Commission could have modified the terms of the PPA including tariff, it could not have forced or compelled GUVNL to accept such terms. GUVNL cannot be compelled to enter into an agreement with specific terms without its consent.

- 3.39 The Hon'ble Supreme Court in Central Bank of India v. Hartford Fire Insurance Co. Ltd AIR 1965 SC 1288 has held that if a party cannot force another party to enter into a contract, the first party cannot complain if the other party would enter into the contract only in certain conditions.
- 3.40 Therefore, when GUVNL could not have been forced to procure the power under REC mechanism at all, let alone from Renew Power or any other generator, GUVNL having entered into the PPA on the basis of certain terms, it cannot be then forced to accept any other term.

- 3.41 There was no coercion of any nature on Respondent No. 1 or any other Wind Generator to enter into the PPA with the above terms. Similarly, there was no duress, compulsion or abuse of dominant position or any other action of GUVNL which could be basis for the Respondent to evade the solemn obligations as per the PPA.
- 3.42 The Respondents and other Wind Power Generators similarly placed, entered into the PPA voluntarily. In this regard the Appellant/Applicants crave reference to the decision of the Hon'ble Supreme Court in Transmission Corporation of Andhra Pradesh Limited v Sai Renewables Power Private Limited and Ors (2011) 11 SCC 34.
- 3.43 It is also relevant that Renew Power and other similarly placed Wind Power Generators had voluntarily signed the PPAs and did not at the relevant time objected or protested to the tariff being only Rs 2.64/KwH. In fact, admittedly, Renew Power and others on the basis of the above PPA registered under the Central Commission REC Regulations 2010 and further received RECs for the power sold to GUVNL. At that time, neither Renew Power nor any other generator approached the Central Commission to claim any violation of the Central Commission REC Regulations 2010.
- 3.44 Renew Power and other Wind Power Developers cannot be allowed to raise the issue in APPC and other terms and conditions of the PPA as an afterthought in December 2013 I.e. after 18 months of the signing of the PPA on 29.03.2012 and after duly implementing the PPAs and taking the benefits of REC Mechanism of the Central Commission. The Tribunal in British Super Alloys Private Ltd v.

GERC and Ors. dated 22.04.2014 in Appeal No. 249 of 2013 has noted that the plea of coercion.

3.45 GUVNL had also relied on decision of Excise Commissioner v. Issac Peter (1994) 4 SCC 104 relied on in S. K. Jain v. State of Haryana and Another (2009) 4 SCC 357.

3.46 Insofar as the plea of coercion sought to be raised by Renew Power and other similarly placed wind power developers, the decision of this Tribunal in Paras 9.8, 9./9 and 9.19 are not on the above basis. The coercion issue has been dealt by the Review Petitioner in the appeal filed before this Tribunal against the Order of the State Commission.

3.47 GUVNL was under no obligation to enter into a PPA under REC mechanism. Such power does not count towards Renew Renewable Purchase Obligations of GUVNL. GUVNL therefore entered into the PPA under REC mechanism only on the basis of specific terms and conditions and the same cannot be changed to force GUVNL to enter into a contract it had never agreed to. Even assuming but not admitting that the terms were one sided, that cannot by itself be a reason to force GUVNL to accept terms it had not agreed to.

3.48 There cannot be any issue of unequal bargaining power or reasonableness in cases of commercial contracts, even if one of the parties is State. The Hon'ble Supreme Court in S. K. Jain v. State of Haryana and Another (2009) 4 SCC 357 held:

"8. It is to be noted that the pleas relating to unequal bargaining power was made with great emphasis based on certain observations made by this Court in Central Inland Water Transport Corpn Ltd v. Brojo Nath Ganguly. The said

*decision does not in any way assist the appellant, because at Para 89 it has been clearly stated that **the concept of unequal bargaining power has no application in case of commercial contracts**”*

3.49 Even otherwise, the State Commission is not competent to reopen the PPA and alter the terms and conditions on the basis of coercion, duress, unequal bargaining power or unjustness of contract. The only relief for such claims of the Respondent under the Contract Act, 1872 is that the contract is voidable at the option of the Respondent (Section 19). Thus, the Respondent-Generators can either accept the contract on the existing terms and conditions or void the contract. The Respondent cannot seek and the State Commission cannot grant any relief of altering the terms and conditions of the contract, without the consent of the Appellant. This is also consistent with the decision of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor (Supra) wherein it was recognized that even if the State Commission has the power to re-determine tariff, it cannot force the licensee or generating company to enter into a contract on such tariff.

3.50 This has already been recognized by this Tribunal in Velagapudi Power Generation Limited v. Southern Power Distribution Company of Andhra Pradesh and Other (Appeal No. 47 of 2009 dated 19.04.2010) wherein it has been recognized that the claim of coercion and duress and seeking rectification of contract are contrary reliefs:

“16. Ongoing through the various prayers it is clear that the Appellant has through the prayers sought various reliefs which are mutually contradictory. In short, the Appellant on one hand claims for declaration from the State Commission that he was coerced into signing of the PPA dated 23.11.2006 and as such, such coercion makes the PPA voidable and on the other hand it has merely sought for rectification of the PPA only in respect of some clauses.”

