

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 2nd December, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. V J Talwar, Technical Member

APPEAL No.88 of 2013

IN THE MATTER OF
NTPC Limited

... Appellant

Versus

Central Electricity Regulatory Commission,

....Respondent(s)

Counsel for Appellant(s): Mr. M.G. Ramachandran
Ms.Swagatika Sahoo
Mr.Poorva Singal
Mr.Anushree Bandnan
Mr. Avinash Menon

Counsel for Respondent(s):Mr.Aditya Mukherjee for R-4
Mr.R.B.Sharma for R-3
Mr. Alok Shankar for R-2
Mr. Aashish Gupta
Mr. Gopal Jain for R-2
Mr. P.B. Lal for R-4.

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. NTPC Limited is the Appellant herein.

2. Challenging the order dated 8.2.2013, passed by the Central Electricity Commission in the Review Petition filed by the Appellant, this Appeal has been filed.
3. The short facts are as follows:
 - (a) The Appellant filed the Petition before the Central Commission for determining the Tariff for the Badarpur Generating Station of the Appellant for the Tariff Period 1.4.2009 to 31.3.2004.
 - (b) The Central Commission while determining the tariff disallowed some of the claims and passed the order on 23.5.2012.
 - (c) Aggrieved by the above order, the Appellant sought Review on four aspects in the Review Petition No.18 of 2012. These four aspects are as follows:
 - (i) Disallowance of Expenditure of Rs.1474 lacs in the Financial Year, 2009-10;
 - (ii) Adjustment on account of cumulative repayment on account of recapitalization of assets considered as 90% in loan repayment instead of adjustment of 70% in loan repayment and 20% in equity repayment;

(iii) Non consideration of liabilities of Rs.7.29 lacs on the capital cost as on 1.4.2009;

(iv) Disallowance of past expenditure capitalized.

(d) According to the NTPC, the Central Commission by the Order dated 8.2.2013, allowed the Review on two aspects (iii) and (iv) prayed for by the NTPC but disallowed the review confirming the findings in regard to claim (i) and (ii).

(e) As against the disallowance of the said two claims, the Appellant has filed this Appeal as against the Review Order dated 8.2.2013.

4. The Respondent in the Appeal has raised the preliminary objections regarding the maintainability of the Appeal on the ground that the Central Commission by the order dated 8.2.2013 rejected the said two claims in the Review Petition in respect of those claims and therefore, an Appeal against an Order rejecting the Review Petition is not maintainable as per Order 47 Rule 7 of the Civil Procedure Code and the Appeal would be maintainable only against the main order dated 23.5.2012.

5. On the other hand, the learned Counsel for the NTPC, the Appellant submits that since the Review Petition as against the main order dated 23.5.2012 was allowed partly by the

Central Commission on some claims, the main order got merged with the Review Order dated 8.2.2013 and that therefore, the Appeal before this Tribunal is maintainable against the Review Order dated 8.2.2013 and not the Original Order dated 23.5.2012.

6. In the light of the rival contentions, the only question which arises for consideration is **whether the Appeal as against the Review Order dated 8.2.2013, is maintainable in the absence of any Appeal as against the Original Order dated 23.5.2012?**

7. The learned Counsel for the Appellant has cited the following decisions:
 - (a) Sushil Kumar Sen v State of Bihar AIR 1975 sc 1186;
 - (b) Rekha Mukherjee v Ashis Kumar Das and Others (2005) 3 SCC 427;
 - (c) DSR Steel P Limited V State of Rajasthan (2012) 6 SCC 782;
 - (d) Kunhay Ammed and Others v State of Kerala (2000) 6 SCC 359;

8. The relevant observations made in the above said authorities are as follows:
 - (a) Sushil Kumar Sen v State of Bihar AIR 1975 sc 1186;

“....The decree that is subsequently passed on review, whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one”

(b) Rekha Mukherjee v Ashis Kumar Das and Others (2005) 3 SCC 427;

“.....It was observed that when a review is made, the original decree ceases to exist as a result of the decision of the judge to grant the application for review”.

(c) DSR Steel P Limited V State of Rajasthan (2012) 6 SCC 782;

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 is 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 the purpose 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 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 decision of this Court in *Manohar v Jaipalsing* in our view, correctly, settles the legal position. The view taken in *Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala*, wherein the former decision has been noted, shall also have to be understood in that lights only.

(d) *Kunhay Ammed and Others v State of Kerala* (2000) 6 SCC 359;

“...This is because the decree reviewed gets merged in the decree passed on review and the Appeal to the superior court preferred against the earlier decree- the one before review- becomes infructuous”.

