# APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

## (APPELLATE JURISDICTION)

**Appeal No. 20 of 2015**
**and**
**Appeal No. 21 of 2015**

**Dated : 26.05.2022**

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson**
**Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**IN THE MATTER OF:**

**West Bengal State Electricity**
**Transmission Company Limited**
**Vidyut Bhavan, Block DJ,**
**Sector – II, Bidhannagar,**
**Kolkata – 700091.** **…. Appellant (s)**

**Versus**

**West Bengal Electricity Regulatory Commission**
**FD – 415 A, Poura Bhawan,**
**3rd Floor, Sector – III,**
**Bidhannagar,**
**Kolkata – 700106.** **…. Respondent(s)**

Counsel for the Appellant (s) : Mr. M. G. Ramachandran, Sr. Adv.
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Ms. Babita Sant for R-1

# J U D G M E N T

**Per Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

1. The two captioned appeals have been filed by the West Bengal State Electricity Transmission Company Limited (in short "Appellant" or "WBSETCL" or "transmission Licensee") having grievances against the Annual Performance Review (APR) orders passed by the West Bengal Electricity Regulatory Commission (herein after "State Commission", or "WBERC")

2. The Appeal No. 20 of 2015 has been filed by the Appellant assailing the Order dated 10.06.2014 ("Impugned Order 1") passed by the State Commission in review petition no. APR (R)-1/12-13 against order dated 19.10.2012 in Case No. APR-26/11-12.

3. The Appellant, being aggrieved by the State Commission order dated 09.09.2013 ("Impugned Order 2") in petition no. APR-32/12-13 and order dated 10.06.2014 ("Impugned Order 1") in petition no. APR(R)-4/13-14, filed the second captioned appeal being appeal no. 21 of 2015.

***Parties in both the Appeals***

4. The Appellant, West Bengal State Electricity Transmission Co. Ltd., was incorporated as a public limited company under the Companies Act 1956 on 16.02.2007 and vested with the function of the Transmission Load Despatch in the State of West Bengal under the West Bengal Power Sector Reforms Transfer Scheme, 2007 Formulated by the Government of West Bengal under Section 131 of the Electricity Act, 2003 (hereinafter referred to as "the Act"). WBSETCL was also designated as the State Transmission

Utility in the state of West Bengal and is a deemed transmission licensee under the second proviso of Section 14 of the Act.

5. The Respondent**,** West Bengal Electricity Regulatory Commission is a statutory body set up under the provisions of the Electricity Regulatory Commission Act, 1998 (14 of 1998), presently vested powers and functions as defined under the Electricity Act, 2003.

6. The issues under challenge are common in the two captioned appeals and are as follows:

A) Appeal no. 20 of 2015
   (i) Rate of interest on Working Capital and
   (ii) Incentive

B) Appeal no. 21 of 2015
   (i) Interest on Normative Loan,
   (ii) Interest on Normative Working Capital, and
   (iii) Advance against Depreciation.

7. The Respondent Commission conceded to revisit the claims of the Appellant under item no. (i) & (ii) of the Appeal no. 21 of 2015 as such only issues pertaining to item no. (i) & (ii) in the first captioned appeal and item no. (iii) of the second captioned appeal are under adjudication.

8. However, the Respondent Commission, in addition to above issues, also challenged the captioned appeals on the grounds of maintainability. It was submitted that these appeals have been filed, challenging the orders passed on 10.06.2014, for both the appeals through separate orders, in review petitions being petition no. APR (R)-1/12-13 and APR (R)-4/13-14

filed by the Appellant, it was argued that the review petitions having been dismissed by rejecting the request of the Appellant on the grounds which were considered in the main petitions filed before the State Commission, as such these captioned appeals are not maintainable.