3.51 Thus, in terms of the above, the State Commission had no jurisdiction at all to vary the provisions of Clause 5.1 and 5.2 of the PPA dated 29.03.2012 and change the tariff from Rs 2.64/KwH being the ceiling tariff to tariff being the average pooled power purchase cost to be computed by the State Commission from time to time. Such an action on the part of the State Commission is also contrary to law in view of the determination of the terms and conditions for registration and issue of REC by the Central Commission under the Central Commission's REC Regulations, 2010. When the Central Commission itself had recognized that the PPAs can have a tariff lower than Pooled Cost and had clarified its intention not to interfere with the contracts and further when, based on the PPA dated 29.03.2012, Renew Power had successfully registered itself under the Central Commission's REC Regulation 2010 and received RECs, it is not open for the State Commission to seek to vary terms of such PPA.

3.52 When the Generator is agreeing to certain terms and conditions, the Regulatory Commission does not thereafter have to protect the interests of the generator. The Generator, being a business entity is capable of considering its interests and has willingly entered into a Contract agreeing to certain terms and conditions and is therefore bound by them. This is also clear from the Tariff Regulations of the State Commission as well as Central Commission (Regulation 4 of GERC Multi Year Tariff Regulations 2011 and 2016 and Regulation 47 of CERC (Terms and Conditions of Tariff) Regulations, 2014) wherein the Generator can agree to a better norm for determination

of tariff. The State Commission cannot then vary the terms of the PPA to the advantage of the generator and at the cost of the consumers.

3.53 Renew Power has raised the issue that the procurement of power by GUVNL from Renew Power was never approved by the State Commission. It is submitted that in the case of renewable power the State Commission had approved a model PPA. Further, the tariff terms and conditions to the extent decided are by the Central Commission and not by the State Commission. These have to be incorporated in the model PPA. Renew implemented the PPA without insisting on any specific approval of the PPA by the State Commission. The petition filed by Renew Power on 10.12.2013 was not for approval of the PPA.

3.54 It is, therefore, not open to Renew Power to take the stand that the petition filed by Renew Power was for approval of the PPA and therefore reopening of the PPA issue can apply only to the approved PPA and not in the present case.

3.55 Without prejudice to the above if the stand of Renew Power is that the PPA was never approved by the State Commission, then there was no concluded contract. If the State Commission while granting approval has changed terms and conditions mutually agreed to between the parties, either party is entitled not to proceed with the PPA consistent with the decision of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498 as mentioned herein above. It cannot be that in the case of approved PPA the terms and conditions cannot be varied but in the case of

unapproved PPA the State Commission can not only vary the terms and conditions agreed to between the parties and thereafter specifically enforce the changed terms and conditions by forcing the parties to accept the same. The process of approval of the PPA does not take away the contractual freedom of the parties. There still has to be a contract agreed to between the parties and if either of the party is not agreeable to the changed terms, then there can be no contract.

4. The learned counsel, Mr. S.Venkatesh, appearing for the Respondent No. 1 has filed following submissions/ arguments for our considerations:-

- 4.1 Learned counsel for the Respondent submitted that the Appeal No. 209 of 2015 [was filed by GUVNL before this Tribunal against the Order dated 01.07.2015 passed by the Gujarat Electricity Regulatory Commission (“**GERC**”) in Petition No. 1363 of 2013. Appeal No. 209 of 2015 was disposed of by way of Judgment dated 06.12.2018. The GUVNL had also challenged the Judgment dated 06.12.2018 before the Hon'ble Supreme Court by way of Civil Appeal No. 1253 of 2019. The said Civil Appeal was disposed of by the Hon'ble Supreme Court vide its Order dated 15.02.2019, whereby GUVNL was granted liberty to approach this Tribunal either by way of a rectification application or review, as advised. It was in terms of the liberty granted by the Hon'ble Supreme Court, GUVNL filed the instant Review/ Rectification Application.
- 4.2 Before detailing the submissions on behalf of Renew, it would be relevant to note the detailed factual background leading to the filing of the instant Petition/Application. The instant Petition/Application

filed by GUVNL is not maintainable and is an abuse of process of law. The same is evident from the following:

- (a) The Petition/Application does not disclose its true purpose and intent. GUVNL has sought to misguide this Tribunal by interchangeably using the nomenclatures Review and Rectification.
- (b) Without prejudice to the above, none of the ingredients of Review Petition have been made out in the instant Petition/Application.
- (c) GUVNL has obliquely filed the instant Petition/Application and has suppressed critical facts including selective omission and deletion of submissions relating to Rule 8 of the Electricity Rules, 2005 (“**Electricity Rules**”).
- (d) By of the present proceedings, GUVNL is seeking to accord sanctity to the PPA as an unregulated contract de hors Section 86(1)(b) of the Electricity Act.

