

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Review Petition No.12 of 2012

IN

Appeal No. 17 of 2012

Dated: 17th April, 2013

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

In The Matter Of
Ajmer Vidyut Vitran Nigam Limited.,
Hathibhata Power House,
Ajmer-305 001
Rajasthan

Appellant/Review Petitioner

Versus

- 1. Rajasthan State Electricity Regulatory Commission**
Vidyut Bhawan, Jyoti Nagar,
Jaipur-302 005

- 2. Rajasthan State Mines & Minerals Limited,**
4, Meera Marg,
Udaipur-313 004
Rajasthan

....Respondent(s)

Counsel for Appellant(s):/
Review Petitioner

Mr. Shyam Moorjani
Mr. Shantanu Bharadwaj

Counsel for Respondent(s): Mr. C K Rai
Mr. Sudhanshy Palo
Mr. Ravin Dubey for R-1
Mr. P N Bhandari for R-2

ORDER

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

1. Ajmer Vidyut Vitran Nigam Limited, the Review Petitioner was the Appellant in Appeal No.17 of 2012. This Appeal was dismissed by this Tribunal by the judgment dated 20.9.2012.
2. Aggrieved by this judgment, the Review Petitioner/Appellant has presented this Petition for the review of the said judgment of this Tribunal.
3. The short facts are as under:
 - (a) The Review Petitioner is the Distribution Licensee in the State of Rajasthan. The State Mines and Minerals Limited, the Second Respondent, was the consumer of the Petitioner.
 - (b) In pursuance to the policy for promoting generation of power from the non conventional energy source issued

by the Government of Rajasthan, the State Mines and Minerals Limited (R-2) set up various Wind Energy Power Plants in Rajasthan. Wheeling and Banking Agreements were entered into between the Petitioner and the Second Respondent.

- (c) A dispute arose between the Petitioner and State Mines and Minerals Limited (R-2) in respect of wrong adjustments made by the Petitioner relating to wheeled energy of the wind generator for captive consumption by starting a new accounting system.
- (d) Challenging this wrong adjustment on the basis of new accounting system, the State Mines and Minerals Limited (R-2) filed a Petition before the Rajasthan State Commission praying for the declaration that the change of procedure by way of new accounting system and the consequent adjustment made by the Appellant was wrong.
- (e) The State Commission after hearing the parties allowed the said Petition holding that the change of procedure adopted by the Petitioner/Appellant was wrong and accordingly set-aside the said billing procedure by the order dated 4.11.2006.

- (f) Thereupon, the Petitioner/Appellant filed a Review Petition before the State Commission which was ultimately dismissed by the order dated 13.4.2007.
- (g) As against these orders dated 4.11.2006 and 13.4.2007, the Petitioner/Appellant filed the Appeal before this Tribunal in Appeal No.74 of 2007. The said Appeal was ultimately dismissed by the majority judgment dated 5.8.2009 confirming the State Commission's order dated 4.11.2006 and 13.4.2007 and directing the Appellant to bill the State Mines and Minerals Limited (R-2) only in the old method applied before November, 2005. The Petitioner/Appellant against this judgment filed Writ Petition in Rajasthan High Court instead of filing the Appeal in the Supreme Court. On the pretext of the pendency of the Writ Petition, the Petitioner did not comply with the direction issued by the State Commission. Since the judgment dated 5.8.2009 rendered by this Tribunal giving directions to the Petitioner/Appellant was not given effect to, by the Petitioner/Appellant, the State Mines and Minerals Limited(R2) filed a Petition before the State Commission u/s 142 read with Section 86(1) of the Electricity Act praying for the compliance of the

orders of the State Commission dated 4.11.2006 and for refund of the amount wrongly adjusted which was confirmed by the Appellate Tribunal.

