IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 49 of 2016

Dated: 3rd July, 2024

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

In the matter of:

Neyveli Lignite Corporation Limited
First Floor, No. 8, Mayor Sathyamurthy Road,
FSD, Egmore Complex of Food Corporation of India,
Chetpet, Chennai – 6000031. ….Appellant

Vs.

1) Central Electricity Regulatory Commission
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi – 110001.

2) Tamil Nadu Generation and Distribution
Corporation Limited
7th Floor, Eastern Wing, 144,
Anna Salai, Chennai – 600 002.

3) Kerala State Electricity Board
9th Floor, Vidyuth Bhavanam,
Pattom, Thiruvananthapuram – 695004.

4) State Power Purchase Co-ordination Committee
Power Company of Karnataka Ltd.,
Kavery Bhavan, Bangalore – 560009.

5) Transmission Corporation of Andhra Pradesh Ltd.
APPCC/APTRANSCO, Room No. 447, A Block,
Vidhyut Soudha, Hyderabad – 500049.

6) Transmission Corporation of Telangana Ltd.
TSPCC/TSTRANSCO, Room No. 447, A Block,
Vidhyut Soudha, Hyderabad – 500049.

7) Puducherry Electricity Department,
Beach Road, Puducherry – 605001.

Counsel for the Appellant(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Mr. Amal Nair
Ms. Kriti Soni
Ms. Ashabari Basu Thakur
Ms. Anushree Bardhan
Ms. Surbhi Kapoor
Ms. Srishti Khindaria
Ms. Shikha Sood
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Mr. J. Dhanasekaran
Ms. Tanya Sareen
Mr. Shubham Arya

Counsel for the Respondent(s) : Mr. Alok Shankar
Mr. Kumarjeet Ray
Mr. Mahip Singh
Ms. Nayantara A. Pande for R-1

Mr. S. Vallinayagam
Ms. S. Amali for R-2

Mr. P. V. Dinesh
Mr. Sindhu T. P.
Mr. Bineesh K.
Ms. Enna Oomen
Mr. Ashwini Kumar Singh
Mr. Mukund P. Unny
Ms. Arushi Singh
Mr. Rajendra Beniwal

Mr. M. T. George for R-3

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned Appeal has been filed by M/s. Neyveli Lignite Corporation Ltd. (in short "NLC" or "Appellant") under Section 111 of the Electricity Act, 2003 challenging the Order dated 21.01.2016 passed by the Central Electricity Regulatory Commission (herein after referred to as the "CERC" or "Central Commission") in Review Petition No. 9 of 2015 filed in Petition No 68 of 2013 relating to the revision of pooled lignite price on account of inclusion of Mine II Expansion lignite cost for the period from 2010-11 to 2013-14.

Parties

2. The Appellant, Neyveli Lignite Corporation Limited is a Government Company having setup Lignite based thermal power plants in the country, *inter-alia,* has core activities of lignite excavation and power generation using lignite from captive mines, further, all Southern States including Union Territory of Puducherry and the State of Rajasthan are beneficiaries of the power generated from the Appellant's power plants.

3. The Respondent No. 1, CERC, is a Statutory Body constituted under Section 76 of the Electricity Act, 2003 having powers to adjudicate the disputes as raised in the captioned appeal under the provisions of the Act.

4. The Respondents No. 2 to 6 are the State Distribution Licensees or the holding companies vested with the powers to procure electricity on behalf of the State Distribution Licensees of the Southern Region, *inter-alia*, are the beneficiaries of the Appellant's Power Plant.

Facts of the Appeal

5. The Appellant being a generating company owned and controlled by the Central Government is covered by clause (a) of sub-section (1) of Section 79 of the Electricity Act, 2003, as such, the generation and sale of power by the Appellant is regulated by the Central Commission, further, the lignite price for the Appellant's plants is determined in accordance to the guidelines of Ministry of Coal (in short "MoC") issued in this regard, further, MoC letter dated 02.02.1998 stipulates that pricing of lignite for new projects need to be on the basis of pooled cost for the Appellant's Corporation as whole (in respect of all the mines accept Mine–I which is a standalone mine for TPS-I, the relevant part of the guidelines reads under:-

> *"As and when projects like Mine-I Expansion and Mine-IA go into production, the price of lignite from these projects would also enter into the pooled price*".

6. On 18.10.2004, the Government of India vide Letter No. 43011/3/2004.Lig/CPAM sanctioned an integrated project consisting of Mine-II (Expansion) with capacity of 4.5 million tonne per annum and Thermal Power

Station (TPS)-II (Expansion) with two units of 250 MW each, the sanctioned parameters of the project were as under:

		MINE-II Expansion	TPS-II EXPANSION
i)	Target Output	4.5 million tones of lignite per annum	2x250 MW
ii)	Sanctioned Cost (₹ in crore)	2161.28	2030.78
iii)	Date of achieving the target output capacity/Date of commissioning	Start of lignite production: on 53rd month from the date of sanction (Feb 2009) Full production capacity- On 57th month from the date of sanction(June 2009)	Unit 1 on 53th month from the date of sanction (Feb 2009) Unit-2 on 57th month from the date of sanction(June 2009)

7. It is the submission of the Appellant that due to some unforeseen problems, despite all the efforts of the Appellant, Mine-II Expansion project was commissioned on 12.3.2010 with a time overrun of 9 months and the Units 1 and 2 of TPS-II Expansion were commissioned much later on 05.07.2015 and 22.04.2015 respectively.

8. The Appellant filed the Petition No. 68 of 2013 before the Central Commission for pooling of Mine II lignite cost for the period 2010-11 to 2013-14, the Appellant submitted before the Central Commission that since TPS-II (Expansion) and Mine-II (Expansion) were sanctioned as one integrated project, it was first considered to include Mines-II (Expansion) in the tariff petition to be filed for TPS-II (Expansion), however, since TPS-II (Expansion) had not been able to achieve Commercial Operation Date due to technical snags and three years have elapsed since Mine-II (Expansion) went into production, pooling of Mine-II (Expansion) lignite cost cannot be delayed further.

9. The Appellant, further, submitted before the Central Commission that the lignite price of Mine-I is a Standalone price and the lignite prices of Mine-I(Expansion), Mine-IA and Mine- II are pooled together to arrive at the pooled lignite price of its mines in terms of the guidelines dated 2.2.1998, therefore, since Mine II Expansion is similar to the above two mines, the Appellant filed the above petition for revision of the approved pooled lignite transfer price on inclusion of Mine II Expansion Cost which would in turn be adopted for realization of energy charges from TPS-I (Expansion) and TPS-II from the year 2010-11 onward.

10. On 7.5.2015, the Central Commission passed the order in Petition no. 68 of 2013 whereby while allowing the pooling of lignite price of Mine II Expansion from the date of commissioning of Mine II expansion till 2013-14.

11. Aggrieved by the findings of the Central Commission in para 31 of the order dated 7.5.2015 with regard to the issue of incentive earned to be refunded as well as revenue earned by selling to the third parties to be apportioned to the beneficiaries, the appellant herein filed a review petition being No. 9 of 2015 on 28.5.2015.

12. On 21.1.2016, the Central Commission passed the Impugned Order in the Review Petition no. 9 of 2015 partially modifying the order dated 7.5.2015, holding as under:-

"Analysis and Decision:

11. We have considered the submissions of the Review Petitioner and the respondents and perused the documents available on record. The Review Petitioner has sought review on the two aspects which are discussed as under:

Issue No. 1: Incentive earned by NLC corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage 1 and Stage 2 stations shall be refunded to the beneficiaries:

12. The petitioner has submitted that in case of TPS-I (Expansion), the norms have been decided as 80% and because of the availability of the lignite, had the Commission specified the norms the Commission would have decided on the NAPAF to be at the maximum 80% (and not more). This is without prejudice to the contention of NLC that TPS II stage I and II are old generating stations and should not be equated with TPS I Expansion which is a newer generating stations.

14. The Commission in the impugned order held that in order to balance the interest of beneficiaries on account of inclusion of the cost of Mine-II Expansion in the pooled price without commissioning of TPS-II Expansion had taken a considered view and directed that any incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I and Stage-II stations shall be refunded to the beneficiaries corresponding to their allocation from TPS-II Stage-I and Stage-II.

15. The review petitioner has contended that the Commission would have specified norm of 80% had the lignite been available in Mine-II (Expansion). It is clarified that no such view was taken by the Commission while disposing of the petition. However, it has not been denied that the extra lignite which led to the extra generation on TPS-II, was supplied from Mine-II (Expansion).

16. The Commission in the impugned order while taking a conscious view directed NLC to refund the incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I. In view of this, there exists no error apparent on the face of the order. Accordingly, review sought by the petitioner on this ground is rejected.

Issue No.2: The revenue earned by selling lignite to outside agencies shall also be accounted for the benefit of the beneficiaries.

