IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

RP No. 3 of 2025
IN
APPEAL No. 378 of 2018

Dated : 28th April, 2025

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

In the matter of:

Suryataap Energies and Infrastructure Private Limited
Through its Director
House No. 331, Usha Building,
A.T. Road, Machkhowa,
Guwahati, Assam – 781009
Email: court.clerk@hsalegal.com

… Petitioner

Versus

1. **Assam Electricity Regulatory Commission**
Through its Secretary
ASEB Campus, Dwarandhar,
G.S Road, Sixth Mile,
Guwahati, Assam – 781022
Email: aerc_ghyhotmail.com

2. **Assam Power Distribution Company Limited**
Through its General Manager
Bijulee Bhawan, Paltanbazar,
Guwahati, Assam - 781001
Email: chairman@apdcl.org, md.apdcl@apdcl.org

… Respondent (s)

Counsel for the Petitioner(s)	:	Hemant Sahai Nitish Gupta Molshree Bhatnagar Shubhi Sharma Tushar Srivastava Nipun Sharma Nimesh Jha Shaida Das Punyam Bhutani Deepak Thakur Aparna Tiwari Paritosh Bisen Kamya Sharma Varnika Tyagi Divyansh Kasana Samprati Singh for App. 1
Counsel for the Respondent(s)	:	Anand K. Ganesan Swapna Seshadri Aishwarya Subramani Harsha V Rao for Res. 2

ORDER

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The Petitioner, a solar power producer owning a 5 MW solar PV project in District Sonitpur, Assam is seeking review of judgement dated 19th December, 2024 passed by this Tribunal in Appeal No. 378 of 2018 whereby the appeal was allowed and impugned order dated 29th November, 2017 passed by the 1st Respondent – Commission was set aside. Vide the said order dated 29th November, 2017, the Commission

had determined the final project specific tariff for the petitioner's solar power project @Rs.8.78 per KWH for a period of 25 years from the date of commercial portion of the project. The Petitioner had been arraigned as Respondent No. 2 in the Appeal which was filed by the Discom Assam Power Distribution Company Ltd. (Respondent No. 2 herein).

2. This Tribunal, vide the said judgement dated 19th December, 2024 remanded the case back to the Commission for fresh determination for the petitioner's solar power project on the basis of market Benchmark norms prevailing during the relevant period in which the power project was commissioned.

3. It appears that this Tribunal had found that the Commission, while determining the project specific tariff for petitioner's solar power plant, had adopted norms of CERC Regulations for financial year 2015-16 whereas the petitioner's power project was commissioned on 20th August, 2016 i.e. during the Financial Year 2016-17. Accordingly, while setting aside the order dated 29th September, 2017 of the Commission, it was observed that :-

> *"20. No fault can be found in the commission adopting operating and financial norms of CERC Regulations, in the*

absence of original documents/invoices but what is questionable is what lead the commission to adopt norms of CERC Regulations for Financial year 2015-16, when the power project of the 2nd Respondent was commissioned on 20/08/2016 i.e. during the financial year 2016-17.

21. The impugned order in silent on this aspect but the Commission has given clarification in this regard in the order dt. 02/05/2018 passed on the Review Petition of the Appellant by stating that bench mark capital cost norms for 2015-16 shall be valid for next year i.e. 2016-17 also for Solar PV projects in view of Regulations 9.2(a) and 9.2(b) of AERC Regulations 2012. Here the Commission has fallen into a grave error. Regulations 9.2(a) and 9.2(b) of these regulations are applicable only while determination of generic tariff for solar PV projects whereas the commission was dealing with a petition for determination of project specific tariff. On one hand, the commission has proceeded with the petition as per Regulations 7, 8 and 9.3 but at the same time it has applied Regulations 9.2(a) and 9.2(b) which relate to determination of

generic tariff. Thus, the commission has patently misdirected itself which has resulted in an erroneous and unsustainable tariff determination.

22. It is a settled principle of law that date of commission of a power project is material for determination of tariff particularly in case of solar power plants where there is no variable cost associated with the generation of power and the fixed cost incurred depends on the date & year of commissioning. Therefore, if the Commission was not satisfied with the data/information/documents furnished by the 2nd Respondent, it ought to have determined the capital cost on the basis of market benchmark norms prevailing during the relevant period in which the power project of the 2nd Respondent was commissioned.