- (h) However, the State Commission without considering the majority judgment of this Tribunal dated 5.8.2009 simply dismissed the said Petition by the order dated 6.1.2011 on the ground that though by the order dated 4.11.2006, the State Commission set aside the change of billing procedure, no specific directions were given with regard to refund of the amount wrongly adjusted in the said order and hence the Petition under Section 142 was not maintainable.
- (i) The State Mines and Minerals Limited (R-2) aggrieved by the said order dated 6.1.2011 rejecting the prayer for directing the Petitioner/Appellant to refund the amount wrongly adjusted, filed a Petition for review of the order on the ground that the State Commission in the order dated 6.1.2011 failed to take into consideration the judgment of this Tribunal giving the consequent directions to the Petitioner/Appellant while confirming the order passed by the State Commission dated 4.11.2006.

- (j) Having realised the mistake that the State Commission did not follow the direction issued by this Tribunal, the State Commission entertained the said Review Petition, heard the parties and corrected the mistake by following the Tribunal's judgment and granted the relief sought for by the State Mines and Minerals Limited (R-2) by giving a direction to the Petitioner/Appellant to refund the amount wrongly adjusted by the order dated 29.11.2011.
 - (k) As against this order, the Petitioner/Appellant has filed the Appeal before this Tribunal in Appeal No.17 of 2012. This Tribunal, after hearing the parties dismissed the Appeal by concluding that the impugned order passed by the State Commission dated 29.11.2011 allowing the Review Petition filed by the State Mines and Minerals Limited by giving a direction to the Petitioner/Appellant for refund of the amount wrongly adjusted, is justified.
 - (l) The Appellant, aggrieved over by this judgment has filed this Review Petition seeking to set-aside our judgment dated 20.9.2012 on various grounds.
4. The learned Counsel for the Review Petitioner/Appellant has argued on the following points:

- (a) This Tribunal while passing the impugned judgment dated 20.9.2012 has not taken into consideration all the contentions raised by the Review Petitioner/Appellant.
- (b) There was no specific order of refund made by the State Commission in the order dated 4.11.2006. This was not taken into consideration by this Tribunal.
- (c) The State Mines and Minerals Limited (R-2) had not prayed for refund of the adjusted amount and therefore question of ordering refund before the State Commission does not arise.
- (d) In the judgment dated 5.8.2009 rendered by this Tribunal, there was no specific direction for the refund of the amount. So, the reading of refund by implication in the judgment dated 5.8.2009 is totally erroneous.
- (e) Even assuming that the Tribunal had specifically ordered refund in its judgment dated 5.8.2009, the same would be '*per in curium*' and without jurisdiction.
- (f) The Petition under Section 142 of the Electricity Act, 2003 filed by the R-2 before the State Commission was not maintainable in terms of the provisions of Section 120 (3) of the Electricity Act, 2003 and therefore, the impugned order dated 29.11.2011 is without jurisdiction.

(g) The Writ Petition filed by the Review Petitioner as against the judgment dated 5.8.2009 before the Rajasthan High Court is a legal recourse. This Tribunal would not be competent to comment about the said legal recourse. It is only for the High Court or Hon'ble Supreme Court to comment on it. Taking legal recourse cannot be termed as a dilatory tactic.

5. On these grounds, the Review Petitioner seeks to review of the judgment of this Tribunal.

6. The learned Counsel for the State Commission as well as the State Mines and Minerals Limited (R-2) made their reply in justification of the judgment of this Tribunal.

7. The question that arises for consideration in this Review Petition is as follows:

“Whether any ground for review is made out by the Petitioner on the strength of the points urged by the Review Petitioner?”

8. Let us discuss this issue now. This Petition has been filed u/s 120 (2) (f) of the Electricity Act, 2003 for review of the judgment dated 20.9.2012. Let us refer to the said Section:

“120 Procedure and Powers of Appellate Tribunal:

(1).....

(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 (5 of 1908), while trying a suit, in respect of the following matters namely:-*

(a) to (e).....

(f) *reviewing its decisions;*

9. The above Section confers powers to this Tribunal to review its own orders or decisions which are the same powers vested in a civil court under the Civil Procedure Code while trying a suit.

10. The Civil Court while reviewing its order has to follow the provisions of Order 47 Rule -1 of the Civil Procedure Code. This is reproduced hereunder:

“1. Application for review of judgment: (1) Any person considering himself aggrieved-

(a) *By a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*

(b) *By a decree or order from which no appeal is allowed, or*

(c) *By a decision on a reference from a court of Small causes,*

(d) *And who from the discovery of new and important matter of evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the*

face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order”.