9. The learned Counsel for the Respondent raising the preliminary objection with regard to maintainability of the Appeal, has cited the following authorities:

(a) *Bhatele Ramesh Chand v Dr. Shyam Lal and Ors*, AIR 1964 All 34,

(b) *Dwarkabai w/o Karbhari Gangarde v State of Maharashtra*, 2006 (6) MhLj 604;

(c) *Rekha Mukherjee V Ashis Kumar Das and Ors.*,AIR 2005 sc 1944;

(d) State of Madras V Madurai Mills Co Ltd., AIR 1967 SC 681;

(e) Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510;

10. The relevant portion of the observations are as follows:

(a) Bhatele Ramesh Chand v Dr. Shyam Lal and Ors, AIR 1964 All 34,

“8. The preliminary objection can be very shortly stated. It is that, assuming that the Act and the rules made under it allow a review at all, they must be held to allow that review under Order 47 of Schedule 1, Civil P.C., with all the incidents of a review under that order. One of the incidents of a review under Order 47, Civil P.C., is a restricted right of appeal, which the order itself very carefully limits. No doubt the High Court could alter Order 47, if it chose to. But it has not, and it is common ground that, if the right of appeal from the order of review of 29th August 1942 with which we are now dealing is governed by the right of appeal which would be allowed from an ordinary order in review to which Order 47 applies. then inasmuch as the review so far as the second part of the relief was concerned was rejected, there could be no appeal.”

15. For these reasons my opinion is that an appeal from an order rejecting a review is governed by the provisions of Order 47, Rule 7 Civil P.C. and not by section 45(1), UP Encumbered Estates Act. I think that this construction gives effect to the manifest intention of the Legislature. without doing violence to the words of the Act. Nor, in my opinion, does it produce any inconsistency. In my judgment therefore this appeal does not lie”

(b) Dwarkabai w/o Karbhari Gangarde v State of Maharashtra, 2006 (6) MhLj 604;

In this matter, Review Petition was partly allowed wherein the additional compensation was not altered; however, the rate of solatium was altered. The said order was challenged before the Bombay High Court by filing an Appeal. In that case, the preliminary objection on the maintainability of the Appeal was considered. The findings are as follows:

“5. Having heard the learned Counsel for the parties, following are the points, which arise for my consideration:

(i) Whether the Appeal against part rejection of the application for review is maintainable?

(ii) My findings to the above points, for the following reasons, are: (i) No.

(c) Rekha Mukherjee V Ashis Kumar Das and Ors.,AIR 2005 sc 1944;

“23. An appeal preferred against the said order dated 15.07.2002 by the reliant herein was maintainable in terms of Order 47 Rule 7 CPC. However, no cross objection was maintainable at the instance of the respondents.”

.....

Having Filed a review application on legal advice and having succeeded therein in part, it was not open to it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The Respondents could have only preferred appeal only from that part of the decree in respect whereof review was not

granted.”

(d) State of Madras V Madurai Mills Co Ltd., AIR 1967 SC 681;

“6. the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject-matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

.....

It was held by the High Court that the order of the Income-tax Officer granting registration to the respondent must be deemed to be merged in the appellate order and that the revisional power of the Commissioner of Income-tax cannot, therefore, be exercised in respect of it. The view taken by the High Court was over-ruled by this Court for the reason that the order of the Income-tax Officer granting registration cannot be deemed to have merged in the order of the Appellate Commissioner in an appeal taken against the composite order of assessemnt.”

(e) Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510;

“9.5

But if the order of the lower authority related to several distinct matters and the appeal or revision is filed only in regard to one or few of the matters, there cannot be a merger of the entire order of the lower authority with the order of the appellate/provisional authority. In that event, subject to any statutory provisions, what will merge in the order of the appellate or revisional authority is not the entire order of the lower authority, but only that part of the order which related to the subject-matter of the appeal or revision.”

12. *The following principles thus emerge in regard to the doctrine of merger:*

(i) Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.

(ii) If the appeal or revision is restricted to a delinkable part or portion of the original order or one of the several matters or issues dealt by the original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.

(iii) Where the Appellate authority has given plenary jurisdiction over the entire matter dealt

with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of views. The view of this Court in such cases has been that the merger will be in respect of the entire order.

(iv.....

(v) There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped, out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."

11. On the basis of these decisions, it was argued by the learned Counsel for the Respondent that when the Review Petition raises several distinct matters and the same are partly rejected, the doctrine of merger in so far as the matters for which review is rejected, will not have any application and consequently, the present Appeal is not maintainable.

12. He further stated that assuming that the Review was partly allowed; even then the doctrine of merger will be applicable only to the extent the review was allowed and will not be applicable to the matters for which the review was rejected.
13. Let us now refer to the Order 47 Rule 7 of the Civil Procedure Code.

“7. Order of rejection not appealable-Objections to order granting application

(i) An order of the Court rejecting the application shall not be appealable; but an order granting the application may be objected to at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit.”