23. In view of the above discussion, we are unable to sustain the impugned order of the commission. The same being erroneous is hereby set aside. Accordingly, the appeal stands allowed. The case is remanded back to the commission for fresh tariff determination for the solar PV power project of 2nd

Respondent on the basis of market Benchmark norms prevailing during the relevant period in which the power project of 2nd respondent was commissioned. The Commission shall conclude the fresh exercise in this regard within two months from the date of this order positively."

4. According to the Appellant, the assumption made by this Tribunal that the Commission has adopted norms of CERC Regulations for Financial Year 2015-16 for determination of tariff for the petitioner's power project is not borne out either from the perusal of the impugned order dated 29th November, 2017 of the Commission or from any other material on record and, therefore, the judgement of this Tribunal is based upon mis-conception of facts which constitutes error apparent on the phase of record contemplated under Order 47 Rule (1) of the Code of Civil Procedure 1908 and thus, needs to be rectified by invoking review jurisdiction.

5. We have heard Learned Counsel for Review Petitioner as well as Learned Counsel for the 2nd Respondent M/s Assam Power Distribution Company Limited. We have also perused the Commission's order dated

29th September, 2017, our judgement under review dated 19th December, 2024 and the Written Submissions filed by the Learned Counsels.

6. Learned Counsel for the petitioner vehemently argued that the Commission, while determining the project specific tariff for petitioner's power project, has followed the tariff determination methodology as envisaged under its own AERC Tariff Regulations 2012 and has only made a reference to the benchmark capital cost provided under CERC Tariff Regulations, 2012. He would submit that the Commission has only taken guidance from the benchmark capital cost provided under CERC Regulations, 2012 and has thereafter applied its judicial wisdom in modifying the same for determination of project specific tariff for the petitioner's power project keeping in mind the specific conditions applicable to the project in the State of Assam and the difficulties/issues faced by such project located in that State.

7. Learned Counsel further argued that a patent error has occurred in the judgement dated 19th December, 2024 of this Tribunal on account of glaring mis-conception of facts and the words "sufficient reasons" found in Order 47 Rule 1 of CPC are wide enough to cover/include such

mis-conception of facts. It is his submission that the error in the judgement dated 19th December, 2024 of this Tribunal stares in the eye and, therefore, the same needs to be corrected by invoking power of review.

8. It is further argued by the Learned Counsel that the judgement under review suffers from another patent error also in as much as this Tribunal, has relied upon Commission's order dated 2nd May, 2018 vide which it had dismissed the Review Petition filed by 2nd Respondent. It is argued that since the Review Petition was dismissed by the Commission, the order of the Commission dismissing it could not have been referred to or relied upon by this Tribunal in passing the judgement dated 19th December, 2024 for the reason that "Doctrine of Merger" is not applicable to the cases where Review Petition stands dismissed. He also pointed out that the Respondent No. 2, being aware of the said legal position, had not impugned the review order dated 2nd May, 2018 in the appeal before this Tribunal.

9. Learned Counsel for 2nd Respondent emphatically opposed the Review Petition. He argued that the petitioner has failed to point out any error, let alone any error on the face of record in the judgement under

review and in fact, the Review Petition is an appeal in disguise which is impermissible. He argued that artificial distinction is being attempted to be made between the terms bench market/norms and principles which is of no significance. According to the Learned Counsel, the Review Petition must fail on following grounds :-

> *"(i) Costs are derivatives of/ determined basis the relevant RE Tariff Regulations;*
> *(ii) If such costs are adopted for tariff determination, costs determined for the relevant financial year has to be considered (i.e., the year in which the Project was commissioned) and not of an extraneous year;*
> *(iii) In a project-specific tariff determination, there may not be any basis for applying any norms or parameters since the State Commission will decide the capital cost based on the data to be submitted by the project proponent. However, when no data has been submitted to substantiate the claims and some norms / parameters are required to be adopted, which year should these norms/parameters pertain to;*
> *(iv) Any benchmark / norms prescribed in any Tariff Regulations is to be read as a ceiling beyond which the State Commission cannot grant tariff but does not mean that in a project specific tariff determination, the actual costs, if lower cannot be adopted."*