9. Relying upon the judgment passed by Hon'ble Supreme Court in Bussa Overseas and properties Private Limited & another v. Union of India & another ((2016) 4 SCC 696), the Respondent added that the appellant, in the first captioned appeal, is required to challenge the original order dated 19.10.2012 in view of the fact that once the review is dismissed the right of appeal accrues only in respect of the original order and not in respect of the order passed in review. It is submitted that the original order is of dated 19.10.2012 and therefore time barred. Effectively the appellant is trying to question the decision of the Commission held in the original order dated 19.10.2012 without preferring any appeal as such. The present appeal may be dismissed on this ground alone. Similarly, the second captioned appeal is not maintainable.

10. The para 29 of said judgment of Hon'ble Supreme Court of India rendered in Bussa Overseas and properties Private Limited & another v. Union of India & another ((2016) 4 SCC 696) is reproduced below:

> *"29. Needless to state that when the prayer for review is dismissed, there can be no merger. If the order passed in review recalls the main order and a different order is passed, definitely the main order does not* exist. *In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party."*

11. Further, reliance was placed on this Tribunal judgment dated 02.12.2013 in appeal no. 88 of 2013 (*NTPC vs CERC*) wherein it was held that:

> *"19. The question is whether the doctrine of merger would apply to the cases where the rejection of particular issues in the main order has been confirmed in the Review Order.*
>
> *20. In this context, it would be appropriate to refer to the principles laid down on this issue by the Karnataka High Court in the case of Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510.*
>
> *21. As per this decision, when the subject matter of the order of the lower court is the same, as of the subject matter of the order of the Appellate Court, the order of the lower Court gets merged with the order of the Appellate Court so that there is only one order holding the field. But, if the order of the subordinate authority related to the several distinct issues and the Appeals are reviewed, is filed only in regard to one or few matters, then there cannot be merger of the entire order of the lower court with the order of the Appellate Court. In that event what will merge in the order of the Appellate Court is not the entire order of the lower court but only that part of the order which relates to the subject matter of the Appeal.*
>
> *22. On the basis of these observations, the High Court has laid down the principles with regard to doctrine of merger. They are as follows:*

*(a) Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.*

*(b) If the appeal or revision is restricted to a delinkable part or portion of the original order or one of the several matters or issues dealt by the original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.*

*(c) Where the Appellate authority has given plenary jurisdiction over the entire matter dealt with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of views. The view of this Court in such cases has been that the merger will be in respect of the entire order.*

*(d) There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."*

*23. These principles would make it clear that the purpose of doctrine of merger is to ensure that at one time, one order is operative. This means that part of the order which is not the subject matter of the Appeal cannot be said to have merged with the order passed by the Superior Court. The said principle would apply even in the case of Review. This is because while the Doctrine of Merger is applicable in case of an Appeal or Revision even if the same is dismissed by the Superior Court, the Doctrine of Merger will not be applicable in the event, the Review is rejected. 24. This principle has been quoted in the judgment of Hon'ble Supreme Court in the case of DSR Steel P Limited v State of Rajasthan (2012) 6 SCC 762. The following is the observation:*

*"……*

*25.2. The Second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review Petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with*

*such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.*

*25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review Petition. The decree in such a case suffers neither any reversal nor dismissed thereby affirming the decree or order. In such a contingency, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the Review Petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the Appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.*

***26. The decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been noted, shall also have to be understood in that lights only."***

*25. So, the above observation of Hon'ble Supreme Court, the Doctrine of Merger in the case of Review will be applicable only to the subject matter of the Review and the same will not be applicable if the Review is rejected in respect of the said subject matter.*

*26. In other words, if the Review Petition raises several distinct issues and the some are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. If this is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that the issue has been decided in the main order itself.*

*27. So, it would be appropriate for the party only to file the Appeal as against the main order and not against the rejection of the order passed in the Review Petition.*

*28. According to the Respondent, if the submissions of the Appellant to the effect that since the Review was partly allowed, the entire tariff order stands merged with the Review Order is accepted, there will be serious consequences and ramifications.*

*29. The learned Counsel for the Respondent has pointed the said ramifications which are as follows:*

*(a) The Tariff Order having merged with the Review Order will cease to exist and consequently, the Review Order will be the only operative order. In such an event, the Appellant will be precluded from challenging the aforesaid issues (a) and (b) on merits. In such a scenario that the Appellant is effectively seeking a determination*