17. The Commission in the impugned order had directed that the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations where pooled lignite price approved by the Commission is applicable for computation of energy charges. It is clarified that pooled lignite transfer price per tonne was computed based on production of lignite at 85% CUF as per the guidelines specified by the Ministry of Coal for Computation of lignite price. The

Mines considered for revision of pooled lignite transfer price along with their capacities are as follows:

S. No.	Name of Mines	Capacity at 100% CUF (Million Tonne)	Capacity at 85% CUF (Million Tonne)
1.	Mine-I (Exp.)	4	3.4
2.	Mine-I A	3	2.55
3.	Mine-II	10.5	8.925
4.	Mine-II (Expansion)	4.5	3.825
	Total	22.5	18.7

18. The petitioner has submitted the details of lignite production, total expenditure, recovery from the beneficiaries, revenue from TAQA and sale to outside agencies for the year 2013-14 which have been summarized in para 4 above. Perusal of the tables at para 4 above reveals that 85% production of lignite works out to 3.825 MT for Mine-II (Expansion). The utilization of 3.825 MT at 85% CUF of Mine II Expansion, whether used for power generation or sale to the outside agency, would lead to full annual recovery of charges i.e. Rs. 705 crore for Mine-II (Expansion) at the rate of Rs 1843/tonne. Any sale to outside agency would likely to give additional profit to the petitioner. Accordingly, in terms of Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended on 12.11.2013, the prayer of the petitioner for review of order on the second aspect i.e. regarding revenue earned by sale of surplus lignite to outside agencies is considered and allowed. Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of

TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges.

19. With the above, the Review Petition is disposed of."

13. The order dated 7.5.2015 passed by the Central Commission got merged in the review order dated 21.1.2016, the review order having modified the earlier order dated 21.1.2016.

14. Aggrieved by the order dated 21.1.2016 passed by the Central Commission, the Appellant filed the captioned appeal.

Submissions of the Appellant

15. The Appellant has submitted that the Central Commission vide Order dated 07.05.2015 has held that the Appellant would not be entitled for any incentive for availability over and above the normative availability of 75% as provided for in the Tariff Regulations, 2009, and this has also not been reviewed in the Order dated 21.01.2016, further, added that the Tariff Regulations, 2009 provide for the normative availability to be achieved by TPS-II Stage I and Stage II generating stations as 75%, at which level the full fixed charges are recovered by the Appellant, additionally, the Tariff Regulations, 2009 also provide for incentive to be paid for availability over and above 75%, the relevant Regulations are as under:

"3. Definitions. - In these regulations, unless the context otherwise requires,-

…….

(27) 'normative annual plant availability factor' or 'NAPAF' in relation to a generating station means the availability factor specified in Regulation 26 for thermal generating station and in regulation 27 for hydro generating station;

……..

25. (1) ***Recovery of capacity charge, energy charge, transmission charge and incentive by the generating company and the transmission licensee shall be based on the achievement of the operational norms specified in this Chapter****.*

……

26. The norms of operation as given hereunder shall apply to thermal generating station:

(i) Normative Annual Plant Availability Factor (NAPAF)

……..

(c) Following Lignite-fired Thermal generating stations of Neyveli Lignite Corporation Ltd, other than specified in sub-clause (b)

TPS-I	72%
TPS-II	**75%**

Stage-I & II	
TPS-I (Expansion)	80%

…….”

16. The Appellant argued that the law is well settled, Regulations once framed are binding and any measures or orders passed by the Central Commission has to be in consonance with the Regulations framed, reliance was placed on ***PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603***, ***para 54 to 56***, accordingly, the Impugned Order being contrary to the Regulations is liable to be set aside for this reason alone, even otherwise, the apparent reason given by the Central Commission for denial of incentive, that the lower availability of 75% was on account of lignite shortage, is also misconceived.

17. Further, submitted that the Statement of Objects and Reasons issued by the Central Commission along with the Tariff Regulations, 2009 do not state any such reason, on the other hand, the Statement of Objects and Reasons specifically state that the target availability for payment of incentive shall be the same as the target availability for recovery of full fixed charges, as under:

> *“28.7 As regards target plant load factor for the payment of incentive is concerned, it is not relevant now when the Commission has decided to go for the availability based incentive scheme for the thermal*

*generating stations as provided in draft regulations. This has been discussed separately**. In coal/ lignite based stations we intend to keep the target availability for payment of incentive as the same as that of target availability for the recovery of full fixed charges."***

18. Added that the only reference to lignite shortage is in the Explanatory Memorandum issued by the Central Commission, inter-alia, as under:

"16.2.8 In case of lignite stations of NLC, only TPS-I (Expansion) is able to achieve availability and actual PLF level of more than 85%. TPS-II stage-I & II have not been able to achieve target availability levels of 75%. This is mainly on account Shortfall in Lignite supply due to Land acquisition problem in Mines. TPS-I has achieve availability of 78%. NLC has requested for lower availability of 68.49% in case of TPS-I and 72% for NLC TPS-II. NLC has submitted that TPS-I is facing more forced outages of boilers which were commissioned in 1960. Further, there is lot of variations in lignite quality and higher wetness of lignite due to rain resulting in choking in bunker chutes and raw lignite feeders, all leading to frequent fluctuations in the load of the unit which results in low PLF. Frequent outages of mills and slag conveyors causes reduction in availability.

16.2.9 The availability achieved by NLC TPS-I (Exp) is higher than the normative 75% and other coal based power stations of NTPC of similar sizes are also achieving norms at higher levels on sustained basis, it would therefore be reasonable to raise the normative plant availability factor to 80%. TPS-II stations of NLC has suffer due to land

acquisition problem in Mine-II. Till the problem is resolved, there is a case to keep the availability norms for this station at 75% as there is no possibility of an alternate arrangement for this station. As regards TPSI, the availability norm is being relaxed to 72% considering its old age and problem of frequent failure of mills."

19. Further, contended that once the Regulations are framed, the question of deviating from the same is not justified, even if there is any subsequent development, the only option available in law is for amendment of the Regulations, so long the Regulations are in force, the same are binding and ought to be followed, also, the higher availability of lignite has only benefitted the Respondent beneficiaries by way of higher availability of electricity at the lower cost.

20. It is submission that vide Order dated 07.05.2015, the Central Commission has come to the specific finding that the availability of lignite from the Mine-II Expansion is to the benefit of the Respondent beneficiaries, as otherwise the Appellant could source the lignite from alternate sources at a higher cost, the relevant extract is quoted as under:

"26. TANGEDCO has raised the issue that since TPS-II (Expansion) and Mine-II (Expansion) were sanctioned as an integrated project, transfer price of Mine-II(Expansion) should be determined after the TPS II (Expansion) is commissioned. We are of the view that production of lignite from Mine-II (Expansion) and commissioning of TPS-II (Expansion) should have been matched for the purpose for which Mine-II (Expansion) has been developed. However, the

generation project TPS-II (Expansion) has been delayed due to certain unforeseen problems and Mine-ll (Expansion), having achieved COD in March, 2010, started production of lignite. ***The lignite produced from Mine ll expansion is supplied to the existing generating stations of NLC and to other users of lignite. In other words, the lignite production from Mine-ll (Expansion) is meeting the additional fuel requirements of the existing generating stations of NLC and in the absence of such supply from NLC-ll Expansion, the additional fuels would have been sourced from alternative sources for generation of power and the cost of fuel would have been included in the energy cost. Looked at from this angle, inclusion of the cost of Mine II Expansion in the pooled lignite price is in the interest of beneficiaries****. If the pooling of the lignite price from the date of commissioning of Mine II Expansion is not allowed from the date of its commissioning, it would give adverse signal for further investment as the project developer would not be able to earn adequate return during the period of delay in the commissioning of the integrated generating station. Considering the above factors, the pooling of lignite price of Mine-ll (Expansion) is allowed from the date of commissioning of NLC Mines II Expansion".*

21. In view of above, argued that once the finding is that the use of lignite from Mine-II expansion is in the interest of the beneficiaries, there was no occasion for any denial of incentive to the Appellant, more particularly when such denial is contrary to the Statutory Regulations framed, additionally, the Central Commission has ignored the fact that for ensuring higher availability, the Appellant has to incur additional costs such as higher employee cost,

maintenance cost etc. which are part of the incentive payment by the beneficiaries.

22. Once the fixed charges are recovered at 75%, the marginal power available to the beneficiaries is at a much lower cost in the form of incentive as against fixed charges and this incentive is for meeting the marginal cost of the Appellant, and also to incentivize the Appellant to achieve higher availability which will ensure higher electricity available to the Respondents at a lower cost.

23. Regulation 25(3) of Tariff Regulations, 2009 provides for sharing in gains from secondary fuel oil to be shared by the parties in the ratio of 50:50, wherever any gains are to be shared, it is specifically provided for and there is no such provision for incentive.

24. In the present case, far from sharing of incentive, the Central Commission has directed the entire incentive to be paid to the Respondents, in effect defeating the whole purpose of the Appellant being efficient and achieving higher availability, in fact, after taking all the efforts to be available at a higher level and efficient performance, the entire incentive is now passed on to the beneficiaries.

25. The Appellant would have in fact been better placed to not ensure higher availability and restrict its availability only to 75%, which would have been detrimental to the Respondent beneficiaries.