11. The very same provision would apply to this Tribunal as well.
12. In view of the above provisions, the Review is maintainable only on the following grounds:
 - (a) Discovery of a new and important matter of evidence which even after exercise of due diligence was not within the knowledge of the Petitioner;
 - (b) Discovery of new and important matter of evidence which even after exercise of due diligence could not be produced by the Petitioner during the original proceedings which culminated in the final order passed;
 - (c) Order made on account of some mistake or error apparent on the face of the record or any other sufficient reason.
13. Admittedly, the ground (a) and (b) would not apply to the present case. The learned Counsel for the Review Petitioner has argued the Review Petition on the basis of the ground(c).
14. In the light of the above, it has to be considered as to whether the ground raised by the Review Petitioner in this Review

Petitioner is sufficient to invite the restrictive jurisdiction of this Tribunal to review its judgment dated 20.9.2012.

15. Before considering the said issue, it would be appropriate to refer to various decisions rendered by the Hon'ble Supreme Court laying down the position of law with regard to exercise of the powers for review.
16. The authorities on this issue are quoted below:
 - (a) Meera Bhanja (Smt) Vs. Nirmala Kumari Choudhary (Smit) reported in (1995) 1 SC 170 : AIR 1995 SC 455;
 - (b) M/s. Northern India Caterers (India) Ltd., Vs Lt. Governor of Delhi reported in (1980) 2 SCC 167;
 - (c) Haridas Das Vs Usha Rani Banik (Smt) and Ors reported in (2006) 4 SCC 78;
 - (d) Thungabhadra Industries Ltd.,Vs Govt of A.P (1964) 5 SCR 174 : AIR 1964 SC 1372;
 - (e) Ariban Tuleshwar Sharma V Aribam Pishak Sharma (1979) 4 SCC 389 : AIR 1979 SC 1047;
 - (f) Satyanarayan Laxminarayan Hegde Vs Mallikarjun Bhavanappa Tirmuale (1960) 1 SCR 890 : AIR 1960 SC 137;
 - (g) Sajjan Singh Vs State of Rajasthan (1965) 1 SCR 933: AIR 1965 SC 845;
 - (h) O.N Mohindroo Vs Distt Judge, Delhi (1971) 2 SCR 11 : 1971 3 SCC 5

- (i) Sow Chandra Kante Vs Sheikh Habib (1975) 1 SCC 674: (1975) 3 SCR 933;
- (j) Parsion Devi Vs. Sumitri Devi (1997) 8 SCC 715;
- (k) S Bhagirathi Ammal Vs Palani Roman Catholic Miss 2008 SC 719;
- (l) State of West Bengal Vs. Kamal Sengupta (2008)8 SCC612.

17. The ratio decided by the Hon'ble Supreme Court giving guidelines for exercise of the Power of Review could be culled out which are as follows:

- (a) It is well settled that the Review Proceedings are not by way of an Appeal and have to be strictly confined to the scope and ambit of Order 47 Rule1, CPC;
- (b) The Review jurisdiction cannot be exercised on the ground that the decision was erroneous on merits. That would be the province of the court of Appeal. A power of Review is not to be confused with Appellate power which may enable an Appellate Authority to correct all matter of errors committed by the subordinate court. This power has not been conferred in the review jurisdiction;
- (c) An error apparent on the face of record must be such an error which might strike one mere looking at the record

and would not require any long drawn process of reasoning on points where there may be two opinions;

- (d) An error which has to be established only by lengthy and complicated arguments during the long drawn process of reasoning cannot said to be an error apparent on face of the record;
- (e) The party is not entitled to seek a Review of a judgment delivered by the Court merely for the purpose of re-hearing a fresh decision of the case. The principle is that the judgment pronounced by the court is final. Departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so.
- (f) If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it would be difficult to hold that there is an error apparent on the face of the record.
- (g) The parameters are prescribed in order 47 Rule 1 CPC. It permits the party to press for a re-hearing on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The former part of the rule deals with a situation attributable to the applicant and

the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible;

