

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

REVIEW PETITION NO. 02 OF 2019 & IA NO.167 OF 2019
IN
APPEAL NO. 359 OF 2017 AND APPEAL NO. 336 OF 2017

Dated: 24th April, 2019

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

IN THE MATTER OF:

Rama Shankar Awasthi,
301, Surbhi Deluxe Apartments,
6/7 Dalibagh, Lucknow – 326 001 ...**REVIEW PETITIONER/APPELLANT**

Versus

1. Lanco Anpara Power Limited
Through its Chairman
411/9a, River Side Apartments
New Hyderabad, Lucknow-226 007
2. Uttar Pradesh Power Corporation Limited
Through its Chairman
7th Floor, Shakti Bhawan,
14, Ashoka Road,
Lucknow – 226 001
3. Uttar Pradesh Electricity Regulatory Commission
Through its Secretary
2nd Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Kant
Lucknow – 226 010

....RESPONDENTS

Counsel for the Review Petitioner/
Appellant(s) : Ms. Ranjitha Ramachandran
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. S.B. Upadhyay, Sr.Adv.
Mr. Sakya Sangha Chaudhry
Mr. Avijeet Lala
Ms. Astha Sharma
Ms. Shikha Pandey for R-1

Mr. Rajeev Srivastava for R-2

Mr. C.K.Rai
Mr. Sachin Dubey for R-3

J U D G M E N T

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

1. The present Review Petition has been filed in the light of the order dated 14.01.2019 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 11925-11926 of 2018 filed by the Review Petitioner prayed to review the common judgment and Order dated 07.09.2018 passed in Appeal No.359 of 2017 and connected Appeal No.336 of 2017 and interim applications filed thereunder.

2. The Order of the Hon'ble Supreme Court read as under:-

*“Learned counsel for the appellant seeks leave of this Court to withdraw the civil appeals to approach the Tribunal by way of review or rectification etc. and, in the event, if it becomes necessary, the appellant be given liberty to approach this Court once again. Liberty is granted.
The civil appeals are dismissed as withdrawn.”*

3. The Review Petitioner has prayed as under:-

a) admit the review petition;

- b) review, modify and rectify the errors in the judgement and order dated 07.09.2018 passed in Appeal No.359 of 2017 and connected Appeal No.336 of 2017 and set aside the judgement and order dated 16.08.2017 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition Nos. 871 and 891 of 2013 and the Review Petition No.1062 of 2015 and 1104 of 2016;
- c) allow cost of the review petition;
- d) pass any such further order or orders as deemed just and proper in the circumstances of the case.

4. The Propositions on behalf of the Review Petitioner are as follows:-

PROPOSITION I: EXERCISE OF APPELLATE POWERS

5. There is an error apparent on the face of record and there are otherwise sufficient cause for reviewing and rehearing the matter. The order dated 07.09.2018 passed by this Tribunal is not consistent with the basic principles for exercise of powers by the First Appellate Authority. In support of the proposition, the Review Petitioner relies on the following cases:
- (a) U. Manjunath Rao –v- R. Chandrasekhar (2017) 15 SCC 309-
Paras 6,7,12-16
 - (b) Kranti Associates (P) Limited -v- Masul Ahmed Khan (2010) 9
SCC 496-**Para 47**
 - (c) A.M.Sangappa –v- Sangondeppa and Anr. (2013) SCC Online
SC 1013-**Paras 6-8**

- (d) S.N.Mukherjee –v- Union of India (1990) 4 SCC 594-**Para 10 onwards**
- (e) West Bengal Electricity Regulatory Commission –v- CESC Limited (2002) 8 SCC 715-**Para 102**

6. The order dated 07.09.2018 suffers from an error apparent on the face of record in regard to other aspects as detailed under the propositions hereunder.

PROPOSITION II:GRANT OF RELIEF TO LANCO ON THE BASIS OF INADEQUATE PAYMENT SECURITY MECHANISM IS PATENTLY ERRONEOUS

7. The grant of relief to Lanco on the basis of inadequacy of the payment security mechanism is patently erroneous for the reasons:
- (a) The Tribunal has proceeded on the wrong basis that the Expert Committee earlier appointed had considered the issue and the State Commission has allowed it after critical evaluation. Whereas, the Expert Committee, in fact, concluded the claim on account of payment security mechanism/letter of credit has been covered under Article 4.9 dealing with right to sell power to third parties;
 - (b) The Expert Committee did not hold that there was frustration of contract as per Section 56 of the Indian Contract Act, 1872;
 - (c) The frustration of contract dealt under Section 56 of the Indian Contract, 1872 would mean impossibility of the performance of the contract. The impossibility leading to frustration has been dealt in Satyabratha Ghose –v- Mugneeram Bangur AIR 1954 SC

44; Naihati Jute Mills Limited –v- Khyaliram Jagannath AIR 1968 SC 522 and Energy Watchdog –v- Central Electricity Regulatory Commission (2017) 14 SCC 80.

