

COURT - I

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

APPEAL NO. 145 OF 2019

Dated: 23rd September, 2019

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

In the matter of :

NLC India Limited

...Appellant(s)

Vs.

Central Electricity Regulatory Commission & Ors.

...Respondent(s)

Counsel for the Appellant(s) : Mr. M.G. Ramachandran, Sr. Adv.
Mr. Shubham Arya
Ms. Anushree Bardhan

Counsel for the Respondent(s) : Mr. S. Vallinayagam for R-2

ORDER ON MAINTAINABILITY OF THE APPEAL

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. Apparently, the present appeal is filed against the dismissal of the review petition by Order dated 19.12.2018 passed in Petition No. 39/RP/2017. The said review petition came to be filed against the Order dated 24.07.2017 passed by Central Electricity Regulatory Commission (**Respondent-Commission/CERC**) in Petition No. 146/GT/2015.

2. According to the 2nd Respondent-TANGEDCO, the present appeal is not maintainable since while dismissing the review petition, the Respondent-Commission has not altered or modified the findings and reasons given by it in the July order of 2017. According to it, dismissal of review petition means dismissing the issues which were sought to be reviewed; thereby it confirms the main order and does not warrant any reasoning and discussion in verbatim. In other words, there cannot be any appeal against the dismissal of review petition, since the order is not based on any reasoning, except dismissing the same by holding that there are no grounds for review.

3. The Respondent-TANGEDCO contends that if the order passed in review, in fact, modifies the main order to the extent the prayer in the review petition is allowed, then appeal is maintainable. The Respondent-TANGEDCO further contends that if the Appellant is aggrieved by the order in review petition, modifying the main order, then it is open to challenge the same by filing an appeal by the Appellant to the extent the main order is modified by the review order. Therefore, portions/part of the main order, which are either not sought to be reviewed or refused to be reviewed by

reviewing court can be challenged only by filing the appeal against the main order. Hence, the Respondent-TANGEDCO contends that the Appellant cannot challenge that part of main order which was either not sought to be reviewed or sought to be reviewed but refused by the Court. The concept of merger relied upon by the Appellant in the present appeal to contend that the main order gets merged with the review order is wrong. Since the appeal is not maintainable against the order rejecting an application for review in the light of Order 47 Rule 7 of CPC, the Appellant cannot file an appeal against the rejection of review petition. Since the grounds of review in the review petition against the main order are being the grounds of appeal in the present appeal (by virtue of dismissal of review), the question of merger as far as the dismissed portion of the review order would not arise. They further contend that in the light of settled law laid down in the decision of the Hon'ble Supreme Court in ***Kunhayammed v. State of Kerala*** ((2000) 6 SCC 359 at page 370) at Para Nos.12 and 44, also in ***Bussa Overseas and properties Private Limited and another v. Union of India and another*** ((2016) 4 SCC 696) the present appeal is liable to be dismissed as not maintainable.

4. As against the above submission of the Respondent-TANGEDCO, the Appellant contends as under:

In the impugned order, the CERC has allowed the claim of the Appellant so far as the issue of interest on loan and has granted liberty to the Appellant to raise the issues of initial spares, base lignite price and auxiliary power consumption at the time of truing up proceedings. However, CERC has rejected the claims of the Appellant pertaining to issues of time over run, consequential IDC, IEDC, station heat rate and cost of limestone for interest on working capital. The Appellant relies on the following decisions to contend that even when a decree or order is partly modified by review order, it emerges as a new decree or order, then the appeal would be maintainable only against the new decree or new order.

- i) *Sushil Kumar Sen v State of Bihar AIR 1975 SC 1185 (Para 2, 3 & 4)*
- ii) *Rekha Mukherjee v Ashis kumar Das and Ors (2005) 3 SCC 427 (Paras28, 32-35)*
- iii) *DSR Steel Pvt. Ltd. v State of Rajasthan (2012) 6 SCC 782 (Paras 24-26)*

- iv) *Bussa Overseas and Properties Private Limited v Union of India* (2016) 4 SCC 696 (Para 29)
- v) *Manohar v Jaipal Singh* (2008) 1 SCC 520 (Paras 13 and 14)
- vi) *Shanti Conductors Private Limited and Another v Assam State Electricity Board and Others* (2016) 15 SCC 13 (Paras 24, 25, 28.5 and 55)
- vii) *Kunhayammed v State of Kerala* (2000) 6 SCC 359

5. We have gone through the decisions quoted by both the counsel. The most relevant decision, which comprehensively analyze the controversy before us is DSR Steel Pvt. Limited's case. Relevant Paragraphs at 24 to 26 read as under:

"24. So also the question whether an order passed by the Tribunal in appeal merges with an order by which the Tribunal has dismissed an application for review of the said order was argued before us at some length. Learned Counsel for the Appellants contended that since a review petition had been filed by two of the Appellants namely, J.K. Industries Ltd. (Now known as J.K. Tyres and Industries Ltd.) and J.K. Laxmi Cement Ltd. in this case, the orders made by the Tribunal dismissing the appeals merged with the orders passed by it in the said review applications so that it is only the order dismissing the review application that was appealable before this Court. If that were so the

period of limitation could be reckoned only from the date of the order passed in the review applications.

25. *Different situations may arise in relation to review petitions filed before a Court or Tribunal.*

25.1 *One of the situations could be where the review application is allowed, the decree or order passed by the Court or Tribunal is vacated and the appeal/proceedings in which the same is made are re-heard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the review petition.*

25.2 *The second situation that one can conceive of is where a Court or Tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review reversed or modified. Such an order shall then be a composite order whereby the Court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for purposes of a further appeal, if any, maintainable under law.*

25.3 *The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or Court shall*

have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition. Time taken by a party in diligently pursuing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.

26. The decisions of this Court in Manohar v. Jaipalsing (2008) 1 SCC 520 in our view, correctly settle the legal position. The view taken in Sushil Kumar Sen v. State of Bihar ((1975) 1 SCC 774) and Kunhayammed and Ors. v. State of Kerala (2000) 6 SCC 359, wherein the former decision has been noted, shall also have to be understood in that light only.”

6. It is true that in a tariff petition the Commission concerned considers various elements of tariff and finally decides/determines the tariff. Such tariff arrived at is the decree or order. In this case, even in review petition some claims of the Appellant were answered in their favour and some were held against them. Therefore, we are of the opinion that the decision which reject the claim of the Appellant in the review petition would not change the order dated 24.07.2017 (main order) but as far as the claims which were initially not considered, in other words, which were now considered and modified in review petition, it can be considered as modification of initial

order vis-à-vis those issues. It is well settled that for the purpose of appeal there is only one order and one decree. Even the format of appeal as contended by the Appellant under Section 111 of the Act provides for an appeal only in regard to the order but not in respect of each issue or reasoning given in the impugned order. In the light of modification of decision on certain issues in the review petition, we are of the opinion that the appeal is maintainable against such decision pertaining to those issues. It is made clear that so far as the decision on other issues in the initial order which were not sought for review and so also decisions of those issues which were sought for review but refused cannot form part of grounds/relief sought by the Appellant in the appeal.

7. With these observations, we opine that the appeal is maintainable.

8. Registry is directed to list the matter on **16.10.2019**.

9. Pronounced in the Open Court on this 23rd day of September, 2019.

(S. D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE/~~NON-REPORTABLE~~