- (h) There is a distinction between a mere erroneous decision and a decision which could be characterized by error apparent. The Review is by no means an Appeal in disguise whereby an erroneous decision is re-heard and corrected. Review lies only on a patent error.
- (i) Whatever, the nature of the proceedings, it is beyond dispute that a Review proceedings cannot be equated with the original hearing of the case. The finality of the judgment delivered by the Court will not be reconsidered except “where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility;
- (j) Where the order in question is appealable and the aggrieved party has adequate and efficacious remedy by recourse to Appeal the original courts should exercise the power to review its order with the greatest circumspection;
- (k) An error contemplated under the Rule must be such which is apparent on the face of the record. It cannot be an error which has to be fished out and searched.

(l) Expression “any other sufficient reason” appearing in order 47 Rule1 has to be interpreted in the light of the other specified grounds.

18. In the light of the above mandates laid down by the Hon’ble Supreme Court, let us now discuss each of the grounds urged in this Review.

19. The main contention of the Petitioner is that this Tribunal has not taken into consideration all the contentions raised by him including the contention that no refund was ordered by the State Commission in its order dated 4.11.2006 and that therefore a direction for refund on the strength of the order dated 4.11.2006 is erroneous.

20. To deal with this issue, it would be proper to refer to the submissions of the Appellant/Review Petitioner as recorded by this Tribunal in the judgment dated 20.9.2012:

“3. The learned Counsel for the Appellant would make the following submissions to assail the impugned order dated 29.11.2011:

a)While setting aside the billing procedure, the State Commission, in its order dated 4.11.2006 neither set-aside the recovery made in the past nor ordered for the refund. On that basis, the State Commission by the order dated 6.1.2011 dismissed the Petition No.227 of 2010

filed by the State Mines and Minerals Limited (R-2) under Section 142 of the Electricity Act, 2003 holding that action US 142 of the Electricity Act, 2003 is not warranted. Having held so, the State Commission entertained the Review Petition filed by the State Mines and Minerals Limited (R-2) for review of the order dated 6.1.2011, in Petition No.247 of 2011 and allowed the said Review Petition through the order dated 29.11.2011 by setting aside its own order dated 6.1.2011 by taking a total turn around.

b) In the Review, the State Commission cannot sit in the Appeal over its own order reconsidering and reinterpreting all the materials already available on record by brushing aside its own earlier categorical findings in the order dated 6.1.2011.

(c) There was no error apparent on the face of the record since the order dated .1.2011 cannot be reviewed as the material namely the Tribunal's judgment was already placed on record before the State Commission as referred to in the Review Petition No.247 of 2011. In the Review, the material which was already made available before the State Commission before passing the order dated 6.1.2011, cannot be reconsidered to take a different view on the basis of the said material in the impugned order dated 29.11.2011.

d) The ground that relevant material has not been considered by the State Commission can be a ground of Appeal and certainly not the ground of Review. Therefore, the impugned order dated 29.11.2011 allowing the Review

Petition by sitting in the Appeal over its own order is illegal.

21. This Tribunal gave a finding from Para-34 onwards as under:

"34. There is no dispute in the fact that the State Commission specifically held in the order dated 4.11.2006 that the billing procedure adopted by the Appellant is not based upon the harmonious interpretation of the provisions under the Government of Rajasthan policy and it was against the policy of binding as well as against the policy of natural justice to the generators and as such, the procedure adopted through the new accounting system was wrong. On that ground, billing procedure was set-aside. Having held so, and having set-aside the billing procedure as prayed for by the 2nd Respondent, in the order dated 04.11.2006, the State Commission while passing an order while disposing of the petition under Section 142 of the Act by the order dated 6.1.2011 wrongly interpreted the order dated 4.11.2006 in harmony with the earlier order passed by the Commission dated 25.7.2006 in its own way without taking note of the findings and direction given by the Tribunal which rendered the majority judgment on 5.8.2009 in the very same matter.

35. In short, it can be concluded that the State Commission has committed an error apparent on the face of the record while passing the order dated 6.1.2011 by not giving effect to the judgment of the Appellate Tribunal dated 5.8.2009 by which the specific direction was given

with regard to the refund, which was binding on the State Commission.