4.3 The instant Petition/Application has been filed for Review and/or Rectification of the Judgment dated 06.12.2018 under Section 111 and Section 120 of the Electricity Act. However, the scope and object of a Review Petition, as defined under Order LVII Rule 1 of the Civil Procedure Code 1908 (“**CPC**”), is entirely different than that of a Rectification Application, as defined under Section 152 CPC. In the present Petition/Application, GUVNL has interchangeably used the terms Review and Rectification with the oblique intent to reargue Appeal No. 209 of 2015, which is impermissible in law.

4.4 Curiously, GUVNL has also invoked Section 111 of the Electricity Act with the intent to argue the instant Petition/Application as a fresh Appeal, without appreciating that even by invoking powers of this Tribunal under a Review Petition or a Rectification Application, the entire Appeal cannot be re-argued.

4.5 *Firstly*, while examining the matter from the perspective of a Rectification Application, it would be relevant to note the Judgment of the Hon'ble Supreme Court in the case of *State of Punjab Vs. Darshan Singh*, (2004) 1 SCC 328. The relevant extracts of the same are as follows:

“12..... It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the Code even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. Similar view was expressed by this Court in Dwaraka Das v. State of M.P.2 and Jayalakshmi Coelho v. Oswald Joseph Coelho.

13. The basis of the provision under Section 152 of the Code is founded on the maxim “actus curiae neminem gravabit” i.e. an act of court shall prejudice no man. The maxim “is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law”, said Cresswell, J. in Freeman v. Tranah4 (ER p. 967). An unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified. In Master Construction Co. (P) Ltd. v. State of Orissa5 it was observed that the arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the court, liable to be corrected.

[Emphasis Supplied]

4.6 From the above, it is evident that Rectification cannot be used as a device to question the merits of the case. The provision, therefore, cannot be pressed to correct an omission which is intentional, however, erroneous that may be. In the present case, GUVNL is attempting to re-argue its Appeal by way of the present proceedings, which in terms of the Judgment cited above is impermissible in law.

Therefore, the Petition/Application filed by GUVNL ought to be rejected on this ground alone.

- 4.7 *Secondly*, while examining the present proceedings from the angle of a Review Petition, it may be noted that GUVNL has also filed the present Petition/Application invoking the Review jurisdiction of this Tribunal under Section 120 (2) (f) of the Electricity Act. However, in invoking such powers of this Tribunal, GUVNL in its entire Application/Petition has failed to demonstrate any of the three essential ingredients of review, viz. (a) 'error apparent on the face of the record'; (b) 'discovery of new facts which were not in the knowledge or ought to have been raised during the course of proceedings and goes into the root of the issue(s) involved'; and/or (c) 'sufficient cause' analogous to (a) or (b). This Tribunal in a catena of cases, such as Judgment dated 7.04.2013 passed in Review Petition No. 12 of 2012 in Appeal No. 17 of 2012 titled as **AVVNL vs. RERC & Ors.** and Judgment dated 16.02.2012 passed in Review Petition No. 1 of 2012 in Appeal No. 142 of 2009, titled as **BRPL vs. DERC** has already held that the power to Review its Judgment under Section 120 (2) (f) has to be exercised in terms of Order LVII Rule 1 CPC. To better appreciate the scope of proceedings under Order LVII Rule 1 CPC, it would be relevant to note the Judgment of the Hon'ble Supreme Court in the case of **Kamlesh Verma v. Mayawati, (2013) 8 SCC 320**, wherein the Hon'ble Supreme Court held as follows:

"17.....

18.....

19. *Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the*

parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.

Summary of the principles

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

20.1. When the review will be maintainable:

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

The words “any other sufficient reason” have been interpreted in Chhajju Ram v. Neki¹⁸ and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius¹⁹ 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 negated.*

21. Keeping the above principles in mind, let us consider the claim of the petitioner and find out whether a case has been made out for interference exercising review jurisdiction.”

4.8 Evidently, from the above, it can be concluded that the instant proceedings initiated by GUVNL do not in any manner fulfil any of

the essential conditions required for sustaining a plea for review. *Resultantly*, from the above settled position of law, and applying the same to the present case, the following conclusion can be drawn:

- (a) GUVNL cannot interchangeably use phrases Rectification/Review as both of them denote completely different and distinct meanings.
- (b) The present Application for Rectification is not maintainable as GUVNL has sought to assail merits of the Judgment dated 06.12.2018, which is impermissible in terms of the Judgment of the Hon'ble Supreme Court in *State of Punjab (supra)*.
- (c) The present Application for Review is also not maintainable as GUVNL has not demonstrated the ingredients of Order LVII Rule 1 CPC. The instant Petition/Application therefore runs contrary to Para 20.1 of the Hon'ble Supreme Court's Judgment in *Kamlesh Verma (supra)*. In fact, GUVNL in the guise of a Review Petition is seeking to re-argue the entire Appeal, which is also impermissible in terms of para 17 to 19 of *Kamlesh Verma (Supra)*.