*of whether the review was correctly rejected by the CERC or not, which is not permitted.*

*(b) In the event of the Tariff Order is said to have merged with the Review Order in its entirety, no appeal can be filed against the part of the review order wherein the review has been rejected. The same is on account of the fact that reviews being a creature of the statute; the restrictions imposed under the statute on the remedy against the review order will also have to be given effect to. Further, the tariff order having merged with the Review Order also cannot be challenged. Hence, if the submissions of the Appellant are accepted the same will leave the Appellant remediless.*

*(c) Assuming that a separate Appeal was filed by the Appellant, after the filing of the Review Petition but before passing of the Review Order, challenging the Tariff Order on issues distinct from the issues raised in the Review petition, then the entire Tariff Order would merge with the Review Order and such an Appeal will become infructuous.*

*30. We find force in the submissions made by the Respondent. Therefore, we hold that doctrine of merger will not be applicable to the matters wherein the review has been rejected or to a case wherein the Review Petition has been partly rejected.*

***31. If the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. When this principle is applied to the present case, then we are constrained to hold that the present***

***Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that these issues have already been decided in the main order itself. Thus, we uphold the objection regarding the Maintainability of the Appeal."***

12. From the plain reading of the above judgment, it is clear that High Court of Karnataka has laid down the principle whereby stating that "*There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."*

13. Further, from in Bussa Overseas and properties Private Limited & another v. Union of India & another ((2016) 4 SCC 696) it is held there is no merger of review order with the main order in case the prayer for review is dismissed. However, if the order passed in review recalls the main order and a different order is passed, definitely the main order does not exist. In that event, there is no need to challenge the main order, for it is the order in review that affects the aggrieved party."

14. On the contrary, the Appellant submitted that the review petitions have been filed on various issues, of which some of the issues have been considered by the State Commission. Therefore, the main order is amended and the review order succeeds the main order. Reliance was placed on various judgments, namely:

*a) Sushil Kumar Sen v State of Bihar (AIR 1975 SC 1186).*

*b) Rekha Mukherjee v Ashis Kumar Das and Ors ((2005)3 SCC 427).*

*c) DSR Steel Pvt. Ltd. vs. State of Rajasthan ((2012) 6 SCC 782).*

*d) Kunhayammed and Ors v. State of Kerala and Another ((2000) 6 SCC 359).*

*e) Bussa overseas and Properties Private Limited and Another v. Union of India and Anr. ((2016) 4 SCC 696).*

*f) Municipal Corporation of Delhi v. Yashwant Singh Negi ((2013) 6 SCC 782).*

*g) Manohar s/o Shankar Nale and Others v. Jaipal Sing s/o Shivlalsing Rajput and Ors ((2008) 1 SCC 520).*

15. The most relevant judgment of the Hon'ble Supreme Court of India, which comprehensively analyze the present issue of maintainability before us is DSR Steel Pvt. Limited's case. Relevant paragraphs at 24 to 26 of the judgment for the sake of emphasis are quoted again as under:

*"……*

***25.2. The Second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review Petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.***

*25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review Petition. The decree in such a case suffers neither any reversal nor dismissed thereby affirming the decree or order. In such a contingency, there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the Review Petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the Appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition.*

***26. The decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been noted, shall also have to be understood in that lights only."***

16. From para 25.2 of the above judgment, it can be extracted that in case the Commission passes an order in a review petition, allowing the review petition, reversing or modifying the decree/ order passed in the main petition, such an order results into a composite order whereby the Commission not only vacates the earlier decree/ order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the

one made earlier. the initial decree/ order is vacated and at the same time another decree/ order and the decree so vacated, reversed or modified is then the decree that is effective for the purpose of a further appeal, if any, maintainable under law.

17. Therefore, we decline to accept the objections raised by the Respondent Commission in regard to the maintainability of the appeals in hand, thereby allowing the two appeals in hand.