26. The Appellant also submitted that the Central Commission has directed the entirety of the profits earned by the Appellant by selling lignite to the third

parties to be passed on to the Respondent beneficiaries in proportion to their share of power in the generating stations where the pooled lignite price is applicable for the computation of energy charges, initially in the main order dated 07.05.2015, the direction was to pass on the entire revenue earned, the relevant extract of the Order dated 07.05.2015 is as under:

> *"31. In order to balance the interest of beneficiaries on account of inclusion of the cost of Mines II Expansion in the pooled price without commissioning of TPS II Expansion, we direct that any incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I and Stage-II stations shall be refunded to the beneficiaries corresponding to their allocation from TPS-II Stage-I and Stage-II**. Further, the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations where pooled lignite price approved by the Commission is applicable for computation of energy charges."***

27. However, in the Review Order dated 21.01.2016, the Central Commission modified the above direction to the extent of the profit on sale of lignite to outside agencies over and above the capacity utilisation of 85%, inter alia, as under:

> *"18. The petitioner has submitted the details of lignite production, total expenditure, recovery from the beneficiaries, revenue from TAQA and sale to outside agencies for the year 2013-14 which have been summarized in para 4 above. Perusal of the tables at para 4 above reveals that 85% production of lignite works out to 3.825 MT for Mine-II*

(Expansion). The utilization of 3.825 MT at 85% CUF of Mine II Expansion, whether used for power generation or sale to the outside agency, would lead to full annual recovery of charges i.e. Rs. 705 crore for Mine-II (Expansion) at the rate of Rs 1843/tonne. Any sale to outside agency would likely to give additional profit to the petitioner. Accordingly, in terms of Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended on 12.11.2013, the prayer of the petitioner for review of order on the second aspect i.e. regarding revenue earned by sale of surplus lignite to outside agencies is considered and allowed. ***Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges."***

28. The Appellant argued that the above decision of the Central Commission also for the passing on of the entire profit on sale of lignite by the Appellant to third parties is erroneous as the Central Commission is not even the regulator for the mining activities of the Appellant and cannot control the sale of lignite by the Appellant to any person, including the price at which it is sold, with regard to the mining and supply of lignite by the Appellant to any third party, the Appellant acts purely as a fuel supplier and it is not subject to the regulatory jurisdiction of the Central Commission.

29. In any event, it is not even the case of the Respondents or that of the Central Commission that the Appellant is diverting any lignite to be used for generation and supply of electricity to the Respondent beneficiaries, and supplying the same to third parties, the entire requirement of the generating stations of the Appellant are being met first and on priority and it is only any excess lignite that is available after meeting the requirement of the generating stations, that is supplied to third parties, in other words, this supply to third parties is not from the share that ought to be used to the generating stations of the Appellant for supply to the Respondent beneficiaries.

30. In the above circumstances, it is erroneous for the Central Commission to consider the profit earned from the sale of excess lignite to be passed on to the Respondent beneficiaries.

31. Further, argued that even from a common commercial perspective, the Impugned Order is erroneous, so long the beneficiaries have the benefit of the lignite for the generation of electricity, there is no vested right of the beneficiaries over the excess lignite, it is the Appellant as the mining company which take the effort to mine the excess lignite available and supply the same to third parties, consistent with the Regulations of the Ministry of Coal, the Government of India.

32. The Appellant as a commercial entity, after having taken all the risks associated with mining, the effort etc., is left in a situation wherein the entire profit is to be passed on to the Respondent beneficiaries, the Appellant, in fact, would have been much better off not even mining the excess lignite as

available, which mining has in fact resulted in the overall benefit of the economy and availability of lignite to third parties, accordingly, the Impugned Order to such extent is erroneous, without jurisdiction and is liable to be set aside.

33. The Appellant submitted that the TANGEDCO has raised objection to the maintainability of the Appeal on the basis that an Appeal cannot be filed against the dismissal of the Review and NLCIL ought to have challenged the main Order dated 07.05.2015, however, argued that in the Review Order dated 21.01.2016, the Central Commission has modified the main Order dated 07.05.2015 to the extent of the profit on sale of lignite to outside agencies over and above the capacity utilisation of 85%, therefore, the main Order dated 07.05.2015 is merged with Review Order dated 21.01.2016 and modified to the extent the review is allowed in the Review Order dated 21.01.2016.

34. Reliance was placed on this Tribunal's Judgement dated 14.03.2016 in ***Appeal No. 157 of 2015 - The Assam Electricity Grid Corporation Ltd vs The Assam Electricity Regulatory Commission***, wherein the said issue has been dealt and settled, inter-alia holding as under:

> *"6.2.3) The Hon'ble Supreme Court in the case of DSR Steel Pvt. Ltd. Vs. State of Rajasthan reported in (2012) 6 SCC 762 has observed as under:*
>
> > *"25.1 One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is*

manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

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 pursuing 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 Sen v. 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."

6.2.4) Thus in the DSR Steel matter the Hon'ble Supreme Court has considered three situations while dealing with the Review Petition and the appeal against the Review Petition. Thus the Hon'ble Supreme Court has dealt with different situations that may arise and relate to Review Petitions filed before a Court or Tribunal. One of the situations could be where the Review Petition is allowed, the decree or order, passed by a Court or Tribunal, is vacated and the appeal/proceedings in which the same is made are re-heard and fresh decree or order passed in the same. ***In such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the Review Petition. In a separate case, it has been clarified by the Hon'ble Supreme Court that***

original decree/order does not merge with Review Order where Review Petition/application is simply dismissed, which position is however different where Review Petition succeeds partly or wholly because in such a situation original decree or order no longer remains intact.

6.2.5) This Appellate Tribunal vide judgment dated 05.03.2014 in Appeal No.167 of 2013 captioned Power Grid Corporation of India Ltd. Vs. Central Electricity Regulatory Commission & Ors., while dealing with the same issue namely, whether the instant appeal against the order passed on the Review Petition in case the Review Petition partly succeeds without challenging the original or main order, is maintainable and relying on the case law laid down in DSR Steel (P) Ltd. Vs. State of Rajasthan & Ors., reported in (2012) 6 SCC 782 has held that the appeal filed against the Review Order, if Review Petition is partly allowed, is maintainable in the Appellate Tribunal even without filing any appeal against the main order. The relevant part of the judgment dated 05.03.2014, passed by this Appellate Tribunal, in Appeal No.167 of 2013 is reproduced hereunder:

> *"(t) In the impugned Review Order dated 9.5.2013, the instant review petition has been partly allowed and, subsequently orders to this effect were directed to be issued by the Central Commission. The Review Petition has accordingly been disposed of. It is quite evident from the impugned review order that IDC and IEDC with regard to the Assets 1 & 2 were allowed for the reasons*

mentioned therein and the same with regard to the Assets 3 & 4 were disallowed for the mentioned reasons. The Appellant Petitioner claimed IDC and IEDC with respect to all the four Assets 1, 2, 3 & 4 which were disallowed in the main order. In the review order, IDC & IEDC for Assets 1 & 2 were allowed and Assets 3 & 4 were disallowed. On the basis of the review order, consequential order has been issued by the Central Commission which would further result in redetermination of tariff because tariff is determined on the basis of many components/Assets. Moreover, the transmission charges for combined Assets 1 and 3 have been determined in the main order for the period 1.9.2009 to 31.3.2014. The allowance of IDC and IEDC in respect of Asset 1 in the review order will result in modification of transmission charges for combined Asset 1 & 3 determined in the main order.

(u) Thus, by the review order, the learned Central Commission has partly set aside the main order and accordingly allowed the review application after rehearing the parties during the review petition. The main order has consequentially been reversed/modified. Thus, the learned Central Commission has made an order in review petition by which the review petition has been allowed and the decree/order under review has been reversed or modified. Such an order then becomes a composite order whereby the Central Commission has not only vacated the earlier decree or order but simultaneous with such vacation of the earlier decree or order has passed another decree/order by

modifying the one made earlier. Thus, the original decree or order of the Central Commission has been reversed or modified by the subsequent review order or decree and the review order or decree is effective for the purpose of further appeal.

After considering the controversy before us on the point of maintainability of the instant Appeal, and going through the different aspects of the matter and different rulings and legal position, we find ourselves in agreement with the pleas taken by the learned Counsel for the Appellant Petitioner. In our view, the instant appeal against the review order is fully competent and legally maintainable and this point namely; Point-1 is decided in favour of the Appellant Petitioner.

(v) The findings of this Tribunal in Appeal No. 88 of 2013 will not be applicable in the present case as in the present case the issue dealt with in the review petition was IDC and IEDC in respect of Asset 1 to 4, which was allowed partially by allowing IDC and IEDC in respect of Asset 1 & 2. Further, in the main order, the transmission charges for combined Asset 1 & 3 were determined. The review allowing IDC and IEDC in respect of Asset 1 will modify the transmission charges for combined Asset 1 & 3."

6.2.6) In view of the above discussion, we hold that the instant appeal, which has been filed against the Impugned Review order, passed on the Review petition, whereby the State Commission had disallowed three claims and allowed two claims out of the

total five claims raised in the Review Petition, is fully competent and legally maintainable because after allowing Review Petition on two issues namely, employee costs and non-tariff incomes the State Commission would have to re-determine or re-cast the tariff thereby making changes or modifications in the original decree. The settled principle of law is that there cannot be more than one decree in one matter. There can only be one decree in any matter. This issue is thus decided in favor of the appellant. Thus the instant appeal is maintainable, leaving us to decide the appeal on the other points raised in this appeal."

35. Further, submitted that an attempt has also been made to distinguish the Judgement of the Supreme court in DSR Steel by hair-splitting the words used in Para 25.2 of the Judgement, there is no requirement for a Review Order to have a finding of merger, the moment any issue is allowed in a Review the original decree gets modified/reversed/vacated and especially since both the main and the Review Order are passed in tariff proceedings.

36. Also submitted that on the merits the TANGEDCO has contended that the Ministry of Coal vide its Order dated 15.06.2009 while framing the Guidelines for transfer price of lignite has fixed the Capacity Utilisation Factor ('CUF') of 85% for the Appellant's mines for the period 2009-14, this, however, does not mean that beyond the CUF of 85% the Appellant will be sharing the profit with the cost of the beneficiaries, the beneficiaries take the extra electricity which is being generated beyond the CUF prescribed, if so, this cannot be a free supply

and at the bare minimum, incentive is admissible for such higher generation by the Appellant.