4.9 The instant Petition/Application also deserves to be rejected with exemplary costs as GUVNL has indulged in material suppression of facts. GUVNL has also indulged in gross misdirection and the same is evident from the perusal of Civil Appeal No. 1253 of 2019, wherein GUVNL for the first time had taken a plea before the Hon'ble Supreme Court, particularly at question of law at Para K of the Questions of Law and Ground F therein, averring that the Judgment dated 06.12.2018 of this Tribunal is contrary to Rule 8 of the Electricity Rules notified by the Central Government dealing with the tariff determined for the generating companies where the Inter-State

issues are involved. The primary contention of GUVNL before the Hon'ble Supreme Court was that by virtue of Rule 8, GERC was not competent to adjudicate upon the Power Purchase Agreement dated 29.03.2012 ("PPA") between GUVNL and Renew. GUVNL further contended that this Tribunal had failed to consider the above ground despite the same having been raised before it.

4.10 During the admission hearing of the said Civil Appeal, Renew pointed out that the said issue had not been raised by GUVNL in filing Appeal No. 209 of 2015 and that the same was being raised for the first time in the Civil Appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court in the said circumstances passed the Order dated 15.02.2019 granting liberty to GUVNL to file a Review or a Rectification Application if the said issue of Rule 8 was raised before this Tribunal and if the said issue had not been considered. However, at this juncture, it is pertinent to highlight that the argument pertaining to Rule 8 has cleverly again omitted by GUVNL in filing the instant Petition/Application. The same has been specifically pointed/raised by Renew in its Reply. In view thereof, the same has been raised by GUVNL in order to improve its case for the first time in its Note for Arguments placed on record particularly, which is clearly permissible in the eyes of law.

4.11 From the perusal of the present Application, it is seen that GUVNL has conveniently omitted a reference of Rule 8 of the Electricity Rules. Therefore, evidently, GUVNL has indulged in gross suppression and misdirection, and for this ground alone the instant Petition/Application is liable to be rejected. Moreover, GUVNL has not even appended the Civil Appeal filed by it before the Hon'ble

Supreme Court with a clear intent to misguide and misdirect this Tribunal.

4.12 The gross suppression and misdirection of GUVNL is evident from the following facts:

- (a) Renew had filed Petition No. 1363 of 2013 before the GERC.
- (b) In response to the said Petition, GUVNL filed its Preliminary Reply and Written Submissions before GERC, raising all possible grounds. However, GUVNL neither raised the issue of applicability of Rule 8 of the Electricity Rules, nor did it question the competency of GERC to adjudicate upon the Petition filed by Renew.
- (c) The perusal of reply submitted by GUVNL before the State Commission does not reflect any mentions in this regard.
- (d) The written submissions filed by GUVNL before GERC do not envisage any such argument / pleading.
- (e) GERC allowed the Petition of Renew vide its Order dated 01.07.2015. Against the said Order, GUVNL filed Appeal No. 209 of 2015. Again, in the Appeal, GUVNL neither raised the issue of applicability of Rule 8 of the Electricity Rules, nor did it question the competency of GERC to adjudicate upon the Petition filed by Renew.
- (f) Thereafter, GUVNL tried to improve its case and through various Written Submissions urged that the PPA between GUVNL and Renew is governed by the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("REC Regulations,

2010”). However, in making such assertions, GUVNL at no point referred to Rule 8 of the Electricity Rules to contend that GERC did not have the requisite jurisdiction to entertain the Petition filed by Renew.

- (g) The contentions of GUVNL were rejected by this Tribunal vide its Judgment dated 06.12.2018.
- (h) Against the said Judgment, GUVNL filed Civil Appeal No. 1253 of 2019. In the said Civil Appeal, **for the first time**, GUVNL raised the issue of Rule 8 of the Electricity Rules to contend that by virtue of the said Rule, GERC did not have jurisdiction to entertain the Petition filed by Renew.
- (i) In the above circumstances, the Order dated 15.02.2019 came to be passed by the Hon’ble Supreme Court. However, astonishingly GUVNL in filing the instant Petition/Application has once again cleverly omitted any reference to Rule 8 of the Electricity Rules, thereby indulging in gross suppression and concealment which warrants exemplary costs be levied by this Tribunal.
- (j) Thereafter, after Renew had filed its Reply raising objections regarding the selective omission of grounds, GUVNL has become wiser in its Note for Arguments, wherein it has once again pleaded Rule 8 of the Electricity Rules.

4.13 The periodic reliance on Rule 8 and its subsequent omission in the instant Petition/Application depicts the oblique intent by which GUVNL seeks to prosecute the present case. The conduct of GUVNL, and the act of suppression of facts disentitles it to seek any relief from this Tribunal and therefore the instant Petition/Application deserves to be rejected in *toto* with exemplary costs. In this regard,

reliance is placed on the following judgments of the Hon'ble Supreme Court:

- (a) ***SP Chengalavaraya Naidu vs. Jagnath & Ors.***, (1994) 1 SCC 1:
- (b) ***SJS Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.***, (2004) 7 SCC 166:

4.14 As a direct result of the foregoing conduct of GUVNL, there has been a huge adverse impact on Renew inasmuch as, despite having concurrent favourable orders in its favour, GUVNL has not complied with the Order, and in fact acted in contempt thereof, denying Renew of the benefits of the orders. Till date, GUVNL egregiously refuses to implement the GERC Order dated 01.07.2015 and this Tribunal's Judgment dated 06.12.2018 despite the fact that GUVNL has now been denied relief by three Forums. This is exemplified by the fact that GUVNL continues to levy Cross Subsidy Surcharge ("CSS") upon the open access consumers of Renew.