14. The perusal of the above provisions would make it clear that an order rejecting the Petition for Review is not Appealable.
15. According to the Respondent, since the prayers in relation to issues at (i) and (ii) were rejected in the Review Order the Appeal against the said order in respect of those issues is not maintainable in view of the provisions of the Order 47 Rule-7 of the Civil Procedure Code.
16. There is no dispute in the fact that in respect of issue No. (i) and (ii), the Central Commission rejected the claim both in the main order dated 23.5.2012 as well as the Review Order dated 8.2.2013.

17. As observed by the Hon'ble Supreme Court in the case of Municipal Corporation of Delhi v Yashwant Singh Negi, 2013 (5) SCALE 447 once the Court has refused to entertain the Review Petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the Review Petition because on the dismissal of the Review petition, the principle of merger does not apply.
18. If this is the principle which has been laid down by the Hon'ble Supreme Court then we have to deal with situation whether Review Order was partly allowed in respect of some of the issues and partly disallowed in respect of other issues.
19. The question is whether the doctrine of merger would apply to the cases where the rejection of particular issues in the main order has been confirmed in the Review Order.
20. In this context, it would be appropriate to refer to the principles laid down on this issue by the Karnataka High Court in the case of Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510.
21. As per this decision, when the subject matter of the order of the lower court is the same, as of the subject matter of the order of the Appellate Court, the order of the lower Court

gets merged with the order of the Appellate Court so that there is only one order holding the field. But, if the order of the subordinate authority related to the several distinct issues and the Appeals are reviewed, is filed only in regard to one or few matters, then there cannot be merger of the entire order of the lower court with the order of the Appellate Court. In that event what will merge in the order of the Appellate Court is not the entire order of the lower court but only that part of the order which relates to the subject matter of the Appeal.

22. On the basis of these observations, the High Court has laid down the principles with regard to doctrine of merger. They are as follows:

(a) Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.

(b) If the appeal or revision is restricted to a delinkable part or portion of the original order or one of the several matters or issues dealt by the

original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.

(c) Where the Appellate authority has given plenary jurisdiction over the entire matter dealt with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of views. The view of this Court in such cases has been that the merger will be in respect of the entire order.

(d) There will be no merger at all where the subsequent order is passed by the same authority,

either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."

23. These principles would make it clear that the purpose of doctrine of merger is to ensure that at one time, one order is operative. This means that part of the order which is not the subject matter of the Appeal cannot be said to have merged with the order passed by the Superior Court. The said principle would apply even in the case of Review. This is because while the Doctrine of Merger is applicable in case of an Appeal or Revision even if the same is dismissed by the Superior Court, the Doctrine of Merger will not be applicable in the event, the Review is rejected.
24. This principle has been quoted in the judgment of Hon'ble Supreme Court in the case of **DSR Steel P Limited v State of Rajasthan (2012) 6 SCC 762**. The following is the observation:

“

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 is 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 the purpose 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 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 decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been*

noted, shall also have to be understood in that lights only.

25. So, the above observation of Hon'ble Supreme Court, the Doctrine of Merger in the case of Review will be applicable only to the **subject matter** of the Review and the same will not be applicable if the Review is rejected in respect of the said subject matter.
26. In other words, if the Review Petition raises several distinct issues and the some are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. If this is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that the issue has been decided in the main order itself.
27. So, it would be appropriate for the party only to file the Appeal as against the main order and not against the rejection of the order passed in the Review Petition.
28. According to the Respondent, if the submissions of the Appellant to the effect that since the Review was partly allowed, the entire tariff order stands merged with the Review Order is accepted, there will be serious consequences and ramifications.

29. The learned Counsel for the Respondent has pointed the said ramifications which are as follows:

(a) The Tariff Order having merged with the Review Order will cease to exist and consequently, the Review Order will be the only operative order. In such an event, the Appellant will be precluded from challenging the aforesaid issues (a) and (b) on merits. In such a scenario that the Appellant is effectively seeking a determination of whether the review was correctly rejected by the CERC or not, which is not permitted.

(b) In the event of the Tariff Order is said to have merged with the Review Order in its entirety, no appeal can be filed against the part of the review order wherein the review has been rejected. The same is on account of the fact that reviews being a creature of the statute; the restrictions imposed under the statute on the remedy against the review order will also have to be given effect to. Further, the tariff order having merged with the Review Order also cannot be challenged. Hence, if the submissions of the Appellant are accepted the same will leave the Appellant remediless.

(c) Assuming that a separate Appeal was filed by the Appellant, after the filing of the Review Petition but before passing of the Review Order, challenging the Tariff Order on issues distinct from the issues raised in the Review petition, then the entire Tariff Order would merge with the Review Order and such an Appeal will become infructuous.

30. We find force in the submissions made by the Respondent. Therefore, we hold that doctrine of merger will not be applicable to the matters wherein the review has been rejected or to a case wherein the Review Petition has been partly rejected.

31. **Summary of Our Findings**

If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself. Thus, we uphold the objection regarding the Maintainability of the Appeal.

32. In view of our findings above, the Appeal is dismissed as not maintainable.

33. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 02nd Dec, 2013

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