37. Additionally, submitted that the TANGEDCO is contending that the Review Order of the Central Commission is detrimental to TANGEDCO's interest, if so, TANGEDCO ought to have agitated this issue separately by filing appropriate proceedings, and therefore, this cannot be a response to the issues raised by the Appellant, namely the refusal to give any incentive and pass on the benefit of the additional generation to the beneficiaries without appropriate incentive.

38. Also countered the contention of the TANGEDCO that Appellant did not commission its TPS Expansion II generating plant in time while the mine associated with the same had started production, by such an argument the TANGEDCO has attempted to quantify the imaginary losses that it had to incur due to procuring the power from other sources while the TPS Stage II Project was delayed, there is no basis for such a loss and apart from the present Written Submissions TANGEDCO has never raised any claim for such alleged losses, in any event, such a claim is not even permissible in the present proceedings.

39. Also countered the KSEBL's contention that any profit earned by the Appellant by sale of lignite to agencies over and above the CUF of 85% has to be apportioned to the beneficiaries, by stating that such a contention is without any supporting regulation or precedent, if the beneficiaries wish to take the lignite from the TPS II Expansion mine for the sake of additional power, obviously the charges have to be paid by the beneficiaries, however, the

beneficiaries have no contribution in the Appellant making efforts for sale of the additional lignite to third parties, there is no basis for the beneficiaries to receive the entire profit from such sales, further, the fictious calculation of 70.46 crores made by KSEBL has no basis as this calculation has not even been made by the Central Commission as yet, the only reason why a generating company operates its plant beyond the prescribed PLF.

40. Further pleaded that the denial of incentive is extremely unfair and will force the generating companies to shut down the generator once the prescribed PLF/CUF is achieved, there is no other generating station which has been asked to pass on the entire incentive earned to the beneficiaries, also there is no Regulation which permits such a treatment.

Submissions of the CERC

41. The Central Commission submitted that Petition No. 68 of 2013 was filed by Neyveli Lignite Corporation Ltd. for the limited purpose of revision of pooled lignite prices for the period from 2010-11 to 2013-14 by pooling the expenditure of Mine-II Expansion with the existing pooled expenditure of Mine-I Expansion, Mine-IA and Mine-II in terms of the Ministry of Coal guidelines issued *vide* Letter No. 43011/4/91-CM (Vol. VI) dated 02.02.1998, the scope of the original petition was limited to taking into account commissioning of the Mine-II Expansion, corresponding pooled cost of lignite available to the Appellant and implications thereof and availability of the lignite for the generating units of the Appellant.

42. Further, submitted that it is relevant that NLC's TPS-II Power Station (Expansion) and Mine-II (Expansion) were sanctioned as one integrated project,

however, there was a delay in commission of the TPS-II Expansion while the Mine-II Expansion went into production three years prior to the commissioning of the TPS-II Expansion, therefore, the Appellant herein filed the Original Petition before the CERC for revision of the approved pooled lignite transfer price for arriving at a pooled price of lignite which was being used for Neyveli's existing power stations.

43. Therefore, the scope of the Original Petition was limited to the revision of pooled lignite price on account of inclusion of Mine-II expansion lignite cost for the period from 2010-11 to 2013-14 and the scope of the petition was not redetermination of tariff of the generating units of the Petitioner, further, the Normative Annual Plant Availability Factor in terms of Regulations 26(1)(c) of the CERC(Terms and Conditions of Tariff) Regulations, 2009 is 72% for TPS-I, 75% for TPS-II Stage I & II and 80% for TPS-I (Expansion).

44. Further, submitted that in terms of the order of the CERC dated 31.08.2010 in Petition No. 230/2009, the target availability NLC-TPS-I Expansion is 80%, the relevant part of the order has been reproduced hereunder for ready reference: -

> *"Target Availability*
> *57. In terms of Regulation 26(1)(c) of the 2009 regulations, the Target Availability considered for the generating station for the period 1.4.2009 to 31.3.2014 is 80%."*

45. Also argued that the 2009 Tariff Regulations as well as the aforementioned tariff order have become final and are binding on all parties, the

said provisions had to be given effect to and were required to be applied while adjudicating the Original Petition and the Review Petition by the CERC.

46. The CERC informed that the Review Petition was filed by the Appellant before the CERC stating that there was an error apparent on the face of record on two issues as decided by the CERC –

a. *The incentive earned by Neyveli corresponding to the enhanced availability above the NAPAF of 75% (emanating from the 2009 Tariff Regulations) in case of TPS-II Stage I & II shall be refunded to the beneficiaries; and*
b. *The revenue earned by selling lignite to outside agencies must be accounted for the benefit of the beneficiaries.*

47. However, the Review Petition was disposed of with the following directions on the aforementioned issues: -

"16. The Commission in the impugned order while taking a conscious view directed NLC to refund the incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I. In view of this, there exists no error apparent on the face of the order. Accordingly, review sought by the petitioner on this ground is rejected.

18. …… Accordingly, in terms of Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended on 12.11.2013, the prayer of the petitioner for

review of order on the second aspect i.e. regarding revenue earned by sale of surplus lignite to outside agencies is considered and allowed. Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges."

48. It is the CERC's argument that it has applied the provisions of the applicable Tariff Regulations and previous tariff order while adjudicating the instant Review Petition, further, considering the limited mining capacity of the mines linked to the Appellant's plant coupled with the age of the plants had relaxed the norms for NAPAF for Neyveli's power stations.

49. In terms of the Statement of Reasons of the 2009 Tariff Regulations, it is clearly stated that the NAPAF for Neyveli's plants were reduced on an express representation from Neyveli that there would be difficulties in relation to availability of lignite, the relevant part of the Statement of Reasons has been reproduced hereunder for ready reference: -

"NLC has expressed that difference in the availability norms of 5% between coal and lignite power stations should be maintained as in the previous Tariff Orders for the period 2004-2009 in view of the difficulties faced in lignite fired boilers."

50. Therefore, the Appellant's submission that only incentive between 75%-80% of NAPAF should be rationalized is baseless, as without the difficulties in availability of lignite, incentive on NAPAF would have been eligible from 85% onwards as is the case for coal-based stations.

51. Further, contended that the CERC decided the NAPAF norms as stated in the 2009 Tariff Regulations for the Appellant's plant in consultation with the Central Electricity Authority and the stakeholders, and vide the Order passed in Original Petition, it took into consideration the interest of the Appellant and consumers and in accordance with the prescribed norms under the 2009 Tariff Regulations and the tariff orders issued a refund of incentive earned over NAPAF of 75%, further, it is pertinent to consider that the annual fixed charges with respect to Neyveli's generating station were determined at 75% NAPAF level.

52. Therefore, entire fixed cost of the appellant is covered by annual fixed charges up to 75% NAPAF level, any earning on incentive beyond 75% would result in excess profits at the cost of the end consumers.

53. Also submitted that Mine-II expansion cost is also included in the pooled lignite price, therefore boosting the profits of the Appellant, and the Appellant faces no losses beyond NAPAF of 75% as capacity charges beyond such generation is already being paid to the Appellant.

54. The Central Commission argued that the Appellant cannot be permitted to blow hot and cold and choose the operational parameters as per its convenience, the lower NAPAF in the applicable Tariff Regulations was fixed at

the express representation of the Appellant as confirmed by other stakeholders and such lower NAPAF has resulted in higher tariff for the beneficiaries, therefore, in the event the Appellant is now made eligible to recover Incentive over and above the same, it would result in double burden on the beneficiaries, also the excess lignite is available only due to delay in commissioning of the generating unit, associated with the mine, as such, the beneficiaries and the end consumer are already paying for the pooled price of lignite which includes the new mine, thus, if incentive is not shared with the beneficiaries, it would lead to the Appellant being unjustly enriching the Appellant just because lignite from a new mine was allowed to be used in the Appellant's existing plant without which they wouldn't have been able to better their efficiency in any case.

55. Also submitted that one parameter of tariff cannot be independently reviewed and burden on consumers due to lower NAPAF of the generating units of the Appellant cannot be further aggravated by entitling them to recover incentives for higher NAPAF, this would also be in the nature of incentivising the delay in commissioning of the TPS-II (Expansion).

56. Therefore, in light of the submissions made hereinabove, in terms of issue no. 1, the CERC keeping the mandate of the Electricity Act i.e. to ensure recovery of cost in a reasonable manner and protect the interest of the consumers determined tariff for NLC at a reduced NAPAF and balanced the interest by directing refund of the incentives collected.

57. Further, the CERC in its order in the Original Petition had held that any revenue that is earned by selling lignite to outside agencies should be apportioned to the beneficiaries corresponding to the share of power in the

station where pooled lignite price approved by the CERC is applicable for computation of energy charges, also as pointed out herein above, Mine II Expansion and Thermal Power Station-II (Expansion) was an integrated project, total cost of entire project i.e. the generating station and mine were capitalised and paid for by the beneficiaries.

58. Additionally, in the light of the Order of the Ministry of Coal dated 02.01.2015, wherein Neyveli had themselves represented that the Capacity Utilization Factor ("**CUF**") of 85% would be as per industry practice, and in the same order, the Ministry of Coal had therefore held that in line with the BPSA entered with Neyveli and its beneficiaries, the normative capacity utilization for Neyveli mines would be at 85%.