4.15 The entire transaction in the present case pertains to generation and sale of electricity within the State of Gujarat. Therefore, in terms of the settled position of law, it would only be GERC which would have jurisdiction in the present matter, has already been rightly exercised. In this regard, the following is noteworthy:

- (a) In terms of Section 79 (1) (a) and 79 (1) (b) of the Electricity Act. The Central Electricity Regulatory Commission ("**CERC**") shall only regulate the tariff of generating companies owned by the central government or generating companies which have a composite scheme for generation and sale of electricity in more than one State.

- (b) The present case admittedly does not fall within the ambit of Section 79 of the Electricity.
- (c) In the present case, the since the entire transaction pertains to an intra-state supply of electricity and not inter-state/central supply of electricity, it would be incorrect to submit that CERC would have jurisdiction in the matter and not GERC, i.e. the incumbent State Commission.
- (d) At this highly belated stage, by suggesting that GERC would not have jurisdiction, while by virtue of Section 79, CERC also does not have jurisdiction, GUVNL is seeking to perpetuate a scenario of a completely unregulated contract.
- (e) Rule 8, as selectively being alleged by GUVNL, would only apply when tariff is actually determined by CERC for generators falling under Section 79 of the Electricity Act. In view of the foregoing admitted fact of intra-state transaction, Rule 8 therefore would not be applicable in the present proceedings.
- (f) On the contrary, Section 86(1)(b) of the Electricity Act empower the State Commission (GERC in the present case) to regulate the entire power purchase and procurement process of a distribution licensee (GUVNL in the present case) of its State through agreements (such as the PPA executed with Renew in the present case). This also includes the price at which GUVNL procures electricity.
- (g) Even in terms of the PPA, which has been executed by GUVNL, *albeit* without any regulatory approval under Section 86(1)(b), in case of any dispute between the parties, GERC would have jurisdiction to decide the same. Hence, for GUVNL to now aver, in Review/Rectification proceedings that GERC

does not have jurisdiction, is wholly untenable and erroneous, and such plea ought to be rejected by this Tribunal.

- (h) It is settled law that no party ought to be permitted to approbate and reprobate, especially in the same proceedings, which, in the facts of the present case, GUVNL is obliquely attempting to do, by its selective reliance on Rule 8.

5. Our consideration & findings:-

- 5.1 Learned senior counsel, Mr. M.G. Ramachandran appearing for the Review Petitioner submitted that the instant petition has been filed for review / rectification of the judgment dated 06.12.2018 passed by this Tribunal in Appeal No.209 of 2015 in pursuance of the order of the Hon'ble Supreme Court dated 15.02.2019 in Civil Appeal No.1253 of 2019. He indicated that the Appeal No.209 of 2015 was filed by the Applicant/Appellants before this Tribunal against the impugned order dated 01.07.2015 passed by the State Commission in Petition no.1363 of 2013. Learned senior counsel was quick to submit that the judgment of this Tribunal suffers from an error apparent on the face of the record as it proceeds to hold that the State Commission is empowered under the Act to regulate and change the tariff and terms & conditions in the PPA. He emphasised that the State Commission is not competent to reopen the PPA and varying the tariff and its terms & conditions to hold the PPA to be one sided.
- 5.2 Learned senior counsel for the Review Petitioner further contended that PPAs' were entered into in terms of REC Regulations, 2010 framed by the Central Commission and in no way inconsistent with regulations. The State Commission required to protect the

consumer interest and cannot reopen a PPA to allow higher tariff to a generator at the cost of consumer interest. He also stated that there was no Coercion or duress or otherwise any lack of free will in the execution of the PPAs by the Respondent. In fact, in terms of the REC Regulation, 2010 dealing with the purchase of renewable power, the Respondent and other similarly placed generators voluntarily opted for sale of electricity to GUVNL at a price not exceeding Rs.2.64 per KWH which was the pooled cost of power purchase of relevant distribution licensee as envisaged in Regulation 5(I)(c). Learned senior counsel vehemently submitted that the competency of the State Commission to reopen the PPA and vary the tariff conditions were raised by GUVNL before the State Commission as well as this Tribunal. However, both the authorities have decided otherwise that the State Commission being the sector regulator is empowered to regulate and change the tariff conditions, if so deemed fit.

