

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

RP No. 11 of 2024

Dated: 07th February, 2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

Jindal India Thermal Power Limited

Through Mr. Sanjay Mittal,
Authorized Representative
Registered Office: Habitat India, C-3,
Qutab Institutional Area,
Katwaria Sarai, New Delhi – 110016
Email: jitpl.ra.@jindalgroup.com

(OLD ADDRESS)

Plot No. 2, Pocket-C,
Nelson Mandela Marg, Vasant Kunj,
New Delhi - 110070

... Review Petitioner

Versus

1. Central Electricity Regulatory Commission

Through its Secretary,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001
Email: info@cercind.gov.in

2. GRIDCO Limited

Through its Chairman,
Janpath, Bhubneshwar - 751020
Odisha
Email: gridcofca@gridco.co.in

... Respondents

Counsel on record for the Appellant(s) : Sajan Poovayya, Ld. Sr. Adv.
Matrugupta Mishra
Swagatika Sahoo
Nipun Dave
Sonakshi
Akanksha V. Ingole
Shiv Chopra
Harsh Jain for App. 1

Counsel on record for the Respondent(s) : for Res. 1

Raj Kumar Mehta
Himanshi Andley for Res. 2

ORDER

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The petitioner, by way of this petition, has sought review of Order dated 31.07.2024 passed by this Tribunal in petitioner's appeal no. 78 of 2022, thereby dismissing the appeal.
2. According to the petitioner, apart from certain clerical/typographical errors, the Order dated 31.07.2024 suffers from some patents errors also which need to be rectified in exercise of powers of review by this Tribunal.
3. We have heard learned senior counsel appearing on behalf of the review petitioner and the learned counsel appearing on behalf of the Second Respondent. We have also perused the Judgment dated 31.07.2024 which is sought to be reviewed and have also gone through the written submissions filed by the learned counsels.

4. At the outset, we may note that Section 114 of the Code of Civil Procedure (CPC) is a substantive provision dealing with scope of review and is quoted below;

Section 114, CPC

Subject as aforesaid, **any person considering himself aggrieved—**

(a) by a decree or order from which an appeal is allowed by this Code, but from which **no appeal has been preferred.**

(b) by a decree or order from **which no appeal is allowed by this Code,** or

(c) by a decision on a reference from a **Court of Small Causes,** may apply for a **review of judgment to the Court which passed the decree or made the order,** and the Court may make such order thereon as it thinks fit.

5. The grounds on which review of a Judgment/Order can be sought have been specified in Order XLVII of the Civil Procedure Code which are reproduced hereinbelow;

Order XLVII, CPC

Application for review of judgement:-

(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,**

(c) by a decision on a reference from a **Court of Small Causes**, and who, from the **discovery of new and important matter or evidence which**, after the 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 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.**

(2) A party **who is not appealing from a decree or order may apply for a review of judgment** notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, **shall not be a ground for the review of such judgment.**

6. A bare reading of these relevant legal provisions would make it clear that an application for review of a judgment/order is maintainable upon (I) discovery of a new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of review applicant or could not be produced by him when the judgment/order was passed;

or (II) on account of some mistake or error apparent on the face of record; or (III) for any other sufficient reasons.

7. The expression “error apparent on the face of record” used in Order XLVII Rule 1 indicates an error which is self-evident and staring in the eye. Any error or mistake which is not a self-evident and has to be deduced by the process of reasoning cannot be said to be an error apparent on the face of record justifying exercise of power of review. Power of review can be exercised only where a glaring omission or a patent mistake is found in the order under review.

8. We may also note that the power of review can be exercised only for correction of patent mistake and not to substitute a view for the reason that review petition cannot be permitted to be an appeal in disguise.

9. In the instant case, the petitioner has pointed out clerical/typographical errors in paragraph nos. 2(iv), 2 v) and 2 (vii) of the Judgment under review.

10. It is firstly stated that in paragraph no. 2(iv), it is mentioned that appeal no. 297 of 2019 filed by the petitioner is still pending disposal whereas the same has already been disposed off by this Tribunal vide Order dated 07.02.2024. Secondly, it is stated that in paragraph no. 2(v) this Tribunal has recorded that the petitioner assailed the order dated

26.02.2018 of Odisha Electricity Regulatory Commission before this Tribunal by way of an appeal no. 250 of 2018 whereas the said appeal was filed by Second Respondent (GRIDCO). Thirdly, it is pointed out that in paragraph 2(vii) of the judgment under review, it has been mentioned by this Tribunal that relief sought by the petitioner in writ petition no. 18150 of 2018 was for quashing of MoUs dated 17.10.2008, 30.12.2010 as well as PPA dated 05.01.2011 and supplementary PPA dated 23.07.2013, whereas the prayer in the writ petition was to the effect that certain clauses of supplementary MoU dated 17.10.2008, PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 may be declared illegal and contrary to the provisions of Sections 61 and 62 of the Electricity Act, 2003 as well as Regulations issued therein.