36. In other words, if the findings and consequential directions given in the majority judgment of the Tribunal dated 5.8.2009 had been taken note of by the Commission and if the legal position has been clarified by the learned Counsel for the 2nd Respondent, the State Commission would not have passed dismissing the Petition by order dated 6.1.2011, which is completely in conflict with the findings of the Tribunal.

37. As a matter of fact, as pointed out by the learned Counsel for the State Commission, the order passed by the Commission on 4.11.2006 got merged with the Appellate Tribunal's judgment dated 5.8.2009 wherein the Tribunal not only confirmed the order of the State Commission dated 4.11.2006 but also upheld the retrospective applicability of relief by holding that "During the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified by the parties, the Appellant will bill the Respondent No.2 in the method applied before November, 2005".

38. In view of the fact that already the State Commission by the order dated 4.11.2006 set aside the billing procedure adopted by the Appellant and also of the fact that the Tribunal up-held the retrospective applicability of the relief and accordingly gave the consequential directions, the State Commission ought to have considered the findings given in its order dated 4.11.2006

as well as the findings and directions given by this Tribunal on 5.8.2009 and on that basis it ought to have granted the appropriate relief on 6.1.2011 itself but unfortunately as confessed to by the learned Counsel for the Rajasthan State Mines and Minerals Limited(R2), the real impact of the Tribunal's judgment dated 5.8.2009 was not explained and brought to the notice of the State Commission while arguing the matter and that the State Commission also had out of over sight made a mistake inadvertently, by not following findings and direction given in the judgment of this Tribunal.

41. Summary of Our Findings

a)The State Commission committed an error apparent on the face of record while passing the order dated 06.01.2011 by not giving effect to the judgement of the Appellate Tribunal dated 05.8.2009 giving a specific direction with regard to the refund on the basis of the order dated 04.11.2006, which was binding on the State Commission.

(b) It is a settled law that when the orders of an inferior court is confirmed or modified by the Appellate Court, the order of the inferior court gets merged with the Appellate Court's order. In view of this principle, the impugned order dated 04.11.2006 passed by the State Commission got merged with the judgment rendered by the majority judgment of this Tribunal dated 05.8.2009. The State Commission ought to have taken note of the findings and directions given by this Tribunal in its order

dated 06.01.2011. The failure to do so was a mistake on the part of the Commission. When such mistake was brought to the notice of the Commission, it correctly realised its mistake and corrected the error apparent on the face of the record by passing the impugned order, which in our view is correct and justified.

22. These paragraphs would indicate that this Tribunal in the judgement dated 20.9.2012 specifically held that the State Commission though had not passed the order regarding the refund in the order passed on 4.11.2006, the State Commission in the impugned order of this Appeal i.e. 29.11.2011 had correctly passed the consequential order directing the refund of the amount in pursuance of the judgment of this Tribunal dated 5.8.2009 which got merged with the order dated 4.11.2006. In view of the above, the aspect pointed out by the Review Petitioner in this Petition has already been considered by this Tribunal on the strength of the judgment dated 5.8.2009 by this Tribunal which not only confirmed the order of the State Commission dated 4.11.2006 but also upheld the retrospective applicability of the relief consequent to the order dated 4.11.2006
23. As held by the Hon'ble Supreme Court, the learned Counsel for the Review Petitioner cannot re-agitate the entire matter on

merits as if this is a fresh Appeal. As indicated earlier, when this aspect was pointed out by the Review Petitioner regarding the absence of the order of refund in the order dated 4.11.2006, this Tribunal in Appeal No.17/2012 has considered that aspect in detail and held that the State Commission had ultimately given a specific direction in the order dated 29.11.2011 on the strength of the judgment of this Tribunal dated 5.8.2009 which is perfectly valid.