10. It is further argued by the Learned Counsel that the findings of this Tribunal in the judgement under review that the date of commissioning of the project is relevant consideration for the purposes of tariff determination, is a legal finding and any challenge to the same can only be by way of an appeal. He would submit that by way of the judgement under review, this Tribunal has rightly set aside the Commission's order dated 29th November, 2017 in view of the inconsistencies and the absence of reasoning therein. In order to buttress his submissions, the Learned Counsel cited the judgements of the Hon'ble Supreme Court in :-

(a) Lily Thomas v. Union of India (2000) 6 SCC 224,

(b) Sanjay Kumar Agarwal v. State Tax Officer (2024) 2 SCC 362,

(c) Kamlesh Verma v. Mayawati (2013) 8 SCC 320, and

(d) State of West Bengal Vs. Kamal Sengupta (2008) 8 SCC 612.

Our Analysis

11. At the outset, we may note that Section 114 of CPC is the substantive provision dealing with scope of review and is quoted below:

“114. Review.—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.”

12. The grounds on which review of a judgment / order can be sought, have been specified in Order XLVII of the CPC which are reproduced hereinbelow: -

“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, 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."

(Emphasis supplied)

13. 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 the 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 reason.

14. 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 self-evident and has to be deducted from a 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. We may also note that the power of review can be exercised only for correction of a patent mistake but not to substitute a view for the reason that a review petition cannot be permitted to be an appeal in disguise.

15. In *Chhajju Ram v. Neki Ram* AIR 1922 PC 112, it was held that the words “any other sufficient reason” appearing in Order XLVII Rule 1 CPC must mean “a reason sufficient on grounds at least analogous to those specified in the rule”. This interpretation was approved by the Supreme Court in later judgment in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasium* 1955 1 SCR 520. In *Kamlesh Verma v. Mayawati & Ors.* (2013) 8 SCC 320, Hon’ble

Supreme Court has succinctly summarized the principles for exercising review jurisdiction as under:-

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the stature:

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 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius 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.

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 negatived."

16. We also find advantageous to quote here following Paragraphs of the judgment of the Hon'ble Supreme Court in *S. Madhusudhan Reddy v. V. Narayana Reddy & Ors*. (2022) SCC OnLine SC 1034:-

"31. As can be seen from the above exposition of law, it has been consistently held by this Court in several judicial pronouncements that the Court's jurisdiction of review, is not the same as that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an

error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the Court to exercise its powers of review under Order XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of thejudgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however an error apparent on the face of the record can only be

corrected by exercising review jurisdiction. Yet another circumstance referred to in Order XLVII Rule 1 for reviewing a judgment has been described as "for any other sufficient reason". The said phrase has been explained to mean "a reason sufficient on grounds, at least analogous to those specified in the rule" (Refer: Chajju Ram v. Neki Ram and Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius)."

17. We do not find any force in the arguments of the petitioner's counsel that the judgement under review dated 19th December, 2024 suffers from patent error in as much as it relies upon the order dated 2nd May, 2018 of the Commission vide which the Commission has dismissed the Review Petition filed by the 2nd Respondent against the original order dated 29th November, 2017. We have referred to the Commission's order dated 2nd May, 2018 in paragraph No. 21 of the judgement under review only for the reason that the Impugned order dated 29th November, 2017 was silent on the aspect as to why did the Commission proceed to adopt norms of CERC Regulations for Financial Year 2015-16 and the

clarification in this regard was given by the Commission in the Review Order dated 2nd May, 2018. It was only with a view to find as to what had led the Commission to pass the impugned order dated 29th November, 2016 that we were constrained to go through the Review Order dated 2nd May, 2018 and to make a reference to the same in para No. 21 of judgement under review.

18. It is true that the Review Order dated 2nd May, 2018 of the Commission was not and could not have been assailed before this Tribunal by way of appeal. It is also equally true that we have not founded our judgement on any portion of the said Review Order and have made a reference to it only for the purpose of peeping into the mind of the Commission in order to find the reasons upon which the Commission has passed the original order dated 29th November, 2017 as the original order dated 29.11. 2017 was silent about it.