- 5.3 Learned senior counsel appearing for the Review Petitioner submitted that the said regulation continued till 11.07.2013 when the Central Commission brought about the second amendment to the said Regulation which envisaged that the RE generator shall sell the electricity generated to the distribution licensee of the area in which the eligible entity is located at the pooled cost of power purchase of such distribution licensee as determined by the appropriate commission. Learned counsel highlighted that the second amendment has not been given retrospective effect to apply to the PPAs entered into prior to 11.07.2013. In fact, this aspect has been clarified by the Central Commission in the statement of reasons issued in the second amendment as “this amendment” will apply

prospectively and as such will not affect the already executed PPAs at lower than APCC. Writing the amendment and clarifications issued by the Central Commission, learned senior counsel reiterated that the State Commission had no jurisdiction to reopen the PPA dtd. 29.03.2012 which incorporates to tariff revision in terms of the Central Commission REC Regulations, 2012. To strengthen his submissions, learned counsel submitted that prayer that tariff terms & conditions are within the scope of Central Commission. The State Commission has no jurisdiction to vary, amend or verify the same in line with provisions of Rule VIII of the Electricity Rules, 2005.

5.4 Learned senior counsel for the Review Petitioner contended that option to be exercised by either of the parties is valid as per decision of the Hon'ble Supreme Court in following cases:-

- a. *Central Bank of India v. Hartford Fire Insurance Co. Ltd AIR 1965 SC 1288;*
- b. *Her Highness Maharani Shantidevi P Gaikwad v. Savjibai Haribai Patel and Ors (2001) 5 SCC 101*

Further, the commercial contract entered into voluntarily between the parties cannot be valid except by a statutory regulation as decided in *PTC India Limited v Central Electricity Regulatory Commission (2010) 4 SCC 603*. In this regard, there is no provision in any of the Regulations of the State Commission empowering the State Commission to vary and modify the PPA entered into GUVNL & Renew Power.

5.5 Learned senior counsel also placed reliance on following judgments of the Apex Court to contend that the sanctity of the contract is required to be maintained:

(a) Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Another (2016) 11 SCC 182

(b) Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat Pvt) Ltd and Ors (2017) 16 SCC 498

(c) Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Co. (India) P. Ltd (2017) 16 SCC 498

5.6 Learned senior counsel further contended that the terms & conditions of the PPA are not entirely statutory as held by Hon'ble Supreme Court in *India Thermal Power Corporation Limited v State of Madhya Pradesh & Ors. (2000) 3 SCC 379*. Learned counsel emphasised that it is also settled principle of law that the State Commission cannot force to distribution licensee to enter into particular agreement and to accept terms without its consent. Further, to deny a coercion or duress as alleged by the Respondent, the learned counsel referred to the judgment of Hon'ble Supreme Court in *Central Bank of India vs. Hartford Fire Insurance Co. Ltd. AIR 1965 AIR SC 1288*. Learned counsel vehemently submitted that the renew power and other wind power generators entered into the PPA voluntarily and there was no Coercion or any nature on the Respondents and similarly there was no duress compulsion or abuse of dominant position or any other action of GUVNL which could be basis of Respondents to evade the solemn obligations as per the PPA.

5.7 To justify his contentions in regard to Coercion, duress or unequal bargaining power, the learned counsel placed reliance on various judgments of this Tribunal and the Apex court, as brought out supra, under the submissions of the Review Petitioner. Summing up his

arguments, learned senior counsel appearing for the Review Petitioner reiterated that in view of the above, the judgment dated 06.12.2018 passed by this Tribunal in Appeal No.209 of 2015 is liable to be rectified or modified.

5.8 ***Per contra***, learned counsel, Shri S. Venkatesh, appearing for the Respondent / Renew Power submitted that the instant review petition has been filed for review and / or rectification of judgment dtd. 06.12.2018 under Section 111 & 120 of the Electricity Act, 2003. However, the scope and object of a Review Petition as defined under order NVII Rule 1 of the CPC 1908 is entirely different than that of a rectification application, as defined under Section 152 CPC. In the present Petition/Application, GUVNL has interchangeably used the terms rectification oblique intent to reargue the Appeal No.209 of 2015 which is impermissible in law. Learned counsel was quick to point out that the Review Petitioner has also invoked Section 111 of the Act with the intent to argue the instant petition/application as a fresh appeal without appreciating that even by invoking powers of this Tribunal under a Review Petition or a rectification application, the entire appeal cannot be reargued. He stated that while examining the matter from a prospective of rectification application, it would be relevant to note the judgment of Hon'ble Supreme Court in the case of State of Punjab vs. Darshan Singh 2004 1 SCC 328. From a bare perusal of the above judgment, it is evident that rectification cannot be used as a device to question the merits of the case. The present case, GUVNL is attempting to reargue its Appeal by way of the present proceedings which is Impermissible in law.

5.9 Learned counsel for the Respondent further submitted that while examining the present proceeding from the angle of the review petition, it is noted that GUVNL has also filed the present petition/application invoking the review jurisdiction of this Tribunal under Section 120(2)(f) of Act. However, in invoking such powers of this Tribunal, GUVNL in its entire application/petition has failed to demonstrate any of the three essential ingredients of review viz. a) error apparent on the face of the record; b) discovery of new facts and c) sufficient cause analogous to a) or b). This tribunal in a catena of judgments has held that the power to review its judgment under Section 120 (2)(f) has to be exercised in terms of the order NVII Rule I CPC. In this regard, the judgment dtd. 16.02.2012 of this Tribunal in Review Petition No.1 of 2012 and judgment dated 07.04.2013 passed in Review Petition No.12 of 2012 may be referred to. Besides, the judgment of the Hon'ble Supreme Court in the case of Kamlesh Verma Vs. Mayawati 2013 SCC 320 is quite significant.