24. This conclusion arrived at by this Tribunal in our judgment dated 20.9.2012 cannot be questioned in this Review Petition as it would amount to re-opening and re-agitating the entire matter which is not permissible under law as laid down by the Hon'ble Supreme Court in various decisions as quoted above.
25. In view of the above, the contention of the Review Petitioner that this Tribunal has not considered the submissions of the Petitioner in the Appeal is factually incorrect and totally untenable.
26. The next contention of the Petitioner is that the reading of refund by implication in the judgment dated 5.8.2009 is '*per incurium*' and without jurisdiction.
27. This statement made by the learned Counsel for the Review Petitioner is quite mischievous and improper. The judgment

dated 5.8.2009 admittedly, is not a subject matter either in Appeal No.17 of 2012 or in the present Review Petition No.12 of 2012. As a matter of fact, only in pursuance of the declaration and consequential directions given by this Tribunal in judgment dated 5.8.2009, the order had been passed by the State Commission on 29.11.2011 ordering for the refund. So, the validity and propriety of the judgement dated 5.8.2009 cannot be agitated before this Forum as we are only concerned with the Review of our judgment dated 20.9.2012 in Appeal No.17/2012. While justifying the order passed by the State Commission by the order dated 29.11.2011, this Tribunal in Appeal No.17 of 2012 had necessarily to refer to the declaration and consequential directions issued by this Tribunal in the judgment dated 5.8.2009. As stated earlier, the State Commission set aside the change of methodology by the order dated 4.11.2006. While the same was challenged by the Appellant before this Tribunal in Appeal No.74 of 2007, this Tribunal by the judgment dated 5.8.2009 had not only confirmed the order of the State Commission dated 4.11.2006 but also upheld the retrospective applicability of the consequential relief through the following observations:

“During the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified by the parties, the Appellant will bill the

Respondent No.2 in the method applied before November, 2005”.

28. On the basis of this declaration and direction, the State Commission followed the directions and passed the directions regarding the refund by the order dated 29.11.2011. This order was in terms of the directions given by this Tribunal by the judgment dated 5.8.2009. If the State Commission had not followed the direction given by this Tribunal in the judgment dated 5.8.2009, then the State Commission would have been hauled up for the violation of the directions given by this judgment dated 5.8.2009. To avoid the said unpleasant situation, the State Commission in obedience to the direction of this Tribunal had passed the order giving proper directions by following the direction of the Tribunal in letter and spirit.
29. The question as to whether this Tribunal is competent to give such a declaration and consequential direction to the State Commission in the judgment dated 5.8.2009 cannot be raised in this Review Petition contending that it is '*per in-curium*'. If the Review Petitioner being the Appellant in Appeal No.74 of 2007 felt aggrieved over the judgment dated 5.8.2009, it should have filed an Appeal as against that judgment before the Hon'ble Supreme Court under Section 125 of the Electricity Act. But in this case, the Appellant/Review Petitioner instead of approaching the Hon'ble Supreme Court by filing an Appeal

had rushed to the High Court and filed a Writ Petition under Article 226 challenging the judgment of this Tribunal.

30. It is now pointed out by the learned Counsel for the Respondent that the Writ Petition has also been dismissed subsequent to our judgment dated 20.9.2012.
31. Under those circumstances, even after the dismissal of the Writ petition, the Review Petitioner cannot question the jurisdiction of this Tribunal to render the judgment dated 5.8.2009 contending that it is '*per in-curium*'.
32. The learned Counsel for the Review Petitioner being, a court officer, is expected to help this Tribunal to arrive at legal and proper conclusion or decision. Contrary to the said ethics, the learned counsel for the Review Petitioner has resorted to challenge the majesty of this Tribunal by claiming that judgment dated 5.8.2009 is '*per in-curium*'. This is unfortunate.
33. As indicated above, instead of questioning the judgment in Appeal to be filed before the Hon'ble Supreme Court, the attempt of the Appellant to drag the matter further by filing this Review before this Tribunal not only questioning our judgment dated 20.9.2012 without any valid reason but also questioning the validity of the earlier judgment given by this Tribunal in Appeal No.74 of 2007 on 5.8.2009 is highly reprehensible.

Furthermore, the ground of '*per-in-curium*' cannot be the ground for review as per the applicable provisions of law as quoted in various decisions referred to above. Therefore, this contention also would fail.

