

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**R.P. No. 7 of 2014 in
Appeal no. 28 of 2013**

Dated: 13th May, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

- 1. Bharat Aluminum Company LimitedReview Petitioner/
Balco Nagar, Korba Respondent no.2
Chhattisgarh – 495 678
Versus**
- 1. Chhattisgarh State Electricity Regulatory
Commission
Irrigation Colony, Shanti Nagar
Raipur – 492 001 (Chhattisgarh)**
- 2. Chhattisgarh State Power
Distribution Co. Ltd.
Vidyut Seva Bhavan, Danganiya
Raipur, Chhattisgarh – 492 013Respondent(s)/
Appellant(s)**

**Counsel for the Review Petitioner(s)/ : Mr. Prashanto Chandra Sen
Respondent no.2 Ms. Rajkumari Banju**

**Counsel for the Respondent(s): Mr. C.K. Rai
Appellant(s) Ms. Suparna Srivastava**

ORDER

RAKESH NATH, TECHNICAL MEMBER

This Review Petition no. 7 of 2014 has been filed by Bharat Aluminum Company Limited for Review of judgment of this Tribunal dated 2.1.2014 in Appeal no. 28 of 2013 on the ground that there is error apparent on the face of the record.

2. The Review Petitioner/Respondent no.2 has stated that the finding of the Tribunal that the relief of annual overhauling for outage of unit 3 and 4 would not qualify for force majeure is an apparent error as the Review Petitioner had made a claim for annual overhauling as statutory entitlement and not as a force majeure condition in Petition no. 55 of 2010. The claims were made separately for annual overhauling and incidence

of force majeure. The Tribunal has found in the impugned judgment that the dispensation allowed in order dated 30.4.2010 for the period 2010-11 for the PPA entered into for a period of one year could not be applied in the present case. This is also is an apparent error as the order dated 30.11.2012 of the State Commission while allowing the relief of annual overhauling to the Review Petitioner/Respondent no. 2 had only applied analogy in the order passed by the State Commission dated 22.6.2010. Therefore, order dated 30.4.2010 was not applied retrospectively to the PPA for FY 2009-10 while giving relief in the order dated 30.11.2012 as concluded by the Tribunal. According to the Review Petitioner, there is nothing in the law which prevented the State Commission from complying with the reasoning and logic of the order dated 30.4.2010 which the State Commission was

aware while passing the order dated 22.6.2010 which in turn was reaffirmed in the order dated 30.11.2012 by a reasoned order as stated above.

3. According to the Respondent, there was no error apparent on the face of the record of the impugned judgment and the remedy in the present case lies only by way of a statutory Appeal under Section 125 of the Electricity Act, 2003.
4. We have heard the Learned Counsel for the parties and have carefully considered the submissions made by them.
5. We find that the whole controversy in the matter had begun when definition of force majeure was modified in the PPA for power supply during FY 2009-10 with

respect to the PPA for the FY 2008-09. The PPA for the period of supply from 20.9.2008 to 31.3.2009 included the annual overhauling and major generator/equipment of breakdown as event of force majeure to be considered for calculation of load factor. However, in the subsequent PPAs for the period 2009-10 the distribution licensee included only annual overhauling in the force majeure but excluded the situation of generator/equipment breakdown from its purview. Aggrieved by non-inclusion of major breakdown in force majeure and consequently in calculation of load factor, the Review Petitioner/Respondent no. 2 had filed a petition before the State Commission praying *interalia* for a direction to the distribution licensee to adhere to the definition of force majeure as defined in the PPA dated 12.3.2009 for the period 20.9.2008 to 31.3.2009. The State Commission by order dated 22.6.2010

interalia directed the distribution licensee to amend the definition of force majeure and bring it in line with the definition contained in the Grid Code. It was made clear in the order dated 22.6.2010 that the annual overhauling being a statutory requirement already known to the generator could not be considered to be covered under force majeure.

6. This Tribunal in the impugned judgment has found that the State Commission's findings in the impugned order dated 30.11.2012 were in contravention of its findings in its order dated 22.6.2010 which had already attained finality and the State Commission had re-examined and re-adjudicated the issue regarding covering annual overhauling in force majeure condition for calculation of load factor in the impugned order dated 30.11.2012 which was already decided in its order dated 22.6.2010

thus acting in contravention of the principle of res judicata. The Tribunal also held that the period of annual overhauling was to be planned in advance and the Captive Power Plant was expected to agree for contracted supply to the distribution licensee taking into account the overhauling of its units during the period of supply during the FY 2009-10. The directions of the State Commission in the order dated 22.6.2010 were also noted by the Tribunal which did not include any relief on account of annual overhauling to be given for calculation of the load factor.

7. The contention of the Review Petitioner is that annual overhauling may not be considered as force majeure but they should be given benefit on account of annual overhauling as decided in the order dated 30.4.2010 in calculation of load factor..

8. We do not agree with the Review Petitioner since this could not be the valid reason for review of the impugned judgment. The issue before the Tribunal was that the matter had been decided by the State Commission by order dated 22.6.2010 and the same was to be implemented. The Tribunal decided the Appeal based on the findings of the State Commission in the order dated 22.6.2010.
9. In view of above, we do not find any error apparent on the face of the record in the impugned judgment. Accordingly, the Review Petition is dismissed.
10. Pronounced in the open court on this **13th day of May, 2014.**

(Rakesh Nath)
Technical Member

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(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NON-REPORTABLE

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