59. Thus, the CERC in the Impugned Order reviewed its finding and held that any additional profit earned by sale of lignite to outside agencies over and above the CUF of 85% as determined by the Ministry of Coal shall be apportioned to the beneficiaries corresponding to their share of power.

60. The CUF of Mine-II Expansion is 85% and the lignite transfer price of mines is arrived at in consideration of the said CUF, therefore, the Appellant recovers the entire cost of Mine-II expansion through the lignite transfer prices from the beneficiaries of Neyveli's power stations at a CUF of 85%.

61. Hence, any additional sale of lignite above CUF of 85% would mean additional benefit to the Appellant at the cost of the beneficiaries, the Mine-II Expansion cost is included in the pooled lignite price and is collected from the beneficiaries and the Appellant does not incur any extra cost in mining and

selling more lignite, as such, the beneficiaries bear the cost of mining, therefore the revenue generated from excess generation of lignite ought to be shared with the beneficiaries.

62. It is also submitted by the CERC that generating stations having captive mine are generally not allowed to sell the captive production to outside agencies, this is done primarily to ensure that mining does not become a separate business and generation business should not in any manner subside the mining operations, while NLC is entitled to sell lignite produced to other users, since the entire cost of mining is considered in the tariff of the generating station, the revenue therefrom should be accounted for to the beneficiaries only.

Submissions of the Respondent No. 2 (TANGEDCO)

63. The Respondent No. 2, challenged the Appeal, stating an appeal is not maintainable against the dismissal order in a review petition, i.e., wherein the grounds on which review was sought by the appellant before the CERC were refused to be reviewed by the CERC, such an appeal is barred by Order 47 Rule 7 CPC, the relevant issues raised by the appellant in its review petition before CERC are as under:

(i) The incentive earned by NLC corresponding to enhanced availability above the NAPAF of 75% in case of TPII stage I and stage II generating stations shall be refunded to the beneficiaries.

(ii) The revenue earned by selling lignite to outside agency shall also be refunded to the beneficiaries;

64. Further, submitted that the CERC vide order dated 21.01.2016 in 9/RP/2015 dismissed the review petition filed by the appellant herein on the first issue holding that:

> *"16. The Commission in the impugned order while taking a conscious view directed NLC to refund the incentive earned corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage-I. In view of this, there exists no error apparent on the face of the order. Accordingly, review sought by the petitioner on this ground is rejected."*

65. Also placed before us the contention of the appellant, in its review petition on the second issue before CERC, the same is extracted hereunder:

> *"5. The Review Petitioner has submitted that as per the above statement, the lignite cost has worked out at ₹ 1596.257 per tonne for 18.7 million tonnes of which the apportioned cost to the beneficiaries is only ₹ 2646.454 crore for 16.579 million tonnes constituting 88.66% of the total quantum of lignite. The balance ₹ 338.546 crore for 2.121 million tonnes constituting 11.34% of the total is recovered from the outside agencies and not from the beneficiaries. Accordingly, the lignite cost was already apportioned between the beneficiaries and the outside agencies. Therefore, there cannot be any further adjustment of revenue earned by selling lignite to outside agencies in favour of the beneficiaries. Neither Ministry of Coal guidelines 2014 nor the earlier guidelines for pricing of lignite have any mention about passing the benefits of open sales."*

66. It is his argument that the CERC vide order dated 21.01.2016 in 9/RP/2015 disposed of the review petition filed by the appellant herein on the second issue holding that:

> *"Accordingly, in terms of Regulation 103A of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, as amended on 12.11.2013, the prayer of the petitioner for review of order on the second aspect i.e. regarding revenue earned by sale of surplus lignite to outside agencies is considered and allowed. Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges."*

67. Accordingly, submitted that the above decision of CERC, clarifies the order passed by it in 68/MP/2013, the modification of order reiterates the decision of CERC that the revenue earned by selling lignite outside agency shall also be accounted for the benefit of beneficiaries, the contention of the review petitioner that "*Therefore, there cannot be any further adjustment of revenue earned by selling lignite to outside agencies in favour of the beneficiaries."* was rejected by CERC, thus, the only modification, CERC introduces in the review order is that "*any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilisation Factor of*

85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the commission is applicable for computation of energy charges."

68. Further, the specific contention of the review petition before CERC that -- "*The balance ₹ 338.546 crore for 2.121 million tonnes constituting 11.34% of the total is recovered from the outside agencies and not from the beneficiaries. Accordingly, the lignite cost was already apportioned between the beneficiaries and the outside agencies. Therefore, there cannot be any further adjustment of revenue earned by selling lignite to outside agencies in favour of the beneficiaries.* -- was rejected by CERC by the Order passed in the review petition.

69. It is submitted by the Respondent No. 2 that all the questions of law raised by the appellant in the present appeal relates to the above said two issues raised by the appellant in its review petition before CERC and refused to be reviewed by CERC in the order dated 21.01.2016 in 9/RP/2015, no appeal is permissible against and order refusing to review the issues raised in the review petition filed against the main order as per Order 47 Rule 7 CPC.

70. Reliance was placed on the judgment in ***DSR Steel Private Ltd versus State of Rajasthan (2012) 6 SCC 782*** where this particular issue has been dealt with by the Supreme Court, the relevant extract is quoted as under:

> *"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 any alteration or modification. It is an order by which the review petition has dismissed whereby 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. …."*

71. The above view has been reiterated more clearly in ***Bussa Overseas and Properties Private Ltd versus Union of India (2016) 4 SCC 696***.

"29. ***Needless to state that when the prayer for review is dismissed, there can be no merger****. If the order passed on 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."*

72. Further, in ***Shanker Motiram Nale v. Shiolalsing gannusing Rajput (1994) 2 SCC 753,*** it was held that:

"*An appeal against the order rejecting the application for review of judgement and decree passed by the learned that single judge is not available as appeal is not against the basic judgement."*

73. To arrive at this conclusion, the Supreme Court referred to Order 47 Rule seven of CPC, 1908 that bars an appeal against the order of the Court rejecting the review, further, in ***Rekha Mukherjee vs Ashis Kumar Das (2005) 3 SCC,*** it was categorically held that:

> *"31. … Having filed a review application on legal advice and having succeeded therein in part, it was not open to it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The respondents could have only preferred appeal only from that part of the decree in respect thereof review was not granted….."*

74. In light of above, the Respondent No. 2 submitted that the order of the review petition dismissing the issues, which were sought to be reviewed in the review petition, do not alter or modify the findings and reasons given by CERC in the order dated 07.05.2015 passed by CERC in 68/MP/2013, the issues refused to be reviewed remain as such in the main order, and the appellant has challenged that portion of the order in the review petition, which refused to interfere with the findings in the main order or which dismissed the review petition.

75. Further, added that the part of the main order against which no review was sought for and that part of the main order which is refused to be reviewed, exist as such, in spite of the fact that the review order reviewed other issues raised in the review petition, thus, when an appeal is sought to be filed against the review order dismissing the issues raised in the review petition, it is the main order alone which is to be challenged.

76. Also submitted that the order in the review petition dismissing the issues, which were sought to be reviewed only confirms the main order, even if the order in the review petition dismissing the review sought by the appellant is set aside, the findings in the main order remain undisturbed, thus, the findings of the order dated 07.05.2015 passed by CERC in 68/MP/2013 cannot be appealed against in the present appeal, accordingly, the appellant ought to have filed a separate appeal against the original order dated 07.05.2015 passed by CERC in 68/MP/2013.

77. Further, argued that the Paragraph 25.2 of ***DSR Steel Private Ltd versus State of Rajasthan (2012) 6 SCC 782*** lays down the law that to the extent review petition is allowed, ***"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.",*** there is no finding on merger of a decree in paragraph 25.2 of ***DSR Steel Private Ltd versus State of Rajasthan (2012) 6 SCC 782,*** also, Paragraph 25.1, 25.2 and 25.3 have to be read together and not paragraph 25.2 in isolation.

78. Apart from the above the main issue which arose for consideration in paragraph 24 and 25 of the above said judgment before the Supreme Court was the date from which period of limitation could be reckoned, the order passed in the review modifies the main order to the extent the prayer in the review petition is allowed, the part of the main order which is refused to be reviewed, exists as such, even after the review order modifies part of the main order on the issues which were sought to be reviewed.

79. It is his submission that as per the law settled by this Appellate Tribunal and the Supreme Court, the Appellant cannot file an appeal against issues raised by it in the review petition, and refused to be reviewed by the reviewing court, the appeal filed by the Appellant is not maintainable against the review petition order wherein CERC refused to interfere with the findings arrived at it in the main order, it is well settled law that the principle of merger does not apply to an order refusing to review a finding in the main order.

80. The Respondent, further, argued that without prejudice to the above contentions, it is submitted that even on merits the contention of the Appellant that -- *The Review Petitioner has submitted that as per the above statement, the lignite cost has worked out at ₹ 1596.257 per tonne for 18.7 million tonnes of which the apportioned cost to the beneficiaries is only ₹ 2646.454 crore for 16.579 million tonnes constituting 88.66% of the total quantum of lignite.* "*The balance ₹ 338.546 crore for 2.121 million tonnes constituting 11.34% of the total is recovered from the outside agencies and not from the beneficiaries. Accordingly, the lignite cost was already apportioned between the beneficiaries and the outside agencies. Therefore, there cannot be any further adjustment of revenue earned by selling lignite to outside agencies in favour of the beneficiaries"* does not arise for consideration in the present appeal.