18. As already stated, the learned counsel for the appellant and respondent reached an agreement on issues of normative interest on loan and interest on working capital raised in Appeal No 21 of 2015. Accordingly, by order dated 18.04.2022, it was held that:

> *"The second captioned appeal (Appeal no. 21 of 2015) assails the Order dated 09.09.2013 passed by the respondent Commission disallowances under three heads being the cause of grievances which include interest on normative loan (borrowed capital), interest on working capital and computation of advance against depreciation. During the hearing, upon instructions, learned senior counsel appearing for the Respondent Commission submitted that given the contentions that have been raised by the appellant herein, the respondent Commission is ready and inclined to revisit the first two issues viz. interest on normative loan and interest on working capital. In this view, it was agreed on both sides that the matter to the extent of the said issues vis-à-vis the Tariff Order for FY 2011-12 passed on 09.09.2013 (as was also subject matter of the subsequent Review Order dated 10.06.2014) be remitted to the State Commission for reconsideration, without any expression*

*of opinion by this Tribunal in appeal, the decision pressed herein being restricted to the remaining issues only."*

19. The issues, therefore, under challenge are only the following three issues for consideration and further scrutiny:

(1) Rate of interest on Working Capital (Appeal 20/2015)
(2) Incentive (Appeal 20/2015)
(3) Advance against Depreciation (Appeal 21/2015)

***Issue no. 1* -Rate of interest on Working Capital**

20. The Appellant has submitted that the State Commission has erred in determining the Interest on working capital for the FY 2010-11 period. It was added that the rate of interest considered and applied by the Respondent Commission under the provisions of Regulation 4.6.5 of the Tariff Regulations, 2007 is incorrect.

21. The Regulations applicable for the FY 2010-11 are the Tariff Regulations, 2007. The relevant regulation is reproduced below:

"*4.6.5. Interest on Working Capital*
*4.6.5.1. working capital requirement shall be assessed on normative basis @ 18% on estimate annual sales revenue reduced by the amount of Depreciation, Deferred Revenue Expenditure and Return of the generating company / licensee.*
***4.6.5.2 Rate of interest on working capital so assessed on normative basis, shall be equal to the short-term prime lending rate of State Bank of India as on the 1st April of the year preceding the year for which tariff is proposed to be***

***determined or at the actual rate of borrowing whichever is less.***

*4.6.5.3 In addition to interest on working capital, the licensee shall be allowed interest on cash security deposit taken by it at the rate in terms of the regulations of the Commission on actual basis.*

*4.6.5.4 The Commission may allow, if considered necessary, interest on temporary financial accommodation taken by the generating company/ licensee from any source to a reasonable extent of unrealized arrears from the consumers / beneficiaries.*

22. The Tariff Regulation (Regulation 4.6.5.1) was amended by the State Commission by the WBERC (Terms and Conditions of Tariff) Amendment Regulations, 2007. The amended Regulation 4.6.5.1 is quoted as under:

*"4.6.5.1 The working capital requirement shall be assessed on normative basis @ 18% on summation of annual fixed charge, fuel cost and power purchase cost reduced by the amount of depreciation, deferred revenue expenditure, return on equity and other non cash expenditures such as, the provision for bad-debt, reserve for unforeseen exigencies, special appropriation against any withheld amount of previous year, arrear on account of adjustment due to Annual Performance Review, FPPCA, etc of a generating company or a licensee, as the case may be."*

23. From the above, the rate of interest to be considered on normative basis is equal to Short Term Prime Lending Rate (PLR) of the State Bank of India or at the actual rate of borrowing whichever is less. The Appellant submitted that the rate applicable for the said FY 2010-11 was 9.25%.

24. The Respondent Commission submitted that the contention to the effect that all amounts towards loan were taken into account irrespective of the fact that whether the same is relatable to working capital or not is not correct. In fact, for computation of average interest rate, Commission only considered the loan taken for revenue expenditure as may be reflected from Form C.