34. The learned counsel for the Review Petitioner nextly contended that the Petition filed before the State Commission u/s 142 of the Act was not maintainable since the same was barred by the provisions of Section 120 (3) of the Electricity Act, 2003 and therefore, the order impugned in the Appeal as well as the judgment dated 20.9.2012 was without jurisdiction.
35. This contention also, in our view cannot be the ground for review. Section 120 (3) deals with the powers of the Appellate Tribunal for the purpose of executing its own orders. The State Mines and Minerals Limited (R-2) was not the Appellant in Appeal No.74 of 2007. However, the direction had been given by this Tribunal by the judgment dated 5.8.2009 giving a declaration and direction to the State Commission to pass the consequential order. On that basis, the R-2 approached the State Commission and sought for compliance of the said order. Accordingly, the State Commission being the subordinate authority of the Appellate Tribunal had passed the order in line with the directions given by the Appellate Tribunal. The powers given to this Tribunal u/s 120 (3) would not curtail the powers of

the State Commission from passing the orders to ensure the compliance of the directions given by this Tribunal. Moreover, this point cannot be urged in the Review Petition as the scope of Review is limited.

36. Unless there is an apparent error on the face of the record, this Tribunal cannot recall our earlier decision merely because it was an erroneous decision.
37. Even assuming the judgment dated 20.9.2012 rendered by this Tribunal is erroneous, the proper course for the Review Petitioner to file the Appeal u/s 125 of the Electricity Act, 2003 before the Hon'ble Supreme Court and not by filing the Review Petition as the same does not fall under the restrictive scope of review jurisdiction. Therefore, this ground also in our view does not merit consideration.
38. The next ground urged by the learned Counsel for the Review petitioner is that the Writ Petition as against the judgment dated 5.8.2009 filed before the High Court is a legal course and this Tribunal has no jurisdiction to comment about it and it is only for the High Court or Hon'ble Supreme Court to comment on it.
39. At the outset, it shall be stated that this cannot be the ground for review of the decision taken in our judgment. We have decided the Appeal as against Appellant on various other

grounds not on the grounds of the Appellant's taking recourse for approaching the High Court. Our comment about the conduct of the Appellant to have approached High Court instead of filing Appeal before Supreme Court was only to show that the action of the Appellants in driving the parties to run from pillar to post was not bonafide.

40. Let us refer to the observations made by this Tribunal about the conduct of the Petitioner/Appellant.

“47. From the above facts, the following aspects are evident:

a) Despite the order passed by the Tribunal on 04.11.2006, in favour of the 2nd Respondent, the Appellant did not allow the R-2 to obtain/ receive the fruits of the said order. In order to prevent the 2nd Respondent to get the relief, the Appellant adopted all methods to drag on the matter.

b) The Appellant instead of filing an Appeal against the order dated 4.11.2006 had filed a Review before the State Commission and it was pending for some time. Ultimately, the same was dismissed on 13.4.2007. Thereupon, the Appellant filed the Appeal No.74 of 2007 before this Tribunal. This Appeal also was dismissed with the consequential direction on 5.8.2009.

c) Instead of filing the Appeal before the Hon'ble Supreme Court under section 125 of the Act, the

Appellant chose to rush to High Court and filed a Writ Petition as against the Tribunal's judgment. There are no circumstances shown as to why he had bypassed the jurisdiction of Hon'ble Supreme Court. Admittedly, there was no stay in the Writ Petition. Even then, the Appellant did not comply with the findings and directions given by the majority judgment of the Tribunal dated 5.8.2009.

d) Ultimately, the Respondent-2 had to file a Petition under Section 142 of the Act on 23.7.2010 which was dismissed on 6.1.2011. Again the Respondent filed a Review petition on 2.2.2011 which has been ultimately allowed by the order dated 29.11.2011 in favour of the 2nd Respondent”.

41. These observations were made by this Tribunal in the judgment dated 20.9.2012 in Appeal No.17 of 2012 in order to express our impression that the R-2 was dragged and driven from pillar to post by the Appellant without allowing to get the fruits of the order passed by State Commission and the Tribunal. In that context we have indicated that the Review Petitioner/Appellant instead of filing an Appeal under Section 125 of the Cr.PC under which the Hon'ble Supreme Court is entitled to set aside the judgment, had filed a Writ Petition in the High Court seeking to set aside this Tribunal's judgment and thus both the State Commission as well the State Mines and Minerals Limited (R-2) were further dragged to the High Court.