5.10 Learned counsel for the Respondent further contended that evidently from the above, it can be concluded that the instant proceedings initiated by GUVNL do not in any manner fulfil any of the essential conditions required for sustaining a plea for review. Learned counsel alleged that GUVNL has indulge in gross misdirection which is evident from the perusal of Civil Appeal no.1253 of 2019 wherein for the first time it had taken a plea before the Hon'ble Supreme Court that the judgment dtd. 06.12.2018 of this Tribunal is contrary to Rule 8 of the Electricity Rules, notified by the Central Govt.. In the said Civil Appeal, GUVNL has further contended that this Tribunal has failed to consider the above ground

despite the same has been raised before it. Learned counsel point out that the argument pertaining to Rule 8 has cleverly omitted by GUVNL while filing the instant petition / application. However, in order to improve its case for the first time in its note of arguments placed on record, GUVNL has now raised the same.

5.11 Learned counsel for the Respondent further submitted that reference to Rule 8 of the Electricity Rules, 2005 was neither placed before the State Commission nor before this Tribunal in A.No.209 of 2015 and for the first time GUVNL raised this issue in the fresh Civil Appeal before the Hon'ble Supreme Court. The periodic reliance on Rule A and its subsequent omission in the instant petition/application depicts the oblique intent by which the GUVNL seeks to prosecute the present case. To substantiate his argument in this regard, learned counsel placed reliance on following judgments of the apex court :-

- a) *SP Chengalavaraya Naidu vs. Jagnath & Ors.*, (1994) 1 SCC 1:
- b) *SJS Business Enterprises (P) Ltd. Vs. State of Bihar & Ors.*, (2004) 7 SCC 166:

5.12 Learned counsel alleged that as a direct result of the foregoing conduct of the GUVNL, there has been a huge adverse impact on Renew power in as much as despite having concurrent favourable orders in its favour, GUVNL had not complied with the orders and in fact acted in contempt thereof denying renew power of the benefits of the orders. For instance, GUVNL has not implemented the GERC order dtd 01.07.2015 and this Tribunal's judgment dtd 06.12.2018 and continued to levy ESS upon the Open Access consumers of Renew power.

5.13 Learned counsel for the Respondent highlighted the fact that the entire transaction in the present case pertains to generation & sale of electricity within the State of Gujarat and therefore in terms of the settled principles of law it would only be the State Commission which would have jurisdiction in the present matter. By the present proceedings, GUVNL is seeking to accord sanctity to the PPA as an unregulated contract *de hors* section 86 1(b) of the Electricity Act. Even in terms of the PPA which has been executed by GUVNL, albeit without any Regulatory approval under section 86 (1)(b) in case of any dispute between the parties, CERC would have jurisdiction to decide the same. Hence, for GUVNL to now ever in review / rectification proceedings that CERC does not have jurisdiction is wholly untenable and erroneous.

5.14 Learned counsel for the Respondent accordingly submitted that the Review Petition has no merit and needs to be rejected with cost.

OUR FINDINGS

5.15 We have carefully considered the submissions of both the parties and also referred to various judgments of this tribunal as well as Hon'ble Supreme Court relied upon by the Review Petitioner and the Respondent. Admittedly, the review / rectification petition has been filed by the review petitioner in reference of the order dated 15.02.2019 passed by Hon'ble Supreme Court in Civil Appeal No.1253 of 2019 which is reproduced as under:-

“Heard learned counsel for the appellants and perused the relevant material.

It is contended by the learned counsel for the appellants that an issue had been raised before the Appellate Tribunal for Electricity (APTEL) that the State Regulatory Commission was not competent to reopen the PPA.

In this regard, averments made before the APTEL in the memo of appeal has been read out to us. Without expressing any opinion on the question as to whether the issue had been raised before the APTEL and if so, the merits thereof, we permit the appellants to move the APTEL for rectification/ review of the order, if so advised.

With the above terms, we dispose of the civil appeal by making it once again clear that we have not made any observation on the merits of the case between the parties. In the event, it becomes necessary, leave is granted to the appellants to approach this Court once again.”

5.16 We notice from the prayers of the Review Petitioner stated supra that review / rectification application is directed at review /rectification of this tribunal’s judgment dtd. 6.12.2018 and also to set aside the order of the State Commission dd. 01.07.2015. This in fact tantamount to re-arguing the main appeal no.209 of 2015 against which the impugned judgment dated 06.12.2018 was passed by this Tribunal. A careful perusal of the submissions made by the Review Petitioner and note of arguments reveal that all these had already been submitted / argued during the proceedings of Appeal No.209 of 2015 before this Tribunal. No any additional material / evidence has been brought out by the Applicant / Review Petitioner. The applicant has made out efforts to merely justifying its arguments either presented before the State Commission or this Tribunal with a concluding remarks that findings of State Commission and this Tribunal have been erroneous and the same constitutes as apparent error on the face of record.