81. Further, added that total cost of extracting Lignite from all the four mines of the Appellant constitutes the pooled price of lignite, this price is determined by CERC as Lignite Transfer Price (in short "LTP"), the entire cost of ₹ *1596.257 per tonne for 18.7 million* incurred by the appellant in excavating lignite from the pooled mines is factored into the LTP determined by CERC and the appellant has not contended in its petition 68/MP/2013 before CERC that it

is incurring additional cost, in addition to the LTP determined by CERC, in respect of 2.121 million tonnes of lignite excavated by it.

82. Further, the Ministry of Coal vide order dated 15.06.2009 relating to fixation of guidelines for transfer price of lignite has fixed the capacity utilisation factor of 85% in respect of NLC Mines for the period 2009-14. CERC in paragraph 18 of the order dated 21.01.2016 in 9/RP/2015 held that:

> " *.... The utilisation of 3.825 MT at 85% CUF of Mine-II Expansion, whether used for power generation or sale to the outside agency, would lead to full annual recovery of charges i.e. Rs.705 crore for Mine-II (Expansion) at the rate of Rs.1843/tonne. Any sale to outside agency would likely to give additional profit to the Petitioner..... Therefore, the impugned order is modified to this extent that any additional profit earned by sale of lignite to outside agencies over and above the capacity utilisation factor of 85% of Mine-II Expansion upto the commissioning of the first unit of TPS-II Expansion shall be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges"*

83. Hence, any profit earned beyond CUF of 85% is with the cost of beneficiaries servicing the entire expenses and rightly to be shared with the beneficiaries, the order of the CERC is as per the relevant MOC guidelines, in fact the above finding of the CERC in the review petition is detrimental to the interest of respondent TANGEDCO as compared to what was held in 68/MP/2013, the order which was reviewed in part.

84. It is submitted that the Appellant did not commission the Generating Plant TPS Expansion II associated with this mine-TPS Expansion II for five years and for all these years, the Respondent No. 2 had to procure power from sources other than the appellant, incurring financial loss, thus, the Appellant cannot be permitted to reap profit from the wrong committed by it, in delaying the generation project by five years resulting into the loss incurred to the second respondent due to procuring power from other sources because of the non-commissioning of TPS Stage II Expansion, the details are as under:

Annexure						
Unit I commissioned on 22.04.2015, Unit II: 30.06.2015.						
Loss calculation:						
Period	**Power from NLC TPS II Exp**	**Purchase cost of NLC TPS II Exp**	**Total TANGEDCO purchase (IEX + PXIL) as per CERC Report**	**Power Purchase quantum due to NLC TPS II Expn**	**Discom \ IEX price**	**Incremental cost incurred**
	(MUs)	**(Rs./unit)**	**MU**	**MU**	**(Rs/unit)**	**Rs. Crs**
2010-2011	1,713	3.39	2604	1713	4.95	267
2011-2012	1,713	3.57	869	869	6.91	290
2012-2013	1,713	3.76	347	347	5.84	72
2013-2014	1,713	3.95	1113	1113	4.62	74
2014-2015	1,713	4.16	387	387	5.3	44
2015-2016 (upto COD of Units)	285	4.38	14184	285	5.14	22
					Total in Crs.	**770**

Submissions of the Respondent No. 3 (KSEB)

85. The KSEB submitted that the CERC had rejected the prayer of the petitioner on reviewing the order on issue no.1, i.e. refunding of the incentive earned by NLC corresponding to enhanced availability above the NAPAF of 75% in case of TPS-II Stage I and Stage-2 generating stations to the beneficiaries, however, with respect to issue no.2, the CERC modified the earlier order dated 7-5-2015 to this extent that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall only be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges**.**

86. Further, submitted that as per the CERC (Terms and conditions of Tariff) Regulations, 2009, the NAPAF for TPS-II Stage-I and II is fixed as 75% and for TPS-I(Expansion) projects as 80%, the rationale for fixing the lower NAPAF for NLC TPS-II Stage-1 and 2 and TPS-1(Expansion) projects by the CERC is lower availability of lignite.

87. The CERC, since the year 2001, is fixing norms on NAPAF for the generating stations through the tariff regulations and for the tariff period 2001-04, the CERC had fixed the NAPAF for coal based thermal generating stations as 80%, however, for lignite based generating stations of NLC namely TPS-II Stage-I and II the norm for NAPAF was fixed as 72%, on account of stated limitation in mine capability to run the station at higher PLF even with 100% of

mine capacity utilization, nevertheless, no such limitation was indicated by NLC for TPS-1(Expansion) project as no such limitation prevailed for the station.

88. Subsequently, on evaluating the actual operating performance of NLC TPS –II station for the period from 2000-01 to 2002-03, (the actual availability achieved for NLC TPS-II station was above 80%), the CERC vide the CERC (Terms and conditions of Tariff) Regulations, 2004 re-fixed the NAPAF of NLC TPS-II station as 75% and retained the NAPAF of NLC TPS-1 Expansion as 80%.

89. Subsequent to the tariff period 2004-09, the CERC had made efforts to increase the NAPAF of thermal stations from 80% to 85% in view of the actual availability achieved by the stations during the past period, accordingly, the NAPAF of thermal stations using coal as fuel was increased from 80% to 85% during the tariff period 2009-14 by the CERC (Terms and Conditions of Tariff) Regulations, 2009, however, NLC had expressed that difference in the availability norms of 5% between coal and lignite power stations should be maintained as in the previous tariff orders for the period 2004-09 in view of the difficulties faced in lignite fired boilers, despite this, the CERC had not considered the request of NLC to fix the NAPAF of lignite fired boilers at 5% lower than the coal based station norms citing difficulties faced with lignite fired boilers.

90. However, in view of the limited mining capacity of linked mines, the relaxed norms for NAPAF for NLC TPS Stage-I and II were continued for the period 2009-14 also, the relevant portion of the SOR of CERC (Terms and Conditions of Tariff) Regulations, 2009 is extracted below:

> *"28.6 ……NLC has expressed that difference in the availability norms of 5% between coal and lignite power stations should be maintained as in the previous Tariff Orders for the period 2004-2009 in view of the difficulties faced in lignite fired boilers. However, it has been decided to retain the draft and specific difficulties if any brought out by NLC could be looked into for suitable modifications."*

91. Thus, argued that the NAPAF of NLC stations using lignite are to be at par with the NAPAF of coal based stations except for the limited mining capacity of linked mines, hence if there is no limitation in the availability of lignite, the PAF of NLC stations can be more than 85% and the NAPAF thus need to be fixed at 85%, however, the NLC stations are actually eligible for incentive only when PAF is above 85% similar to coal based stations, if there is no limitation in lignite availability.

92. The linked mines of TPS-1 Expansion are Mine-1A (3 MTPA) and Mine-1 Expansion (4 MTPA) and the linked mine of TPS-II Project are Mine-II (10.5 MTPA) and Mine-II Expansion (4.5 MTPA), a comparison of the amount of lignite required for running the plants at normative PLF and at actual PLF as per the approved values of Station heat rate and GCV are tabled below:

Table-1. Details of the Lignite used at NLC-II Stage-1&2 from Mine-II Expansion

Station	NAPAF	Lignite required at NAPAF	2009-10			2010-11			2011-12			2012-13		
			Actual availability	Lignite required at actual availability	Addl Lignite used from Mine-II Exp	Actual availability (%)	Lignite required at actual availability	Addl Lignite used from Mine-II Exp	Actual availability (%)	Lignite required at actual availability	Addl Lignite used from Mine-II Exp	Actual availability (%)	Lignite required at actual availability	Addl Lignite used from Mine-II Exp
	(%)	(MT)	(%)	(MT										
NLC TPS-II Stage-1	75.00	4.59	77.26	4.73		82.16	5.03		84.91	5.20		86.35	5.29	
NLC TPS-II Stage-2	75.00	6.12	84.06	6.86		82.90	6.77		85.65	6.99		87.69	7.16	
Total		10.72		11.59	0.88		11.80	1.08		12.19	1.48		12.45	1.73

93. As detailed above, it can be seen that, NLC -II Stage-1 & 2 stations used excess lignite produced from Mine-II Expansion for achieving the enhanced availability.

94. As submitted earlier, the production of lignite from Mine-II(Expansion) started from 2010-11 onwards, however, one of the units of the TPS-II Expansion plant was commissioned only in 22-4–2015, accordingly, as stated by the Central Commission under paragraph -29 of the Order dated 7-05-2015, the actual availability of the NLC stations including TPS-I Expansion and TPS-II Stage-1&2 has considerably increased by way of utilizing the lignite produced from Mine-2 Expansion, the details of the enhancement in availability of the existing NLC stations by utilizing the lignite produced from Mine-II Expansion is extracted below for ready reference.

Table-5. Enhancement in availability of NLC stations by way of utilizing lignite from Mine-II expansion.

(in % age)

Year	TPS -I (Expansion)	TPS –II Stage-I	TPS- II Stage- II
2009-10	81.78	77.26	84.06
2010-11	82.04	82.16	82.90
2011-12	83.70	84.91	85.65
2012-13	90.73	86.35	87.69
Normative Availability	**80%**	**75%**	**75%**
Average Availability	**84.56%**	**82.67%**	**85.08**

95. Hence the averment of the appellant that the incentive on NAPAF between 75% and 80% should alone have been subject to adjustment with the production from TPS-II(Expansion) mine is devoid of any merit.