19. Now we proceed to examine whether the judgement dated 19th December, 2024 has been rendered on mis-conception of material facts, as contended on behalf of the petitioner, and if so whether the same needs to be rectified by invoking the powers of the review under Order 47 Rule 1 read with Section 120(2)(f) of the Electricity Act, 2003.

20. We may note that vide order dated 9th April, 2015 passed by the Commission in Petition Nos. 10 of 2013 and 22 of 2014 of the petitioner, provisional tariff was allowed to the petitioner and at the same time petitioner was directed to file a fresh petition for determination of final tariff immediately after commercial operation of the power project. Accordingly, the petitioner filed the fresh tariff petition No. 03 of 2017 on 30th January, 2017 before the Commission for determination of project specific tariff for its 5 MW grid connected PV solar power plant. This petition has been disposed of by the Commission vide impugned order dated 29th November, 2017 determining the final regularized tariff of Rs.8.78 per KWH for the power plant of 2nd Respondent for a period of 25 years from the date of its commercial operation.

21. This order of the Commission was assailed before this Tribunal by way of Appeal No. 378 of 2018 by the 2nd Respondent on two main grounds namely:-

i. *"The Commission has adopted the benchmark capital cost norm determined by the Central Electricity Regulatory Commission (CERC) for the financial year 2015-16 instead of benchmark determined by CERC for*

the financial year 2016-17 in which year the plant of 2nd Respondent was commissioned;

ii. *The Commission has erroneously applied the generic tariff order in determination of project specific tariff."*

22. The Commission had notified AERC (terms and conditions for tariff determination from Renewable Resources) Regulations, 2012 on 10th September, 2012. Regulation 2 of these Regulations specifically mentions that these are made in line with the CERC tariff Regulations, 2012. Regulation 2 is extracted herein below :-

"2. Introduction

According to Section 61 (h) of the Electricity Act 2003, the Commission shall specify the terms and conditions for determination of tariff for promotion of co-generation and generation of electricity from renewable sources of energy. The Central Electricity Regulatory Commission (CERC) vide L-1/94/CERC/2011 dated 06.02.2012 notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations 2012 under which different aspects of tariff determination for various renewable energy technologies

has been incorporated. These Regulations are made in line with that of the CERC regulations mentioned above."

23. Regulations 8 of these Regulations deals with "Project Specific Tariff" and is extracted herein below :-

"8. Project Specific tariff

a) Project specific tariff, on case to case basis, shall be determined by the Commission for the following types of projects:

(i) Municipal Solid Waste Projects

(ii) Solar PV and Solar Thermal Power projects, if a project developer opts for project specific tariff:

Provided that the Commission while determining the project specific tariff for Solar PV and Solar Thermal shall be guided by the provisions of Chapters VII & VII of these Regulations.

(iii) Hybrid Solar Thermal Power plants

(iv) Other hybrid projects include renewable-renewable or renewable-conventional sources, for which renewable technology is approved by MNRE;

(v) Biomass project other than that based on Rankine Cycle technology application with water cooled condenser.

(vi) Any other new renewable energy technologies approved by MNRE. However, the Commission may consider any Renewable Energy projects for determination of project specific tariff as it may deem it appropriate.

b) Determination of Project specific Tariff for generation of electricity from such renewable energy sources shall be in accordance with such terms and conditions as stipulated under relevant Orders of the Commission.

Provided that the financial norms as specified under Chapter-II of these Regulations, except for capital cost, shall be ceiling norms while determining the project specific tariff."

24. It is pertinent to note here that the proviso attached to clause (b) of Regulation 8 allows the Commission to deviate from benchmark capital cost and provides that the financial norms in Chapter II are ceiling norms with an exception for capital cost. Therefore, this proviso empowers the Commission to adjust the benchmark capital cost as the Commission may find necessary in the peculiar circumstances available for any power project in the State of Assam.