11. Learned Counsel for the Second Respondent fairly conceded that the judgment under review suffers from the above noted clerical/typographical errors which deserve to be rectified.

12. Upon going through the records of the appeal, we also find that the contentions of the petitioner in this regard are correct and the clerical/typographical errors mentioned in the above noted paragraphs of the judgment under review need to be rectified in exercise of review

jurisdiction. The same is accordingly being done. The paragraph nos. 2(iv), 2 (v) and 2 (vii) of the Judgment under review shall now be read as under;

2(iv) Aggrieved by the said order of OERC, the Appellant filed Appeal No. 297 of 2019 before this Tribunal and by interim order dated 28th August, 2020, this Tribunal stayed the operation of the said order as well as all consequential action taken therein. The appeal has already been disposed off vide order dated 07.02.2024.

2(v) Thereafter, the Appellant filed Petition No. 26 of 2014 before OERC on 27th December, 2014 under Section 62 read with Section 86(1)(a) of the electricity Act, 2003 read with relevant Tariff Regulations for Determination of Tariff for the said project for the control period 2014 - 2019. The petition had been filed before OERC because till that date the Appellant had not executed the PPA with any other entity/State Govt. except the GRIDCO. During the pendency of the Petition before OERC, the Appellant executed multiple long-term and medium-term PPAs with Distribution Licensees situated in several States of India. Accordingly, in pursuance to execution of these PPAs, the Appellant's project fell under the ambit of composite scheme in terms of Section 79(1)(b) of the Electricity Act, 2003 and hence the petition was disposed of by the Commission vide order dated 26th February, 2018 while observing that the determination of tariff for the power generated by the Appellant from the said

project falls under the jurisdiction of Central Commission i.e. CERC. The GRIDCO assailed the said order of OERC before this Tribunal by way of Appeal No. 250 of 2018 which was dismissed vide judgement dated 10th January, 2022 upholding the jurisdiction of the Central Commission.

2(vii) Soon after filing of Petition No. 276 of 2018 with the Central Commission, the Appellant also filed the Writ Petition bearing No. 18150 of 2018 before the Hon'ble High Court of Odisha on 20th November, 2018 with the prayer that the notification dated 8th August, 2008 issued by the Govt. of Odisha as well as certain clauses of the MOUs dated 17th October, 2008 and 30th December, 2010 as also PPA dated 5th January, 2011 and supplementary PPA dated 23rd July, 2013 may be declared illegal and contrary to the provisions of Sections 61 & 62 of the Electricity Act, 2003 as well as Regulations framed thereunder. Vide order dated 16th May, 2019 passed in the said Writ Petition, the Hon'ble High court has directed that no coercive action shall be taken against the Appellant.

13. Next, it is submitted on behalf of the petitioner that the judgment under review suffers from a patent error in so far as this Tribunal in paragraph no. 10 ruled out the applicability of Section 10 of the Code of Civil Procedure but at the same time applied the principles envisaged under the said Section 10 of CPC to reach the conclusion that since the

subject matter and the issues raised in both i.e. the petition no. 276 of 2018 (Tariff Petition) and as well as the Writ Petition no. 18150 of 2018 filed in the Hon'ble High Court were identical, the outcome of Tariff Petition will squarely depend on the outcome of the writ petition. Prayer is made to review the said conclusion reached by this Tribunal and to declare that Section 10 CPC has no application to the instant case.

14. We are unable to discern what the petitioner actually intends to convey on this aspect.

15. The petitioner itself has stated and rightly so, that this Tribunal has held in paragraph no. 10 of the judgment under review that Section 10 of the Civil Procedure Code does not apply to the instant case. Having held so, this Tribunal went ahead to apply the principles envisaged under Section 10 CPC, the object of which is to avoid multiplicity of legal proceedings on an identical issue and to avoid conflicting orders/judgments. It is nowhere the case of petitioner that the principles underlying Section 10 CPC cannot be taken aid of by this Tribunal while deciding an appeal. Even if that is so, the proper course of action for the petitioner would be to assail our judgment on this aspect by way of an appeal under Section 125 of the Electricity Act, 2003. In the guise of

review, the petitioner cannot be permitted to reagitate and reargue the issues which have already been addressed and decided.