- (d) It has also been held that where a contract makes provision that is full and complete to deal with the contingency, it is not for the Court/Tribunal to import into the contract some other different proposition.
- (e) The Tribunal, though refers to the above decisions cited in the case **in Para 9.17 at Page 160**, has not dealt with the same and the conclusion reached by the Tribunal on the above aspect is contrary to the settled principles and law laid down by the Hon'ble Courts.
- (f) In any event, Article 10.9 of the PPA speaks about Default Security Agreement being the payment security mechanism and letter of credit being merely a standby payment mechanism. The remedies for non-availability of payment security mechanism is under Article 4.9 and 10.3.5 of the PPA.
- (g) Frustration of contract cannot possibly lead to payment of higher tariff and continuation of contract.
- (h) Therefore, the payment security mechanism/letter of credit aspect has no result of contract being frustrated.
- (i) The earlier order dated 23.11.2015 passed by the State Commission dealing with the Expert Committee did not grant any relief on payment security mechanism.

**PROPOSITION III: GRANT OF RELIF ON ACCOUNT OF NCDP, 2007
IS PATENTLY ERRONEOUS**

8. The New Coal Distribution Policy/NCDP, 2007 cannot lead to grant of relief of under-recovery of fixed charges, variable charges or compensation for higher secondary oil consumption and at the most can lead to payment for procurement of coal from alternative sources, which in fact, is admissible and being duly paid by UPPCL under the PPA. Schedule 8 of the PPA executed between Lanco and UPPCL already provides for the actual cost of coal to be paid by UPPCL to Lanco.
9. In the above, the effect of NCDP of reducing the level of coal availability from the linked mines under the FSA entered into for supply of coal from the linked mines was already provided for in the bidding process in which Lanco was selected. The bid process adopted was Case II Competitive bid process in which actual cost of coal is a pass through, subject to prudence check.
10. The claim considered and allowed by the State Commission and upheld by this Hon'ble Tribunal is, however, not in regard to the actual cost of coal to be allowed.
11. The above claims of Lanco are premised on the basic allegation that generation and sale of electricity by Lanco was 100% envisaged and stipulated to be from the coal availability from Khadia Mines only and use of coal, domestic or imported, from other sources was never envisaged.
12. If the above premise is wrong (which the Review Petitioner submits that the premise is patently erroneous), there cannot be any claim for

non-availability of coal from Khadia Mines of the nature such as under-recovery of fixed charges, fuel charges and also higher secondary oil charges.

13. The errors apparent on the face of the record for the Tribunal to uphold the decision of the State Commission allowing such claims are as under:

(a) The claims made by Lanco are fundamentally wrong inasmuch as there was no stipulation in the bidding process that Lanco was entitled to rely on coal availability from Khadia Mine for 100% of its coal requirement or that the coal will only be sourced through Merry Go Round (MGR) system. In this regard, following documents are relevant:

- i. Orders dated 19.10.2005 and 06.02.2006 passed by the State Commission which stands incorporated both in the revised RFP and in the PPA in terms of Article 20.14;
- ii. Revised Request for Proposal (Revised RFP) dated 20.02.2006 issued by UP Vikas Nigam inviting the proposal;
- iii. PPA dated 12.11.2006 providing for the fuel arrangement to be the responsibility of and conditions subsequent to be satisfied by Lanco;
- iv. Fuel Supply Agreement (FSA) dated 23.04.2012 entered into between Lanco with Northern Coalfields Limited (NCL) providing for supply of fuel can be from sources other than

Khadia mines and the transportation of coal to be by Rail or Road and not exclusively by Merry Go Round (MGR) System. The FSA is referred to in Article 3.1.2 (P) read with definition of the term 'Fuel Supply Agreement' in Article 1 and Article 7.10 of the PPA; and