96. Further, submitted that the CERC vide the order dated 21-1-2016 in RP No.9 of 2015 has issued orders that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall only be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges, the Appellant has raised the issue that CERC erred in interfering with any part of the profit earned by the Appellant which is in accordance with the guidelines of Ministry of Coal.

97. The Respondent No. 3 argued that the capacity of Mine-2 Expansion at 85% CUF is 3.825MT**, t**he lignite transfer price of mines is arrived by adopting a CUF of 85% for the mines as per the guidelines of Ministry of Coal**, h**ence the Appellant is able to recover the entire cost of mine-2 expansion through the

lignite transfer prices from the beneficiaries of NLC's power stations at a CUF of 85%.

98. It is further submitted that any additional sale over the CUF of 85% will yield additional revenue for the appellant at the cost of the beneficiaries**, i**t is observed that in the years from 2009-10 to 2012-13 as tabulated below, the appellant was able to produce more than the 85% CUF from the Mine-2 Expansion and the additional production was sold in the open market.

Year	Capacity of Mine-2 Expansion at 85% CUF	Lignite used from Mine-II Expansion (MT) at NLC-II stage-1 &2 stations	Balance lignite available from Mine-II expansion for sale in open market
	(Million T)	(Million T)	(Million T)
2009-10	3.83	0.88	2.95
2010-11	3.83	1.08	2.74
2011-12	3.83	1.48	2.35
2012-13	3.83	1.73	2.09
Total	15.30	5.17	10.13

99. Therefore, additional production above CUF of 85% is without any additional cost as the full cost of the mine is recovered from the beneficiaries at 85% CUF**, h**ence the appellant is earning revenue at the cost of the beneficiaries by producing from mines above the CUF of 85% and selling in open market.

100. In view of above, there is no error in the order dated 7-5-2015 in Petition No.68/MP/2013 of Hon'ble Commission, that the revenue earned by selling lignite to outside agencies shall be apportioned to the beneficiaries corresponding to their share of power in the stations where pooled lignite price approved by the Commission is applicable for computation of energy charges.

101. Thus, contended that the CERC had correctly judged that any additional profit earned by sale of lignite to outside agencies over and above the Capacity Utilization Factor of 85% of Mine-II Expansion up to the commissioning of first unit of TPS-II Expansion shall only be apportioned to the beneficiaries corresponding to their share of power in the station where pooled lignite price approved by the Commission is applicable for computation of energy charges.

102. The Respondent, further, indicated the amount receivable by KSEB towards refund of incentive.

103. However, the Respondent has not challenged the Impugned Order, therefore, such a claim cannot be adjudicated at this stage.

Our Observations and Conclusion

104. The issues raised in the captioned appeal are limited to TPS-II expansion power project and the Mine-II expansion, the linked mine, the power project and the linked mine have been notified as part of an integrated project.

105. It is, therefore, important to note certain details for the two limbs of the integrated project.

106. The Government of India vide Letter No. 43011/3/2004.Lig/CPAM dated 18.10.2004, sanctioned the integrated project consisting of Mine-II (Expansion) with capacity of 4.5 million tonne per annum and Thermal Power Station (TPS)-II (Expansion) with two units of 250 MW each.

107. Therefore, it cannot be denied that the entire capacity of 4.5 million tonne per annum of lignite is allocated to the TPS-II project and as such the beneficiaries of the integrated project are entitled to any benefit to be accrued from the integrated project.

108. The Units 1 and 2 of TPS-II Expansion power project were commissioned on 05.07.2015 and 22.04.2015 respectively, while the linked mine i.e. Mine-II Expansion project was commissioned on 12.3.2010, as such, the power project was commissioned after a gap of about 5 years.

109. The Appellant contended that the lignite price for the Appellant's plants is determined in accordance to the guidelines of Ministry of Coal (in short "MoC") issued in this regard, further, MoC letter dated 02.02.1998 stipulates that pricing of lignite for new projects need to be on the basis of pooled cost for the Appellant's Corporation as whole (in respect of all the mines accept Mine–I which is a standalone mine for TPS-I, the relevant part of the guidelines reads under:-

> *"As and when projects like Mine-I Expansion and Mine-IA go into production, the price of lignite from these projects would also enter into the pooled price*".

110. It is seen from above, that the guidelines are specific to Mine-I expansion and Mine-IA, on being asked none of the contesting parties could placed before any modified guidelines including the impugned Mine-II expansion.

111. Further, the above guidelines are not applicable in the instant case as the Mine-II expansion is linked exclusively to TPS-II expansion project, and therefore, the price of lignite for this mine cannot be pooled with the price of lignite from other mines, or otherwise, there is a specific directive by MoC.

112. It cannot be denied that MoC has not issued any directive for pooling the cost of lignite mined from Mine -II expansion, however, the CERC allowed the pooling, in the absence of any MoC directive, for the benefit of the beneficiaries.

113. It is also submitted by the Appellant itself that- *since TPS-II (Expansion) and Mine-II (Expansion) were sanctioned as one integrated project, it was first considered to include Mines-II (Expansion) in the tariff petition to be filed for TPS-II (Expansion), however, since TPS-II (Expansion) had not been able to achieve Commercial Operation Date due to technical snags and three years have elapsed since Mine-II (Expansion) went into production, pooling of Mine-II (Expansion) lignite cost cannot be delayed* further-, as part of the Petition No. 68 of 2013 before the Central Commission for pooling of Mine II lignite cost for the period 2010-11 to 2013-14.

114. Therefore, all the issues are to be dealt in accordance with the above.

Issue of Maintainability

115. The Respondent No. 2, TANGEDCO raised the issue of maintainability relying upon the following judgments, as extracted and submitted before us:

a) ***DSR Steel Private Ltd versus State of Rajasthan (2012) 6 SCC 782***

"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 any alteration or modification. It is an order by which the review petition has dismissed whereby 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. …."*

b) ***Bussa Overseas and Properties Private Ltd versus Union of India (2016) 4 SCC 696***

"29. ***Needless to state that when the prayer for review is dismissed, there can be no merger****. If the order passed on 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."*

c) ***Shanker Motiram Nale v. Shiolalsing gannusing Rajput (1994) 2 SCC 753***

"*An appeal against the order rejecting the application for review of judgement and decree passed by the learned single judge is not available as appeal is not against the basic judgement."*

d)Rekha Mukherjee vs Ashis Kumar Das (2005) 3 SCC

"31. … Having filed a review application on legal advice and having succeeded therein in part, it was not open to it to prefer an appeal against the entire decree dated 20.12.2001 whereby the suit in its entirety was dismissed. The respondents could have only preferred appeal only from that part of the decree in respect thereof review was not granted….."

116. The Respondent No. 2 contended that the main order has not been amended/ modified or merged with the Impugned Order and thus the above quoted judgments are applicable, however, the Order passed in the RP has modified the main order by giving partial relief to the Appellant herein, as such the main order has been modified to such extent, accordingly, we find the contention of the Respondent No. 2 that the main order has not been amended or modified is without any merit.

117. On the contrary, the Appellant submitted that in the Review Order dated 21.01.2016, the Central Commission has modified the main Order dated 07.05.2015 to the extent of the profit on sale of lignite to outside agencies over and above the capacity utilisation of 85%, therefore, the main Order dated 07.05.2015 is merged with Review Order dated 21.01.2016 and modified to the extent the review is allowed in the Review Order dated 21.01.2016, reliance was placed on this Tribunal's Judgement dated 14.03.2016 in ***Appeal No. 157 of 2015 - The Assam Electricity Grid Corporation Ltd vs The Assam***

Electricity Regulatory Commission, wherein the identical issue of maintainability has been considered and settled after considering the judgment in ***DSR Steel Private Ltd versus State of Rajasthan (2012) 6 SCC 782:***

> *"6.2.3) The Hon'ble Supreme Court in the case of DSR Steel Pvt. Ltd. Vs. State of Rajasthan reported in (2012) 6 SCC 762 has observed as under:*
>
> > *"25.1 One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.*
> >
> > ***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 pursuing 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 Sen v. 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."