25. Part VII of Electricity Act, 2003 deals with "Tariff". It begins with Section 61 which is about the Tariff Regulations and provides guidelines to be kept in mind by the State Electricity Commissions in specifying the terms and conditions for determination of tariff. It uses the phrase "shall be guided" which indicates that the factors specified in clauses (a) to (i) of the said Section have to be borne in mind necessarily by the Electricity Commission in specifying the terms and conditions for determination of

tariff. One of the factors stated therein refers to the principles and methodologies specified by the Central Commission for determination of tariff applicable to generating companies and transmission licensees. It, therefore, follows that the State Electricity Commissions are required to be guided by the principles and methodologies issued by the Central Commission i.e. CERC from time to time but are not strictly bound to adhere to those principles and methodologies. On this aspect, we find the following observations of the Hon'ble Supreme Court in Reliance Infrastructure Ltd. Vs. State of Maharashtra, (2019) 3 SCC 352 very apt:-

> *"29. Section 181 empowers the state commissions to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Among the matters for which the regulations may provide are "the terms and conditions for the determination of tariff under Section 61"6. In specifying the terms and conditions for the determination of tariff, the appropriate commission (as Section 61 provides) "shall be guided" by the factors which are set out in clauses (a) to (i).* ***The expression "shall be guided" comprises of two elements: the 'shall' and, the 'guidance'. Clauses (a) to (i) provide guidance to the commission in specifying the terms and conditions for the determination of tariff. The expression "shall" indicates that the factors which are specified in clauses (a) to (i) have to be borne in mind by the appropriate commission. As guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate commission.***
>
> *…*

32. ***The Tariff policy provides guidance to the appropriate commission when it frames regulations. The power to frame regulations is legislative in nature. It is conferred upon the appropriate commission. The commission weighs numerous factors. Its discretion in carrying out a complex exercise cannot be constrained.*** *The delegate of the legislature is therefore under a mandate to bring about a fair and equitable balance between competing considerations. Standing at the forefront of those considerations is above all the need to ensure efficiency and to protect the interests of consumers. The submission which has been urged on behalf of the appellant would reduce tariff fixation to a rather simplistic process of bringing about equality between generating units which have the same design and manufacturing origin. Such an approach overlooks the complex factors which have to be borne in mind in the determination of tariffs."*

26. Having said so, we may now turn to the judgment under Review. At the cost of repetition, we would again extract para 20 of the same hereunder :-

"20. No fault can be found in the commission adopting operating and financial norms of CERC Regulations, in the absence of original documents/invoices but what is questionable is what lead the commission to adopt norms of CERC Regulations for Financial year 2015-16, when the power project

of the 2nd Respondent was commissioned on 20/08/2016 i.e. during the financial year 2016-17."

27. It is clear from the perusal of the said para 20 of the judgement under review that this Tribunal has proceeded on the assumption that while passing the impugned order dated 29th November, 2017, the Commission has adopted the norms of CERC Regulations, for Financial Year 2015-16.

28. We may now turn to the impugned order dated 29th November, 2017 passed by the Commission.

29. The discussion with regards to the "Annual Module Degradation" in the said order is as under :-

"II. <u>Annual Module Degradation:</u>

a) <u>Submission of the Petitioner :</u>

The Petitioner submitted that although Hon'ble Commission had allowed 0.5% degradation after 4th year of useful life and reduced the generation thereafter, the levellised tariff was not computed in accordance with the correct formula as directed by Hon'ble Tribunal in Judgment dated 17.04.2013 in Appeal No. 75 of 2012, which was subsequently implemented by Hon'ble GERC in its Order dated 07.07.2014. The Petitioner submitted the judgment copies of the APTEL, GERC and RERC.

b) <u>Commission's analysis & decision:</u>

Hon'ble Central Electricity Regulatory Commission (CERC) in its order No. SM/005/2015 (Suo-Motu) dated 31.03.2015 under clause 7 (1) (c) mentioned that, "Considering the Exchange Rate at '62.05/US$ & module cost at US$ 0.52/Wp, the Commission hereby determines the module cost at '322.66 Lakh/MW for FY 2015-16. Since the RE Tariff Regulations do not provide norms for degradation, the Commission decided to consider module degradation as allowed in the past on national basis based on the study carried out by the Commission as '9.69 Lakh/MW. Accordingly, the Commission determines the total module cost at '332.35 Lakh/MW.