- v. Fuel Policy dated 28.09.2012, referred to in Article 7.9 of the PPA, also providing for the procurement of fuel from sources other than Khadia mines involving rail and road transportation

14. In the light of the above, there cannot be any two opinion that the fuel risk was of Lanco and further Lanco knew right from the beginning when it participated in the Competitive Bid Process that the total coal requirement may not be available from Khadia Mine and Lanco may be required, from time to time, to source coal from other domestic sources or through import and therefore, Lanco ought to have established the infrastructural facilities right from the beginning.
15. In the Order dated 07.09.2018, the Tribunal has generally referred to the Expert Committee Report and has concluded that on account of NCDP there has been consequential major deviation relating to coal and coal related logistics and the relief considered by the State Commission based on the recommendation of the Expert Committee appears to be just and fair for which cogent reason has been given by the State Commission.
16. On the aspect of secondary oil, the decision of the Tribunal as well as the State Commission is contrary to the Clause 4.2 of the Guidelines and Article 7.9 (1) of the PPA and Schedule 8 of the PPA.

The decision, not considering the above stipulation in the Guidelines and the PPA, cannot be sustained in terms of the law laid down decision in Energy Watchdog–v- Central Electricity Regulatory Commission (2017) 14 SCC 80.

PROPOSITION IV: EXERCISE OF REGULATORY POWERS BY THE STATE COMMISSION

17. The Hon'ble Tribunal has held that the general regulatory powers are not done away in its entirety.
18. It is, however, not clear whether exercise of general regulatory powers can be only in terms of Paras 19 and 20 of the Energy Watchdog case (supra) or regulatory powers can also be exercised to grant compensatory tariff.
19. The exercise of regulatory powers is not permissible in matters which are specifically dealt in the guidelines and are fleshed out in the PPA in terms of Paras 19, 20, 50 and 58 of the Energy Watchdog case (supra).

MISCELLANEOUS

20. The Tribunal has distinguished its earlier decision dated 17.05.2018 in Appeal No. 283 of 2015 in Nabha Power Limited –v- Punjab State Power Corporation Limited and Anr.
21. The decision in Nabha Power case lays down the principle of law that regulatory powers cannot be exercised in matters where the Guidelines and PPA provisions deal with the same aspect, taking into effect the decision in Energy Watchdog case.

22. There are certain other issues raised by the Review Petitioner and UPPCL have not been considered by this Tribunal and no findings in respect of those issues has been given by this Tribunal. These are:

- (a) In the earlier order dated 23.11.2015, the State Commission had given the reliefs only for the period from the date of the Order dated 23.11.2015 i.e. but in the order dated 16.08.2017, the relief has been given retrospectively from 12.02.2013 and thereby increasing the quantum without any justification or cause.
- (b) In the earlier order dated 23.11.2015, the State Commission had reduced the return on equity by 0.5%, but in the order dated 16.08.2017, the reduction of 0.5% has been excluded and thereby increasing the quantum without any justification or cause.

These aspects need to be considered by the Tribunal as there is no justification in the decision of the State Commission in allowing such claims in the order dated 16.08.2017.

23. In the circumstances mentioned above, it is submitted that there are errors apparent on the face of record and otherwise there are sufficient grounds for exercise of the review jurisdiction and rectifying the order. Reference in this connection be made to the following:

- (a) Board of Control for Cricket in India–v-Netaji Cricket Club (2005) 4 SCC 741-**Para 19, 88 to 92**
- (b) Dhanani Shoes Limited –v- State of Assam and Others [2008] 16 VST 228 (Gau)-**Para 21-32**
- (c) Moran MarBasseliosCatholicos and Anr. –v- The Most Rev. Mar PoulouseAthanasius and Ors., (1955) 1 SCR 520-**Para 6, 22-23**

- (d) Thungabhadra Industries Ltd. –v- The Government of Andhra Pradesh, (1964) 5 SCR 174- **Para 8, 17-18**
- (e) Rajender Singh –v- Lt. Governor, Andaman and Nicobar Islands and Ors., (2005) 13 SCC 289- **Para 13 and 14**
- (f) Green View Tea and Industries –v- Collector, Golaghat, Assam and Anr.(2004) 4 SCC 122- **Para 14 and 15**

24. Shri Sakya Singha Choudhry, the learned counsel appearing for the Respondent No.1 has filed the written submissions for our consideration as follows:-

24.1 The present Review Petition filed by the Review Petitioner is not maintainable in law and is devoid of merits as the issues raised by the Review Petitioner have already been dealt with by this Tribunal vide order dated 07.09.2018 passed in Appeal No. 359 of 2017 and Appeal No. 336 of 2017 [**“Impugned Order”**]. No new facts, new grounds, nor any error apparent on the face of the record nor other sufficient reasons have been pointed out by the Review Petitioner in the instant review petition.