5.17 After critical evaluation of several proceedings in Appeal No.209 of 2015 and resultant judgment dtd. 06.12.2018, it is relevant to note that the matter was adjudicated after careful consideration of all the submissions and pleadings of all the parties and also taking note of the findings of the State Commission in the impugned order. Further, the rulings in various judgments of this Tribunal and Hon’ble

Supreme Court were also perused before final adjudication of the Appeal. In fact, the Review Petitioner is aggrieved on all the two issues decided by this Tribunal due to one or the other reason mainly not finding a favourable view of his choice against the Respondent generators. Though the Review Petition preferred by the Applicant said to be in pursuance of the order dtd. 15.02.2019 passed by the Hon'ble Supreme Court, however, admittedly the review /rectification application would need to be adjudicated under section 120 (2) (f) of the electricity Act, as under :-

"120. Procedure and powers of Appellate Tribunal

(2) The Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:-

.....
(f) reviewing its decisions;

5.18 Section 120 (2) (f) of the Act thus, confers power to review akin to Section 114 of the Code of Civil Procedure, 1908. Therefore, the decisions of the Hon'ble Supreme Court relating to review jurisdiction are applicable for interpreting the said provisions. Once a judgment is pronounced and an order passed, the court becomes *functus officio* and it cannot thereafter arrogate itself to re-hear the case and re-open the matter. The dictum of the Hon'ble Apex Court in a catena of judgments is that a party is not entitled to seek a review of the judgment merely for the purpose of a re-hearing and a fresh decision of the case.

5.19 In fact, the review petitioner in the guise of the present proceedings has virtually sought a rehearing of the original Appeals. The review petitioner cannot avail of this mode of legal redress since two main

conditions are to be satisfied for entertainment of a review petition as under:-

- (i) *Proof that even after exercise of due diligence some facts were not to the knowledge of the review petitioner, when the original order was passed.*
- (ii) *Mistake or error apparent from the face of record.*

5.20 In the present case, the review petitioner has failed to prove or establish any of the above mandatory criteria for review of the original judgment of this Tribunal. The Review Petitioner/Appellant under the guise of the present review petition is praying to reopen the entire case which is impermissible under the review jurisdiction as held by the Hon'ble Apex Court "Review is not appeal in disguise, where erroneous decision can be reheard and corrected but lies for patent error. Error which is not self-evident and has to be detected by process of reasoning can hardly be called as error apparent from face of record."

Emphasis supplied

5.21 The Hon'ble Supreme Court in catena of its judgements has laid down the scope and ambit of review such in the cases of a) *M/s Goel Ganga Developers India Pvt. Ltd. Versus Union of India through Secretary Ministry of Environment and Forests and Ors.*, b) *Haridas Das Vs. Usha Rani Banik (Smt.) & Ors. – 2006 (4) SCC 78*, c) *Haryana State Industrial Development Corporation Limited Vs. Mawasi & Ors. – 2012 (7) SCC 2000*, d) *M/s Northern India Caterers (India) Pvt. Ltd. Vs. Lt. Governor of Delhi – 1980 (2) SCC 167*, e) *Kamlesh Verma Vs. Mayawati & Ors. – 2013 (8) SCC 320*, etc.. In a nutshell,

“19. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction”.

Emphasis supplied

5.22 The bare perusal of the Review Petition, it is significant to note that the entire grounds, pleadings, arguments etc. were made by the Review Petitioner/Appellant in the main Appeal also to contest on the same prayers/issues which were duly considered, analysed, evaluated and adjudicated by this Tribunal in detail after hearing all the parties at a considerable length of time. From the contents of the review petition, as well as the written submissions of the Review Petitioner thereon, it is crystal clear that neither additional nor fresh ground has been made by the Review Petitioner now which otherwise substantiate its pleadings for reviewing the judgment dated 06.12.2018 and passing any modified judgment therein.

5.23 We have gone through all the materials placed before us relating to the original Appeal as well as the material contained in Review Petition and also critically analysed our findings in the judgment impugned. What thus transpires is that without establishing any of the mandatory criteria for review of the impugned judgment of this Tribunal, the Appellant under the guise of the present review petition is seeking to re-open the entire case for achieving a supposed objective of favourable decision which is impermissible under the review jurisdiction as held by the Apex Court in a number of cases.

5.24 In view of the above, what emerges conclusively is that the case in the review petition neither relates to any discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the review petitioner or could not be produced by him at the time when the judgment was pronounced nor any mistake or error apparent on the face of the judgment has specifically been pointed out and nor any other sufficient reason or ground has been made out by the Review Petitioner. It is also significant to note that a judgment has to be seen in its entirety and should not be assailed based on certain paragraphs, only on pick and choose methodology. Instead, it has to be read in close conjunction of previous orders of the State Commission which stand affirmed by the said judgment as in the present case.

In light of the above, we are of the considered view that there is no merit in the Review Petition No.03 of 2019 in Appeal Nos. 209 of 2015. The same is accordingly dismissed as devoid of merit.

Parties to bear their own costs.

Pronounced in the Virtual Court on this 24th day of July, 2020.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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