16. In a review petition, it is not open to the Courts/Tribunals to reappraise the evidence/arguments and reach at different conclusion even if that is possible. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by subordinate courts [**See Shanti Conductors Private Ltd. Vs. Assam State Electricity Board and Others (2020) 2 SCC 677 and Kamlesh Verma Vs. Mayawati (2013) 8 SCC 320**].

17. Therefore, we straight away reject the contentions of the petitioner on this point.

18. According to the petitioner, another apparent error is found in the paragraph no. 17 of the judgment under review wherein this Tribunal has mentioned that the Commission has to base determination of tariff upon the MoUs/PPAs which are binding upon the parties unless quashed by the Hon'ble High Court in the above noted writ petition.

19. It is stated that these observations are in conflict with the provisions of Section 61 and 62 of the Act, as well as the Tariff Regulations issued by the Central Commission for the reason that the Commission, while

determining the tariff, is bound to act as per these legal provisions as well as the regulations and cannot restrict itself to the provisions of PPA/MoU.

20. We find it appropriate to extract the paragraph no. 17 of the judgment under review;

It is amply clear that in case the Hon'ble Odisha High Court does not agree to the contentions of the Appellant and refuses to quash the MOUS, PPAs and the Notification dated 8th August, 2008 issued by the Govt. of Odisha, the Appellant would be entitled tariff as agreed in the PPAs. It is only in case the Hon'ble High Court finds itself in agreement with the contentions of the Appellant in the Writ Petition and quashes the PPAS, MOUs and the Notification dated 8th August, 2008 that the Appellant can claim its entitlement to full tariff for its generating situation as per the relevant provisions of Electricity Act and the Tariff Regulations. Therefore, in our considered opinion, the Commission was correct in holding that the Tariff Petition is not maintainable at this stage as the judgement of the Hon'ble High court in the Writ Petition No. 18150 of 2018 would have a direct bearing upon the Appellant's entitlement to tariff. As far as the Commission is concerned, it cannot rule upon the legality/correctness and propriety of the MOUs as well as PPAs executed between the Appellant and the Govt. of Odisha. It has to base its determination of tariff upon these MOUs and PPAs which are binding upon the parties unless quashed by the Hon'ble High Court in the above noted Writ Petition.

21. The submission made on behalf of the petitioner on the point under consideration evaporates in thin air in view of what we have observed in the above noted paragraph no. 17 of the judgment under review.

22. It is amply clear that in case the Hon'ble High Court does not declare the contentious clauses of supplementary MoU dated 17.10.2008, PPA dated 05.01.2011 & Supplementary PPA dated 23.07.2013 executed between the parties as illegal and contrary to the provisions of Section 61 and 62 of the Electricity Act, 2003 as well as the Regulations framed thereunder, the petitioner would be liable to supply power to the Second Respondent only at variable cost as agreed in these MoUs/PPAs. It is only in case the Hon'ble High Court finds itself in agreement with the contentions of the petitioner in the Writ Petition and quashes the contentious clauses of the MoUs/PPAs that the petitioner can claim entitlement to full tariff (i.e. fixed as well as variable cost) for the Electricity supplied from its generating station as per the relevant provision of the Electricity Act and Tariff Regulations.

23. The Petitioner itself is conscious about this predicament which is evident from the contents of Paragraph Nos. 9 to 14 of the petition filed by it before the Commission. We find it appropriate to extract these paragraphs of the petition hereinbelow:-

“9. While interpreting contracts, it is a settled principle of law that due regard has to be made to the intention of the parties at the time of executing the contract. In the present case, the state government put to the notice of the Petitioner that an agreement to supply power at only variable cost be executed, and that the said State Government would get a policy/statutory backing since under the provisions of the Electricity Act, 2003, a distribution licensee cannot procure power only at variable cost. It is stated that as per Sections 61, 62 and 86(1)(b) of the Act, the distribution licensees are mandated to procure power by payment of cost of generation, which includes variable as well as fixed costs. The only reason why the Petitioner agreed to sign the PPA at variable cost, was because the said Petitioner was made to believe that suitable changes in the statutory scheme would be effected by the Central Government, at the instant of the State Government, thereby taking away the ability of a generating company to claim full tariff as per regulations. Based upon the said representation, and the fact that the Petitioner had to make an investment decision, the said Petitioner agreed to supply power at variable cost only on account of the above representation of the State Government.