24.2 It is settled position of law that fresh adjudication and fresh evaluation on merits under the garb of a review petition is impermissible under law. A Review Petition cannot be disguised as an appeal.

24.3 Error apparent on the face of the record constitutes an error which is self – evident and does not require a process of reasoning to be found. It constitutes a material error, manifest on the face of the order and not an error which has to be fished out and searched. In other words, error apparent on the fact of the record constitutes an error of

inadvertence, which can be decided merely by perusal of the records and requires no rehearing.

25. The Hon'ble Supreme Court of India has laid down the following principles in ***Kamlesh Verma v. Mayawati and Ors. (2013) 8 SCC 320***:

“20.1. When the review will be maintainable:

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

The words “any other sufficient reason” have been interpreted in Chhajju Ram v. Neki[(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] 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. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

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 negative.

....”

Also, The Hon'ble Supreme Court has laid down principles of review in **State of West Bengal vs. Kamal Sengupta 2008 (8) SCC 612** as follows:

“35. The principles which can be culled out from the above noted judgments are:

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.)”

26. The grounds for review raised by the Review Petitioner are as under:
- A. Implications of NCDP
 - B. Inadequate Payment Security Mechanism
 - C. Exercise of Regulatory Powers
 - D. Non – consideration of certain issues

A. **IMPLICATIONS OF NCDP:**

27. The Review Petitioner has challenged the Impugned Order dated 07.09.2018 passed by this Tribunal on the ground that the relief allowed by this Tribunal in relation to change in law on account of the issue of NCDP is erroneous as:

- (i) it is not as per the provisions of the contract; and

(ii) this Hon'ble Tribunal has not considered the documents put on record by the Review Petitioner to demonstrate the relief available to LAPL under the contract on account of change in law.

The Review Petitioner has argued that the relief under the PPA for change in law would not cover the deemed fixed charges, deemed variable charges, higher secondary fuel oil consumption, and additional capital cost. The PPA envisaged that coal was the responsibility of LAPL and even if change in law relief is allowed, it can at best be the actual cost of coal procured from alternate source.

28. In response, it is submitted that the above ground of review is not maintainable as this ground raised in the Review Petition amounts to rearguing the merits of the matter. The Review Petitioner is effectively seeking a re-consideration of entire issue on merits, which is clearly beyond the scope of review;

29. This issue has been argued extensively by the Review Petitioner by referring to the relevant clauses of the PPA as well as various documents exhibited during the course of arguments in support of such contentions. The arguments of the Review Petitioner have been recorded in detail by this Tribunal in the Impugned Order at paragraphs 6.17-6.35. The Tribunal has dealt with each of these arguments and counter arguments on behalf of Respondent no. 1/

LAPL while delivering its decision under Issue no. 1 at paragraph 8.1-8.10. It is relevant to note that paras 8.7 deals with the issue of responsibility of coal under the bid documents while para 8.8 specifically relates to the provisions of Fuel Policy along with the PPA to uphold the relief granted to Respondent no. 1/ LAPL. Para 8.9 also highlights the fact that the Expert Committee did not compensate Respondent no. 1/LAPL on cost plus basis but only covered losses that had been suffered by Respondent no. 1/LAPL *iner-alia* on account of NCDP.

- 30.** Even otherwise, the Chairman of Respondent no. 2/ UPPCL vide letter D.O. No. 1034/PPA/UPPCL / Lanco Anpara 'C' dated 10.03.2016 addressed to CMD, Coal India Ltd. itself admitted that availability of coal was the sole responsibility of the procurer viz. Respondent no. 2/ UPPCL and UP Discoms. Relevant extracts of the said letter are reproduced as under:

"3. Lanco Anpara "C" project was allocated to M/S LAPL through case-2 competitive bidding guidelines vide no.23/11/2—4-R&R (vol 2) dated 19.01.2005 as follows:-

2.2 The guidelines shall apply for procurement of base load, peak-load and seasonal power requirements through the following mechanism.