It is noted from the above that, the total module cost considered by Hon'ble CERC is inclusive of impact pertaining to module degradation as well further, as the Commission has considered the CERC benchmark for module cost, as detailed in subsequent Paras, consideration of separate Impact pertaining to module degradation doesn't arises

Accordingly, the Commission decided to determine the tariff with module degradation inclusive in total module cost method which is in line with CERC order mentioned above."

30. The discussion indicates that even though the Commission has referred to CERC order dated 31st March, 2015 yet it has not adopted the said order but has only considered the principles laid down by CERC in the said order. Specifying the same amount or figure as total module cost

as specified by the CERC in the order dated 31st March, 2015, would have normally given the impression that the CERC order has been adopted. However, that is not the case. The Commission has only taken guidance from the principles laid down by the CERC to determine the tariff with module degradation inclusive in total module cost.

31. So far as land cost is concerned, the Commission has determined the same on the basis of actuals as proposed by the petitioner with no reference to any CERC Regulations at all.

32. The discussion of the Commission under the head "Civil & General Works" in the order dated 29th November, 2017 is extracted herein below:-

> ***"III) <u>Civil & General Works</u>***
>
> *a) Submission of the Petitioner:*
>
> *The Petitioner submitted that they have incurred Rs. 431.71 Lakh under this heads with the following breakup:*
>
> *(i) Rs. 26.79 Lakh under Land Leveling Cost*
>
> *(ii) Rs. 188.92 Lakh under Civil Works (including Roads) and*
>
> *(iii) Rs. 216 under General Services of Installation and Commissioning.*
>
> *b) Commission's analysis & decision:*

After scrutiny of the documents submitted by the Petitioner and the submissions made by the Petitioner, it is observed that the Petitioner has not followed the proper competitive bidding for selection of the EPC contractor for procurement of items. Further, even after providing repeated opportunity to the Petitioner to produce original bills & invoices, the Petitioner did not submit the same. The Respondent also raised the issue during various stages of the proceeding.

Furthermore, it is observed that the Hon'ble CERC vide the order dated 31.03.2015 has reduced the normative cost of non-module components for FY 2015-16 in comparison to that of previous years (FY2014-15) after considering views of few stake holders.

In view of the above and taking into consideration the increased cost of cables, transformers and other equipments, specially high transportation and labor cost in the State of Assam, the Commission decided to allow 15% increase over the CERC normative cost for FY 2015-16 accordingly, the Commission has approved Rs 57.5 lakh/MW for Civil & general works."

33. Even though the Commission has referred to the order dated 31st March, 2015 of CERC in this regard yet it has taken into consideration the peculiar situation in the State of Assam viz. increased cost of cables, transformers and other equipments, specially high transportation and

labour cost. Upon considering all these factors, the Commission has applied 15% escalation over the benchmark capital cost determined by CERC in arriving at the figure of Rs.57.5 lakh per MW which it approved. Manifestly, the Commission has only taken guidance from the CERC order and has not adopted the same.

34. In determining the cost of “mounting structure”, the Commission has allowed the cost for the same as per actuals, though with reference to CERC Benchmark but has not adopted the said benchmark.

35. With respect to the cost of “power conditioning unit”, we note that the Commission has again taken guidance from the normative cost fixed by CERC for the Financial Year 2015-16 and has allowed 15% increase over the same in view of the special circumstances applicable to the power projects in the State of Assam. It has not taken any figure from the CERC benchmark and has approved a specific figure of Rs.51.75 lakhs per MW. Therefore, on this aspect also it cannot be said that the Commission has adopted the CERC Order/Regulations.

36. The Commission, while evaluating cost of “evacuation infrastructure up to inter-connection point”, has considered CERC norms but has allowed enhancement of 15% on the same in coming to the

specific figure of Rs.63.25 lakhs per MW. This is indicative of the fact that the CERC norms were not adopted blindly.

37. The Commission has allowed the “preliminary and pre-operative expenses including IDC and contingency” as per the actuals without any reference to CERC benchmark.