25. However, the Appellant submitted that the Respondent Commission has, in the Impugned Order, applied the rate of interest of 7.36%, which is not in consonance with the relevant Regulation i.e., the Short-Term Prime Lending Rate of the State Bank of India stating as under:

> "*WBSETCL has claimed the rate of interest on working capital at SBI interest rate of 9.25%. It is seen from the submission in (Form - C to Annexure - 1) of the APR application of WBSETCL for the year 2010-11 that the average rate of interest paid on the borrowings under revenue head comes to 7.36%. The Commission thus consider the rate of interest @ 7.36% being less than the SBI rate as claimed by WBSETCL."*

26. The Appellant submitted that the State Commission has adopted the Average Rate of Interest payable by WBSETCL on the borrowings under the revenue head for considering the interest on working capital. The general borrowings considered by the State Commission for arriving at the above interest rate have no nexus to the working capital requirements of WBSETCL. Further, the borrowings taken into consideration by the State Commission was for only part of the year and not for the entire year.

27. Further, added that the Regulation provides for interest on working capital to be allowed, in case there is no actual borrowings for the working

capital either during the year in question or for part of the year in question, at the interest rate equivalent to the Short Term Prime Lending Rate of the State Bank of India.

28. The Appellant submitted that the working capital may be funded through internal accruals and management of finances. In such cases, the interest or normative rate cannot be denied. Our attention was invited to the decision of this Tribunal in DPSC Limited vs West Bengal Electricity Regulatory Commission in Appeal No. 137 of 2009 dated 06.09.2011 and in Appeal No. 1 of 2011 dated 05.01.2012 wherein this Tribunal had interpreted Regulation 4.6.5 of the West Bengal Commission. The relevant extract from the judgment dated 06.09.2011 in appeal no. 137 of 2009 is quoted here under:

> *"8. The first issue is regarding the interest on working capital.*
>
> *8.1. According to the learned counsel for the Appellant the State Commission has failed to consider the interest on working capital on the basis of the normative working capital computed under the provisions of the Regulation 4.6.5.1.*
>
> *8.2. According to learned counsel for the State Commission, Regulations 2.7.1, 4.6.5.1 and 4.6.5.2 would show that the State Commission is entitled to take the actual interest on working capital incurred by the Appellant. Regulations 4.6.5.1 and 4.6.5.2 form part of general principles of computing cost and return laid down by the State Commission. Such general principles are intended to enable the Applicant to make assessments of the different elements of cost and return at the time of submission of the application for tariff revision. The assessment made for the prospective period has every possibility of having deviations from the actual. There is no provision in the Tariff Regulation which debars the State Commission for regulating the amount of allowable interest on actual basis.*

*8.3. Let us first examine the relevant Regulations.*

> *"4.6.5.1 The working capital requirement shall be assessed on normative basis @ 18% on summation of annual fixed charge, fuel cost and power purchase cost reduced by the amount of depreciation, deferred revenue expenditure, return on equity and other non cash expenditures such as, the provision for bad-debt, reserve for unforeseen exigencies, special appropriation against any withheld amount of previous year, arrear on account of adjustment due to Annual Performance Review, FPPCA, etc. of a generating company or a licensee, as the case may be.*
>
> *4.6.5.2 Rate of interest on working capital so assessed on normative basis, shall be equal to the short-term prime lending rate of State Bank of India as on the 1st April of the year preceding the year for which tariff is proposed to be determined or at the actual rate of borrowing whichever is less".*

*The Regulations provide that the working capital will be assessed on normative basis but the interest rate on working capital shall be the short term prime lending rate of SBI as on 1st April of the preceding year or the actual rate of borrowing, whichever is less.*

*8.4. This issue has already been decided by this Tribunal in the case of Reliance Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. reported as 2009 ELR (APTEL) 0672. The relevant extracts of the judgment are reproduced below:*

> *"11. The Commission has directed that the interest on working capital be treated as efficiency gain and is required to be shared as per Regulation No. 19. The treatment given to the interest on working capital is as under:*
>
> *"**Interest on Working Capital***
>
> *As discussed in the above paragraphs, the actual interest on working capital incurred by REL during FY 2006-07 is nil and the*