1. (i) [For Case-I Not Applicable]

2. (ii) For hydro-power projects, load center projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process. (Case-2)”

* Therefore, for case-2 based project, availability of coal is sole responsibility of procurer.

In case of project established in case-2, Ministry of coal vide OM dated 26.12.2014 has disallowed to participate in allocation of coal block auction as follows:-

“For existing generation capacity contracted through bid based PPAs (Case-2), arranging fuel is the responsibility of power procurer. Such case-2 capacities shall not be eligible to participate in the auction process for the coal blocks.”

4. a) M/s LAPL project is a pit head project for which coal linkage was sanctioned from Khadia extension mines and transportation of coal was to take place through MGR system constructed for Anpara ‘A’ & ‘B’ TPS through BOBR wagaons.

b) Later on, due to new distribution policy declared by coal ministry, Government of India, they were constrained to sign Agreement on the basis of coal supply agreement policy of CIL, due to which they agreed the proposal of coal supply from various NCL mines instead of Khadia extension linked mines.

c) The effect of change in coal linkage was so hard that the PLF of LAPL project for 270 days w.e.f. commissioning was very less than 65% (40%) due to less availability of coal supply from linkage coal of NCL. In view to run the machine from the coal received from other sources (domestic/imported coal), the coal quality/logistics were changed, hence this badly influenced the technical capability of units.

5. In the year 2014-15, UPPCL purchased 6954.513590 MU energy @ Rs.3.374/Kwh of Rs.2346.45 Crs. From M/s LAPL. Had M/s LAPL been not sustainable, he state would have procured such energy from case-I project or from other sources to meet out the shortage of long term RTC energy.

7. To ensure viability and sustainability of machines of M/s LAPL, in spite of Compensatory tariff, UP Electricity Regulatory Commission

directed that Government of UP and UPPCL should ensure entire supply of coal from khadia mines as envisaged in the RFP/PPA.

In view of huge advantage in term of lower tariff of M/s L.A.P.L. and thereby huge saving to U.P.P.C.L. due to low tariff, I will be highly obliged if you can kindly consider the full materialization of coal from Khadia mine through MGR system through BOBR wagons to M/s L.A.P.L. as envisaged in the RFP/PPA”.

31. Also, Managing Director of Respondent no. 2/ UPPCL was a member of the Expert Committee, which acknowledged the defaults of Respondent No. 2/ UPPCL with respect to the project developed by Respondent no. 1/ LAPL. (*Pg. 489, Annexure F of Additional Documents filed by Respondent no.1/ LAPL filed in Appeal No. 336 of 2017*)

B. **INADEQUATE PAYMENT SECURITY MECHANISM**

32. The Review Petitioner has argued that the findings of this Tribunal with regard to relief for non-establishment of Payment Security Mechanism (“**PSM**”) is erroneous since -

- (i) there was no basis for the Ld. State commission to reach the conclusion that Respondent no. 2/ UPPCL at the time of bidding was guilty of frustrating the contract as Respondent no. 2/ UPPCL had offered PSM; and

- (ii) that this Tribunal failed to consider that the Expert Committee did not hold that there was frustration of the contract as per Section 56 of the Indian Contract Act.
- 33.** In response, it is submitted that the contentions of the Review Petitioner are devoid of any merit as these grounds of Review raised by the Review Petitioner are in the nature of ground of appeal challenging the findings of this Tribunal on merits.
- 34.** It is submitted that the Review Petitioner has failed to demonstrate any error apparent on the face of record and therefore no case of review is made out.
- 35.** The issue of payment security mechanism and the relief provided thereunder has been discussed in detail from para 6.36 – 6.49 and 7.12 of the Impugned Order. Further, this Tribunal has dealt with this aspect under Issue no. 2 at para 9.1-9.18 of the Impugned Order. The Review Petitioner is now in fact seeking a re-consideration of the finding of this Tribunal on merits, which is not allowed under the review petition.
- 36.** The very ground that the Ld. State Commission has allowed relief under the principles of frustration even though the same was not recommended by the Expert Committee is nothing but an argument of

convenience on the part of the Review Petitioner. Reference is made to Ground A of the Appeal of the Review Petitioner where the order of the Ld. State Commission was challenged on the ground that the Ld. State Commission has merely reiterated the conclusions of the Expert Committee without any application of mind. Therefore, while on the one hand the order of the Ld. State commission has been challenged by the Review Petitioner as a mere reiterating of the findings of the Expert Committee, in the same breath, the Review Petitioner is now challenging the order of the Ld. State Commission from deviating from the recommendation of the Expert Committee. This amounts approbation and reprobation which is impermissible under law.