38. While determining Capacity Utilization Factor (CUF), the Commission has referred to Regulation 39 on its own AERC Regulation, 2012 and has considered the information from various agencies i.e. NASA, NREL, Meteonorm, Solar GIS and TERY. It has neither referred nor adopted any norm/Regulation of CERC in this regard.

39. Similarly, while considering Auxiliary Energy Consumption (AEC), the Commission has given its own reasoning for allowing the same at 0.25 percent without any reference to CERC norms/benchmark.

40. While determining interest on term loan, the Commission has relied upon the documents submitted by the petitioner which mentioned the interest on loan at 11.5 percent and accordingly, approved the same.

41. It is only with regards to the “Module Cost” that the Commission has considered the marked rate of module as fixed by the CERC for the Financial Year 2015-16. Purportedly, the Commission appears to have

done so for the reason that the petitioner was unable to provide original invoices pertaining to purchase of modules.

42. Thus, undoubtedly the Commission had determined all the components of tariff determination except module cost by application of its own mind, with prudence check and in terms of its own AERC tariff Regulations. The Commission has not adopted any benchmark capital cost of CERC for any year whatsoever. At best it can be said that the Commission has taken guidance from the benchmark set by the CERC for some of the components of the tariff determination, which it was obligated to do as per Section 61 of the Electricity Act, 2003.

43. It appears that the confusion has arisen on account of what the Commission has noted in paragraph No. 5 of the impugned order dated 29th November, 2017 which reads as under :-

> *"In absence of the original documents/invoices submitted by the Petitioner, the Commission deems it appropriate to **adopt** relevant operating and financial norms of CERC regulations for FY 2015-16 for determination of tariff for the reasons that the Commission has so far not issued any generic tariff order for RE projects and secondly the AERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources), 2012, is in line with CERC (Renewable Energy) Regulations, 2012 based on which the above CERC generic tariff order is notified."*
>
> *(Emphasis supplied)*

44. The emphasis is on the word "adopt" used in second line of the paragraph. Clearly, this is a case of selection of wrong word by the

Commission for the reason that the commission has not adopted the financial norms/regulations of CERC, as explained herein above. The Commission ought to have used the words “take guidance” in place of the word “adopt”, which would have been in line with the tone & tenor of the remaining part of the order.

45. We are satisfied that a patent and glaring mistake has occurred in the judgement dated 19th December, 2024 which not only undermines its soundness but also has resulted in serious miscarriage of justice. The error is very material and stares in the eye, which is not only difficult but impossible to ignore. This is a fit case in our opinion where the power of review must be exercised to correct the patent mistake in the judgement under Review. There is no escape from the conclusion that our view and observations in the judgement dated 19th December, 2024 are not borne out from the record and need to be corrected.

46. We may note here we would be failing in our duties and would be perpetuating the glaring mistake in case we don’t review the judgement dated 19th December, 2024 by making much needed corrections in it. To rectify in the compulsion of judicial conscience. In saying so, we derive strength and support from the wise and inspiring words of Justice

Bronson in Pierce Vs. Delameter, “a judge ought to be wise enough to know that he is fallible and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead; and courageous enough to acknowledge his errors”.

47. We have no hesitation in acknowledging that we have erred in passing the judgement dated 19th December, 2024 as the same is based upon mis-conception of facts on account of mis-reading of the impugned order dated 29th November, 2017 of the Commission.

48. We have already explained that while determining projects specific tariff for the petitioner’s solar power project by way of the said impugned order dated 29th November, 2017, the Commission has not adopted the CERC Benchmark norms for the year 2015-16 or for that matter any particular year but has only taken guidance from the Benchmark Norms/Regulations of CERC. The Commission has also taken into consideration the geographical conditions of Assam and has accordingly modified the norms to suit the circumstances applicable to the petitioners power project. The approach of the Commission is in line with Regulation 5(8) of AERC Tariff Regulations, 2012 and the mandate of Section 61 of the Electricity Act, 2003.

49. Hence, no infirmity can be found in the impugned order of the Commission dated 29th November, 2017.

50. Accordingly, we allow the Review Petition and set aside our earlier judgement dated 19th December, 2024. Resultantly, we affirm the impugned order dated 29th November, 2017 of the Commission. The Appeal stands dismissed.

Pronounced in the open court on this 28th day of April, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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