*normative interest on working capital approved by the Commission considering other elements of expenses as approved after truing up, works out to Rs.0.60 Crore. As the actual expenditure under this head is zero, the Commission has considered the entire normative interest on working capital as efficiency gains and has considered sharing of the same with the distribution licensees in the appropriate ratio, as discussed while sharing efficiency gains due to reduction in R&M expenses.*

*12) It is submitted on behalf of the appellant that when working capital is funded through internal sources of the appellant, the internal funds also carry cost. It is further submitted that such funds employed elsewhere would have carried interest income.*

*13) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on working capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as working capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on working capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals and the cost of generating such accruals. The cost of such accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the*

*Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on working capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on working capital as per Regulation 19 has merit".*

*In the above judgment the Tribunal has held that the working capital funded through internal sources also carry cost. Such funds employed elsewhere would have carried interest income.*

*8.5. The above issue has also been dealt with in this Tribunal's judgment dated 28.8.2009 in Appeal No. 117 of 2008 in the matter of Reliance Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission & Ors. The relevant extract is reproduced below:*

*"15. In Appeal No.111/08, in the matter of Reliance Infrastructure v/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital when the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.*

*"7) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as Working Capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like some reserve which does not*

*carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on Working Capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on Working Capital as per Regulation 19 has merit.*

*15. b): The interest on Working Capital, for the year in question, shall not be treated as efficiency gain.*

*16. In view of our earlier decision on the same issue we allow the appeal in this view of the matter and hold that the entire interest on normative interest rate basis is payable to the appellant".*

***8.6. In view of the above, we direct the State Commission to determine the interest on working capital based on normative working capital according to the Regulation 4.6.5.1 and actual interest rate of borrowing, being less than the short term PLR of SBI, as per the Regulation 4.6.5.2. This issue is, thus, decided in favour of the Appellant."***

***(emphasis supplied)***

29. Needless to add that the State Commission is bound by the regulations notified by it as settled by the judgment of the Hon'ble Supreme Court of India in PTC India Limited vs Central Electricity Regulatory Commission (2010) 4 SCC 603.

30. Further, the principle has already been decided by this Tribunal in Appeal no. 137 of 2009, the State Commission is destined to determine accordingly.

31. Therefore, the issue of rate of interest on Working Capital is decided in favour of the Appellant, the State Commission is directed to review and decide the order in accordance with the principle laid down.

***Issue no. 2 -Incentive***

32. The present issue i.e. Incentive is covered by the Regulations 2.8.6, 4.16 and 10 of the Tariff Regulations, 2007 regarding operating norms, performance target and incentive payable to the Transmission Company for performance above the target. The said relevant extract from the regulations read as under:

> *" -----*
>
> *2.8.6. Opening Norms & Performance Target*
>
> *From time to time, the Commission shall specify norms for operation and other factors of generating station, transmission systems, distribution systems and set of performance target on different parameters for incentive through separate notification in due course. Such norms and set of performance target shall be applicable from the second control period. Till such date, the*

*Commission may fix criteria/ norms for determination of tariff subject to prudent check.*

*------*

*4.16 Incentive*

*4.16.1 The Commission shall specify incentive through notification on a set of performance target on different parameter in due course for generating stations and licensees.*

*------*

*10. Incentive (in Schedule 3)*

*10.1 Incentive = Annual Transmission Charges x (Annual Availability achieved - Target Availability) / Target Availability*

*Where, Annual transmission charges shall correspond to intra-state assets or for a particular inter-state asset, as the case may be.*

*Provided that no incentive shall be payable above the availability of 99.75% for AC system and 98.5% for HVDC system.*

*10.2. The paragraph 10.1 of this schedule shall become inoperative as soon as norms and target performance is specified as per regulation 2.8.6."*

33. The Tariff Regulations 2007 were further amended on 31.12.2007 by the State Commission's (Terms and Conditions of Tariff) Amendment Regulations, 2007. The amended Regulations 2.8.6 and Regulation 8 provides as under:

" -----

*2.8.6.4 In addition to the gains originating from better performance which are to be shares as per regulations 2.8.6.2 and 2.8.6.3, the licensee or the generating company shall also be entitled to incentives for improved performance, if the generating company or the licensee attains or exceeds various standards of operating performance related to different parameters for a year according to principles as specified in Schedule - 10 of these regulations. Such incentives for the parameters mentioned in Schedules 10 shall be independently measured for each parameter separately and will not be subject to adjustment or disallowance score. However, this incentive will only be allowed on claim with supporting information from the licensee or generating company concerned.*

*8. Incentive for Transmission Licensee (in Schedule 10)*
*Incentive = Annual Transmission Charges x (Annual Availability achieved - Target Availability) / Target Availability.*
*Where, Annual transmission charges shall correspond to intra-state assets or for a particular inter-state asset, as the case may be.*
*Provided that no incentive shall be payable below the availability of 99.75% for AC transmission line and substation system and 98.5% for HVDC system."*

34. In terms of the above provisions, incentive is admissible at the rate specified for performance by WBSETCL above the target availability. The Appellant submitted that it had duly claimed incentive as per the tariff format prescribed by the State Commission under the Tariff Regulations, 2011.

35. However, the Respondent Commission has, in the impugned Order, rejected the claim submitted by the Appellant citing the reasons as reproduced below:

> *"V) Incentive*
>
> *The Commission in the APR order 2010-11 did not allow the incentive of Rs. 175.64 lakh with the observation that WBSETCL had not submitted any documents regarding availability of the transmission system during, the year. WBSETCL in their Review petition has submitted a certificate from West Bengal State Load Despatch Centre (in short 'SLDC') in this regard and prayed for allowing the incentive in their Review Petition. The Commission feels that there is no scope for further submission of documents regarding their claim for incentive in this review petition as the order on the APR petition was passed after taking view from the stake holders on the documents submitted by WBSETCL in their APR application. Thus, the Commission does not consider the prayer of WBSETCL in this regard."*

36. The Respondent Commission, further, submitted that the APR order for the appellant, for the year 2010-11, was passed on 19.10.2012. The Commission rejected the claim of the appellant on the ground of not furnishing any authenticated certificate with computation of availability along with supporting documents. It is submitted that the claim of incentive is governed by para 8 of Schedule 10 read with Form 1.23 of the Tariff Regulations, 2011, the appellant did not submit any authenticated documents while calculating the incentive in terms of the aforesaid para 8 of the regulation, accordingly, Commission did not allow incentive. It is submitted that the availability of the transmission system can be authenticated by the

authority and/or body which monitors the same the State Load Despatch Centre (SLDC) in this case, therefore, the appellant was required to prove his claim of availability of the transmission system on the basis of authenticated documents of the SLDC.

37. We are not inclined to accept the contentions of the Respondent Commission. The Respondent Commission ought to have followed the principle laid down by the courts including the Hon'ble Supreme Court of India in allowing the review petitions when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases.

38. The Appellant submitted that the State Commission did not seek any additional information or documents in support of the claim of incentive made by WBSETCL during the proceedings held in the main petition, if the State Commission had claimed any such clarification, the documents etc in support of the claim for incentive during the hearing leading to the passing of the Order dated 19.10.2012, the Appellant would have furnished the same. Further, added that the tariff petition was filed in accordance with the relevant regulations, the procedure specified for filing, and the in the specified formats. The State Commission, if consider necessary, can always direct to submit details as it may consider appropriate.

39. Being aggrieved, the Appellant submitted the relevant records in the review proceedings including the relevant records of the State Load Despatch Centre (SLDC) establishing the performance of the Appellant exceeding the targeted level during FY 2010-11.

40. However, the State Commission rejected the claim of the Appellant for incentive, only on the general ground that Appellant did not file the

documents during the tariff proceedings and the same cannot be considered in the review proceedings.