- 37.** The Expert Committee was vested with the duty of working out the compensation payable to Respondent no. 1/ LAPL having regard to the various facts of the case leading to change in law and on compliance of PSM clauses. It was not binding on the Ld. State Commission to accept all recommendations of the Expert Committee. The Ld. State Commission has adopted only such recommendations after due application of mind and has disallowed various other recommendations made by the expert committee, which are listed herein below:

- i. A sum of Rs. 282.56 crores recommended by the Expert Committee and earlier allowed by the Ld. State Commission on account of increase in interest during construction was disallowed by the Ld. State Commission in the order dated 16.08.2017;
- ii. On the basis of the Expert Committee's recommendations, the Ld. State Commission had earlier allowed Rs. 282 Crore to Respondent no. 1/ LAPL on account of variation in Foreign Exchange. However, the same has been disallowed on re-examination in the Order dated 16.08.2017 passed by the Ld. State Commission.

C. EXERCISE OF REGULATORY POWER:

- 38.** It is the case of the Review Petitioner that where there are guidelines dealing with a certain issue, the Ld. State Commission/ Central Commission cannot exercise regulatory powers to grant relief with respect to those issues.
- 39.** In response, it is submitted that the contentions of the Review Petitioner are devoid of any merit as these grounds of Review raised by the Review Petitioner are in the nature of ground of appeal challenging the findings of this Tribunal on merits.

40. The Review Petitioner has failed to demonstrate any error apparent on the face of record and therefore no case of review is made out.
41. The issue of exercise of regulatory powers and the relief provided thereunder has been discussed in detail from para 6.1 – 6.16 and 7.14 of the Impugned Order. Further, this Tribunal has dealt with this aspect under Issue no. 3 at para 10.1- 10.26 of the Impugned Order. The Review Petitioner is now infact seeking a re-consideration of the finding of this Tribunal on merits, which is not allowed under the review petition.
42. Even otherwise, it is submitted that the relief granted to Respondent no. 1/ LAPL is under the provisions of the PPA and under the general principles of law, not in exercise of the regulatory powers.

D. NON- CONSIDERATION OF CERTAIN ISSUES:

43. The Review Petitioner has challenged the Impugned Order on the ground that this Tribunal has upheld relief granted to Respondent no. 1/ LAPL retrospectively with effect from 12.02.2013, when the relief in the earlier round was granted by the Ld. State Commission from the date of the order i.e. 23.11.2016, such as:-
- i. In the earlier order dated 23.11.2015, the Ld. State Commission had given reliefs only for the period from the date of the Order dated 23.11.2015, but in the order dated 16.08.2017, the relief granted has been given retrospective

effect from 12.02.2013, thereby increasing the quantum without any justification or cause;

- ii. In the earlier order dated 23.11.2015, the Ld. State Commission had reduced the return on equity by 0.5%, but in the order dated 16.08.2017, the reduction of 0.5% has been excluded and thereby increasing the quantum without any justification or cause.

44. In response, it is submitted that such ground does not merit any consideration since this aspect has been dealt with by the Ld. State Commission as well as this Tribunal. In this regard, reference is made to the Ld. State Commission's views with regard to compensation from 12.02.2013 at internal page 104 of the Order dated 16.08.2017 passed by the Ld. State Commission. Further, this aspect was also dealt in detail at paras 6.82-6.84, 7.4-7.6 and 9.18.
45. It is pertinent that this Tribunal at para 7.6 has taken note of the fact that even after issuing notice of termination on 11.02.2013, Respondent no. 1/ LAPL continued to supply power to Respondent no. 2/ UPPCL pursuant to directions of the Ld. State Commission. Such being the case, the Ld. State Commission had rightly compensated Respondent no. 1/ LAPL for losses caused to it after issue of notice of termination on 11.02.2013, which has been upheld by this Tribunal.
46. As regards, the non- consideration of the issue of return on equity, it is submitted that the Ld. State Commission while passed the order dated 16.08.2017 has considered the matter de-novo, in stand alone context. It is reiterated that while on the one hand the order of the Ld. State commission has been challenged by the Review Petitioner as a mere reiterating of the findings of the Expert Committee, in the same breath,

the Review Petitioner is now challenging the order of the Ld. State Commission from deviating from the recommendation of the Expert Committee. This amounts approbation and reprobation which is impermissible under law. Ld. State Commission while passing order dated 16.08.2017, has freshly applied its mind to the facts, pleading of the parties, and thus have also disallowed certain claims which were earlier allowed by the Ld. State Commission in its order dated 23.11.2015, as already mentioned above.