42. Now the learned Counsel for the Review Petitioner submits that this comment can be made only by the High Court or Hon'ble Supreme Court and not by this Tribunal. This statement shows the attitude of impertinence on the part of the Appellant to criticise about our observations.
43. One important aspect is to be noticed in this context. In fact our observation made in the judgment in Appeal No.17 of 2012 has been confirmed by the High Court also while passing the order dismissing the said writ petition. Our judgment was rendered on 20.9.2012. Thereafter, the writ petition filed by the Petitioner/Appellant before the High Court as against the Tribunal judgment dated 5.8.2009 came-up for final hearing on 6.10.2012.
44. In this order, the High Court observed that the Appellant/Review Petitioner ought not to have filed the said Writ Petition and dismissed the same. The relevant observations is as follows:

“In the facts of the case, plea of the petitioner that present writ petitions before this court would be maintainable as in its perception that impugned orders suffer from lack of jurisdiction, cannot be accepted because when appeal against the impugned orders lies to Supreme Court, it is only the Supreme Court, which shall examine whether or not substantial question of law is involved in the matter or even the question of alleged lack of jurisdiction for that

matter. This court cannot substitute itself for that of the Supreme Court deliberately provided as the ultimate appellate forum by the parliament, which is indicative of the finality given to the orders of the first appellate forum thereby, not making them not amenable to the writ jurisdiction of the High Courts.

These writ petitions are therefore dismissed being not maintainable”.

45. So, in the light of the observations made by the High Court, we have to reiterate that the conduct of the Appellant in approaching the High Court instead of approaching Hon'ble Supreme Court under Section 125 of the Cr.PC without showing any reasons and also the conduct of the Review Petitioner urging the contention that the judgment of this Tribunal dated 5.8.2009 '*per in-curium*' lacks bonafide.

46. **To sum Up**

(a) This is not a case where there is an apparent error on the face of the record. The grounds urged by the learned counsel for the Review Petitioner would relate to the merits of the matter on the basis of the alleged erroneous conclusions. This would be the province of the court of appeal. If the decision by this Tribunal is not correct, then the same cannot be corrected by this Tribunal in this Review Petition.

(b) The Review Petitioner has simply sought in the Review Petition for a fresh decision of the case on rehearing the entire matter. This is not permissible under the Review jurisdiction. The so called erroneous decision cannot be characterised as an apparent error on the face of the record. Without indicating even remotely any apparent error, the Review Petitioner cannot be allowed to re-agitate the entire matter on merits.

(c) The Review Petitioner is unable to make a distinction between an Appeal and Review Petition. The issues raised by the Appellant/Review petitioner in this Review petition have already been dealt with and decided in our judgment. So, raising the same issues, which have already been decided, cannot be raised in the Review Petition as the same could be raised only in an Appeal since the scope of the Review Petition is very limited.

47. Therefore, all the contentions of the learned counsel for the Review Petitioner are untenable and therefore, this Petition is liable to be dismissed. Accordingly dismissed.

48. In this case also, as observed earlier, we are constrained to refer to the conduct of the Appellant which is highly reprehensible. As such, in this case also, we feel that some cost has to be imposed on the Review Petitioner.
49. However, we are not inclined to impose cost in this matter since we have already imposed the cost in the main Appeal directing the Appellant to pay the cost of Rs.1,00,000/- each to State Commission and the State Mines and Minerals Limited (R-2). It is reported that Review Petitioner has already paid the cost to the parties as directed by this Tribunal and that the amount also had been refunded to the 2nd Respondent in compliance with the order of the State Commission.
50. In view of the above, we are not imposing further cost in this matter.
51. Accordingly, the Review Petition is dismissed without cost.

(V.J Talwar)
Technical Member
Dated: 17th Apr, 2013

(Justice M. Karpaga Vinayagam)
Chairperson

✓ ~~REPORTABLE/NON-REPORTABLE~~