41. Our attention was invited to the judgment rendered in "Rajender Singh vs. Lt. Governor. Andaman and Nicobar Islands and ors. (2005) 13 SCC 289, the relevant extract is as under:

> *"13. We are unable to countenance the argument advanced by learned Additional Solicitor General appearing for the respondents. A careful perusal of the impugned judgment does not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal. The High Court, in our opinion, is not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. Learned counsel for the appellant has also explained to this Court as to why the appellant could not place before the Division Bench some of these documents which were not in possession of the appellant at the time of hearing of the case. The High Court in our opinion, is not correct in overlooking the documents relied on by the appellant and the respondents. In our opinion, review jurisdiction is available in the present case since the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents. The appellant, in our opinion, has got a strong case in their favour and if the claim of the appellant in this appeal is not countenanced, the appellant will suffer immeasurable loss and injury. Law is well-settled that the power of judicial review of its own order by the High Court inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice.*

***14. The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review its own earlier order when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In our opinion, the High Court's order in the review petition is not correct which really necessitates our interference."***

42. Contrary to above judgment, the State Commission has rejected the review petition on the issue of "Incentive". It is settled principles that review jurisdiction is to be exercised not merely for apparent error but to avoid injustice and the resultant multifarious proceedings.

43. In Board of Control for Cricket in India vs Netaji Cricket Club (2005) 4 SCC 741, the Hon'ble Supreme Court has held that:

*"88. We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedent laid down therein are satisfied. The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in Section 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.*

*89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not*

*only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.*

*90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit"."*

44. We are of the opinion that the Respondent Commission should have allowed the review petition on the issue of "Incentive" once the complete documents are placed before it. The issue is decided in favour of the Appellant.

***Issue no. 3 -Advance against Depreciation***

45. The Appellant has claimed Advance Against Depreciation (AAD) as one of the claims in the APR petition as per Regulation 5.5.2 of the Tariff Regulations 2011 in order to meet the shortfall in fulfilling its loan repayment obligations during the year 2011-12, out of the depreciation for that year.

46. As submitted by the Appellant, the actual total loan repayment obligations of the Appellant during the year 2011-12 was Rs. 21929 lakhs, which included an amount of Rs. 5044.00 lakhs repaid to Corporation Bank

out of the proceeds of a Bond issue of Rs. 25000 lakhs in that year, thus a balance amount of only Rs.16885 lakhs remained, after exclusion of the repaid amount. Thereafter, addition of the repayment of normative debt of Rs. 587.63 lakhs considered in the computation of interest on normative loan, resulting into net repayment obligations to Rs. 17472.63, against which, depreciation availed during the year amounted to Rs. 12597.53 lakhs. Accordingly, the Appellant claimed AAD of Rs.4875.11 lakhs in its APR petition.

47. It is important to note here that regarding the issue of "interest on normative loan", issue no. 1 in Appeal no. 21 of 2015, the learned senior counsel appearing for the Respondent Commission conceded to revisit the first two issues viz. interest on normative loan and interest on working capital, and reached an agreement with appellant counsel for re-visit, therefore, the issue of AAD for 2011-12 along will remain unresolved till such time the issue on "interest on normative loan" is decided by the State Commission.

48. Therefore, the State Commission during revisit to the two issues shall determine the AAD also after hearing the Appellant, however, the Appellant is granted liberty to approach the Tribunal, if it remains unresolved.

49. The two issues viz. interest on normative loan and interest on working capital in Appeal no. 21 of 2015 are remitted to the Respondent Commission as conceded by the Ld. Counsel representing the Respondent Commission.

## ORDER

For foregoing reasons as stated supra, we are of the considered view that the captioned appeals have merit. The appeals are allowed and the impugned orders dated 10.06.2014 in case no. APR(R)-1/12-13 and order

dated 10.06.2014 in case no. APR(R)-4/13-14 passed by the West Bengal Electricity Regulatory Commission (WBERC) are set aside to the extent of our findings in the foregoing paragraphs.

The WBERC is directed to pass fresh and reasonable orders expeditiously, but not later than four months from the date of this judgment.

**Pronounced in the Virtual Court on this 26th Day of May, 2022.**

**(Sandesh Kumar Sharma)**
**Technical Member**

**(Justice R. K. Gauba)**
**Officiating Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

pr/mkj