- 47. We have heard learned senior counsel, Mr. M.G. Ramachandran for the Review Petitioner / Appellant and learned senior counsel, Mr. S.B. Upadhyay for Respondent No.1 /Lanco at considerable length of time and we have gone through carefully the written submissions. The issues now raised in the instant Review Petition duly deliberated and considered in the subsequent paras are as follos:-**

Our Consideration & Findings:-

- 48.** The Review Petitioner, Mr. Rama Shakar Awasthi had filed its main Appeal No.359 of 2017 which was adjudicated along with companion Appeal NO.336 of 2017 filed by Uttar Pradesh Power Corporation Ltd.. Both these appeals were decided by a common judgment dated 07.09.2018 as the issues involved in both the Appeals were similar in nature and had arisen out of the same impugned order of UPERC. The said appeals were adjudicated after careful considerations of the submissions and pleadings of all the parties and also taking note of the findings of the State Commission in the impugned order dated 16.08.2017. It is further brought out that the above impugned order of the State Commission had been passed in pursuance of the remand

order dated 30.11.2016 passed by this Tribunal in Appeal No.173 of 2016.

49. After thorough critical evaluation of the issues involved in the Appeals, three issues were framed by this Tribunal requiring evaluation and adjudication. The Review Petitioner in the instant Review Petition is aggrieved on all the three issues due to one or the other reason mainly not finding a favourable view of his choice against the Respondent/LAPL. Interestingly, Uttar Pradesh Power Corporation Ltd. who is the main Respondent and was main Appellant in the original Appeal has not redressed any grievance against the impugned judgment and order dated 07.09.2018 and we are informed that they have implemented the findings of the State Commission as affirmed by this Tribunal vide the above referred judgment.

50. The Review Petition preferred by the Appellant though said to be in pursuance of the order dated 14.01.2019 passed by the Hon'ble Supreme Court, however, admittedly the Review Petition would need to be adjudicated under Section 120 (2)(f) of the Electricity Act, 2003 which reads 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;

- 51.** 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.
- 52.** In the host of judicial judgements, it has been held that the error contemplated for exercise of the review jurisdiction is an error which renders a judicial decision as manifestly incorrect. It is not the case that there is anything error or omission as sought to be contended by the Review Petitioner purportedly in respect of the judgment dated 07.09.2018 in Appeal Nos.359 of 2017 & 336 of 2017 which according to the review petitioner requires exercise of review jurisdiction by this Tribunal.
- 53.** 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 as following two main criteria is to be satisfied for entertainment for a review petition:-

- (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.*

54. 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 seeking 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

55. 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

56. 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 any additional nor fresh ground has been made by the Review Petitioner now which otherwise substantiate its pleadings for reviewing the judgment dated 07.09.2018 and passing any modified judgment therein.
57. We have gone through all the materials placed before us relating to the original Appeals 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.

- 58.** During the original proceedings in main appeals, the main Respondent/UPPCL has categorically indicated that Lanco Anpara Project was allocated to M/s LAPL thorough Case-II biddings and availability of coal was sole responsibility of procurer/UPPCL. It has been duly acknowledged by the State Commission as well as UPPCL on a number of occasions as also evident from the CMD, UPPCL's letter dated 10.03.2016 (stated supra) that the reference project of LAPL provides one of the cheapest power to the consumers of U.P. State and thereby renders huge saving to UPPCL. Keeping all these aspects in view to ensure viability and sustainability of LAPL project, in spite of compensatory tariff, the State Commission directed that Govt. of Uttar Pradesh and UPPCL should ensure entire supply of coal from Khadia mines as envisaged in the RFP/PPA.
- 59.** 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.

Therefore, we are of the considered view that there is no merit in the Review Petition No.02 of 2019 in Appeal Nos.359 of 2017 and 336 of 2017 and is accordingly dismissed as devoid of merit.

60. Needless to say, the pending IA, if any, shall stand disposed of.

61. Parties to bear their own costs.

Pronounced in the open court on this 24th day of April, 2019.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~