10. However, the Petitioner submits that the above representation by the State Government was a manner by which the said Petitioner was agreed to supply power on variable cost based on the above said conditions. The State Government mis-represented to the Petitioner that the statutory scheme qua tariff would be changed, and that the said Petitioner would not be entitled to fixed cost, the Petitioner agreed to execute the PPA since, a lot of investment was at stake. Therefore, when it is apparent that the State Government made the above mis-representation, the PPA clause mandating payment of only variable cost to the Petitioner, is a voidable clause, and when the Petitioner has brought on record the above facts, the above PPA clause has to be treated as a nullity in law. In view of the above, the Petitioner is entitled to tariff as guaranteed under the tariff principles contained in Section 61 of the Electricity Act, 2003, which specifically mentions that generation of power has to be done on commercial principles and that a generator is entitled to its entire cost of generation.

12. It is further submitted that when the MOU and the PPA was entered into by the parties the power sector scenario was totally different, and the IPPs expected more bids and PPAs from the DISCOMS. It was in this backdrop that the petitioner herein agreed to provide power to the Respondent at variable cost only. However, the situation of power industry is totally different and no new bids are expected to come up. Even, the Parliamentary

Standing Committee on Energy in its 37th and 40th Report has accepted that the current condition of private power producers is very critical and they are suffering from a lot of setbacks.

13. *It is submitted that when the basic premise on which the provisioning of supply of power only on variable cost was to be introduced, in the absence of such policy, or statutory backing, to be notified by the Government of India, the entire gamut of supplying power on variable cost only, has no sanction whatsoever, hence non-est in the eyes of law. Therefore, no exception can be drawn in the present case, and the Petitioner is entitled to full tariff as enumerated under Section 62 of the Electricity Act, 2003. On account of the above mis-representation there cannot be any argument at all that the Petitioner executed the PPA / contract for variable cost, with open eyes or by taking a commercial decision. It is stated that mis-representation or fraud vitiates everything and it goes to the very root of the contract, which condition cannot be cured by any explanation whatsoever.*

14. *It is settled principle of law that statute overrides the provisions of a contract. Hence, in light of the above mis-representation by the State Government thereby the Petitioner executed the PPA at variable cost, the tariff has to be determined as per the aforementioned statutory provisions, and not by the contents of the contract which are hit by Section 23 of the contract Act, 1872.*

24. It is in these circumstances that this Tribunal has recorded in the said paragraph 17 of the judgment under review that the Commission, while determining the tariff for the petitioner's power project cannot ignore the provisions of MoUs/PPAs and has to consider the relevant clauses contained therein, unless declared illegal, void and nonest by the hon'ble High Court, as it cannot rule upon the legality, correctness and propriety of the MoUs/PPAs executed between the parties.

25. Therefore, we do not find any apparent error in this regard also in the judgment under review.

26. Another apparent error, according to the petitioner, has occurred in paragraph no.18 of the judgment under review. To appreciate the submissions of the petitioner in this regard we find it pertinent to produce paragraph nos. 18 and 19 judgment under review hereunder:

18. In the light of the above discussion, we do not find any error or infirmity in the impugned order of the Commission. The Appeal is devoid of any merit and is hereby dismissed.

19. However, the Commission, instead of disposing off the Tariff Petition, ought to have adjourned it sine die to be revived after the Judgement of Hon'ble High Court in W.P. No. 18150 of 2018. We direct accordingly. The Appellant shall be at liberty to get the Tariff Petition No. 276 of 2018 revived after the disposal of the Writ Petition by the Hon'ble High Court of Odisha, if it is so advised.

27. It is submitted that liberty granted by this Tribunal to the petitioner in paragraph no. 19 is rendered ineffective and otiose by the dismissal of the appeal in para 18 of the judgment.

28. We find force in the contentions of the petitioner on this aspect and direct that paragraph no.19 shall precede the paragraph no.18 and the paragraph 18, as it stands originally, needs some modification.

29. We direct that the paragraph nos.18 and 19 of the judgment under review shall now be read as;

18. In the light of above discussion, we do not find any error or infirmity in the impugned order of the Commission. However, the Commission, instead of disposing off the Tariff Petition, ought to have adjourned it sine die to be revived after the Judgement of Hon'ble High Court in W.P. No. 18150 of 2018. We direct accordingly. The Appellant shall be at liberty to get the Tariff Petition No. 276 of 2018 revived after the disposal of the Writ Petition by the Hon'ble High Court of Odisha, if it is so advised.

19. The Appeal stands disposed off accordingly in above terms.

30. The review petition stands disposed of accordingly.

Pronounced in the open court on this 07th day of February, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / NON-REPORTABLE

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