6.2.4) Thus in the DSR Steel matter the Hon'ble Supreme Court has considered three situations while dealing with the Review Petition and

the appeal against the Review Petition. Thus the Hon'ble Supreme Court has dealt with different situations that may arise and relate to Review Petitions filed before a Court or Tribunal. One of the situations could be where the Review Petition is allowed, the decree or order, passed by a Court or Tribunal, is vacated and the appeal/proceedings in which the same is made are re-heard and fresh decree or order passed in the same. ***In such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the Court hearing the Review Petition. In a separate case, it has been clarified by the Hon'ble Supreme Court that original decree/order does not merge with Review Order where Review Petition/application is simply dismissed, which position is however different where Review Petition succeeds partly or wholly because in such a situation original decree or order no longer remains intact.***

6.2.5) This Appellate Tribunal vide judgment dated 05.03.2014 in Appeal No.167 of 2013 captioned Power Grid Corporation of India Ltd. Vs. Central Electricity Regulatory Commission & Ors., while dealing with the same issue namely, whether the instant appeal against the order passed on the Review Petition in case the Review Petition partly succeeds without challenging the original or main order, is maintainable and relying on the case law laid down in DSR Steel (P) Ltd. Vs. State of Rajasthan & Ors., reported in (2012) 6 SCC 782 has held that the appeal filed against the Review Order, if Review Petition

is partly allowed, is maintainable in the Appellate Tribunal even without filing any appeal against the main order. The relevant part of the judgment dated 05.03.2014, passed by this Appellate Tribunal, in Appeal No.167 of 2013 is reproduced hereunder:

> *"(t) In the impugned Review Order dated 9.5.2013, the instant review petition has been partly allowed and, subsequently orders to this effect were directed to be issued by the Central Commission. The Review Petition has accordingly been disposed of. It is quite evident from the impugned review order that IDC and IEDC with regard to the Assets 1 & 2 were allowed for the reasons mentioned therein and the same with regard to the Assets 3 & 4 were disallowed for the mentioned reasons. The Appellant Petitioner claimed IDC and IEDC with respect to all the four Assets 1, 2, 3 & 4 which were disallowed in the main order. In the review order, IDC & IEDC for Assets 1 & 2 were allowed and Assets 3 & 4 were disallowed. On the basis of the review order, consequential order has been issued by the Central Commission which would further result in redetermination of tariff because tariff is determined on the basis of many components/Assets. Moreover, the transmission charges for combined Assets 1 and 3 have been determined in the main order for the period 1.9.2009 to 31.3.2014. The allowance of IDC and IEDC in respect of Asset 1 in the review order will result in modification of transmission charges for combined Asset 1 & 3 determined in the main order.*

(u) Thus, by the review order, the learned Central Commission has partly set aside the main order and accordingly allowed the review application after rehearing the parties during the review petition. The main order has consequentially been reversed/modified. Thus, the learned Central Commission has made an order in review petition by which the review petition has been allowed and the decree/order under review has been reversed or modified. Such an order then becomes a composite order whereby the Central Commission has not only vacated the earlier decree or order but simultaneous with such vacation of the earlier decree or order has passed another decree/order by modifying the one made earlier. Thus, the original decree or order of the Central Commission has been reversed or modified by the subsequent review order or decree and the review order or decree is effective for the purpose of further appeal.

After considering the controversy before us on the point of maintainability of the instant Appeal, and going through the different aspects of the matter and different rulings and legal position, we find ourselves in agreement with the pleas taken by the learned Counsel for the Appellant Petitioner. In our view, the instant appeal against the review order is fully competent and legally maintainable and this point namely; Point-1 is decided in favour of the Appellant Petitioner.

(v) The findings of this Tribunal in Appeal No. 88 of 2013 will not be applicable in the present case as in the present case the issue dealt with in the review petition was IDC and IEDC in respect of Asset 1 to 4, which was allowed partially by allowing IDC and IEDC in respect of Asset 1 & 2. Further, in the main order, the transmission charges for combined Asset 1 & 3 were determined. The review allowing IDC and IEDC in respect of Asset 1 will modify the transmission charges for combined Asset 1 & 3."

6.2.6) In view of the above discussion, we hold that the instant appeal, which has been filed against the Impugned Review order, passed on the Review petition, whereby the State Commission had disallowed three claims and allowed two claims out of the total five claims raised in the Review Petition, is fully competent and legally maintainable because after allowing Review Petition on two issues namely, employee costs and non-tariff incomes the State Commission would have to re-determine or re-cast the tariff thereby making changes or modifications in the original decree. The settled principle of law is that there cannot be more than one decree in one matter. There can only be one decree in any matter. This issue is thus decided in favor of the appellant. Thus the instant appeal is maintainable, leaving us to decide the appeal on the other points raised in this appeal."

118. We find the issue raised in the present appeal identical to the issue raised in the aforesaid appeal disposed of by the above judgment, and are satisfied

that the said judgment of this Tribunal completely covers the issue of maintainability raised in this instant appeal.

119. **Therefore, we agree with the submission of the Appellant that there is no requirement for a Review Order to have a finding of merger, the moment any issue is allowed in a Review the original decree gets modified/reversed/vacated and especially since both the main and the Review Order are passed in tariff proceedings.**

Merit of the case

120. Considering the Appeal on merit, the Appellant has challenged the Order on two issues- i) the Appellant is not entitled to any incentive over and above 75% of NAPAF and ii) sharing of profit earned by NLC by selling lignite over and above 85% to third parties.

121. **Let us first take up the issue of Incentive.**

122. It cannot be disputed that the CERC Regulations has relaxed the NAPAF norms for the NLC projects due to limitation in the availability of Lignite for the projects of NLC, accordingly, as against coal based thermal NAPAF of 85%, the CERC has specified NAPAF of 75% for NLC lignite based projects except for TPS-I expansion, which is 80%.

123. Further, entire capacity of 4.5 million tonne per annum of lignite to be mined from Mine-II expansion is allocated to the beneficiaries' project i.e. TPS-II

expansion, therefore, any sale from such mine or diversion to other projects of NLC has to be governed by the guidelines of MoC.

124. On being asked, we could not find any reply on the issue of diversion of lignite from the said integrated project.

125. Further, pooling of cost is also to be governed by the MoC guidelines, however, the CERC, considering the benefits for the beneficiaries, has allowed pooling of cost, which is in compliance with MoC guidelines.

126. Despite it, such pooling of cost has not been challenged by the beneficiaries nor by the Appellant, therefore, the decision of the CERC to such an extent is in force as on date.

127. Therefore, the issue of entitlement of incentive has to be considered in the light of the prevailing Regulations, and the submissions made before us, the relevant extract of the Regulations is reproduced hereunder:

> *"25. (1) Recovery of capacity charge, energy charge, transmission charge **and incentive by the generating company** and the transmission licensee shall be based on the achievement of the operational norms specified in this Chapter.*
>
> *……*
>
> *26. The norms of operation as given hereunder shall apply to thermal generating station:*

(i) Normative Annual Plant Availability Factor (NAPAF)

……..

(c) Following Lignite-fired Thermal generating stations of Neyveli Lignite Corporation Ltd, other than specified in sub-clause (b)

TPS-I	72%
TPS-II Stage-I & II	**75%**
TPS-I (Expansion)	80%

…….”

128. It is also important to note here that the Appellant has relied upon the settled position of law that once Regulations are notified and exists, such Regulations are the binding principles for all, in the instant case whether the lignite is diverted from the integrated project or procured from other sources, the allowance of incentive shall be as per the Regulations, the CERC is also bound by its own Regulations and in case the Appellant is entitled to incentive in accordance with the applicable Regulations, the CERC cannot pass any order contrary to it.

129. We agree that the law is well settled by the Supreme Court in ***PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603***, para 54 to 56, accordingly, the Impugned Order being contrary to the Regulations is liable to be set aside.

130. Once the Regulations are framed, the CERC cannot deviate from the Regulations, so long the Regulations are in force, the same are binding and ought to be followed.

131. The Central Commission submitted that Petition No. 68 of 2013 was filed by Neyveli Lignite Corporation Ltd. for the limited purpose of revision of pooled lignite prices for the period from 2010-11 to 2013-14 by pooling the expenditure of Mine-II Expansion with the existing pooled expenditure of Mine-I Expansion, Mine-IA and Mine-II in terms of the Ministry of Coal guidelines issued vide Letter No. 43011/4/91-CM (Vol. VI) dated 02.02.1998, accordingly, the CERC has applied the provisions of the applicable Tariff Regulations and previous tariff order while adjudicating the instant Review Petition, inter-alia, also considering the limited mining capacity of the mines linked to the Appellant's plant coupled with the age of the plants and had relaxed the norms for NAPAF for Neyveli's power stations.

132. In terms of the Statement of Reasons of the 2009 Tariff Regulations, it is clearly stated that the NAPAF for Neyveli's plants were reduced on an express representation from Neyveli that there would be difficulties in relation to availability of lignite.

133. Even, if we agree with the argument of the CERC that there were shortages in the availability of lignite for the projects of NLC and thus would not have achieved higher NAPAF resulting into extra incentive to it, the prevailing Regulations cannot be ignored, in fact, if the CERC had not allowed pooling of price for Mine-II expansion and utilisation of lignite from this mine in other

projects, there would not have extra enrichment to NLC at the cost of end consumers.

134. Certainly, NLC would not have achieved the NAPAF as claimed now, such a situation is contrary to guiding norms under section 61 of the Electricity Act, 2003 as this is an additional burden on the consumers/ beneficiaries as they are already paying higher tariff due to lower performance norms.

135. The CERC should have dealt the issue of pooling of cost more prudently within the provisions of the applicable Regulations.

136. The submission of the CERC cannot be denied that the entire fixed cost of the appellant is covered by annual fixed charges up to 75% NAPAF level, any earning on incentive beyond 75% would result in excess profits at the cost of the end consumers, however, it is in line with the relevant Regulations.

137. The argument of the Central Commission holds no merit that the Appellant cannot be permitted to blow hot and cold and choose the operational parameters as per its convenience, the lower NAPAF in the applicable Tariff Regulations was fixed at the express representation of the Appellant as confirmed by other stakeholders and such lower NAPAF has resulted in higher tariff for the beneficiaries, the Central Commission should have allowed pooling only after considering the relevant Regulations.

138. It also cannot be disputed that the excess lignite is available only due to delay in commissioning of the generating unit, in fact failure on the part of the Appellant to commission the TPS-II expansion in time has resulted into extra

benefit to it in the form of additional lignite becoming available and so incentivizing for default, that to when the end consumers are paying for such a mine cost as part of the integrated project.

139. However, all such contentions cannot be agreed to at this stage due to the applicability of prevailing Regulations, the contention of the CERC that the beneficiaries and the end consumer are already paying for the pooled price of lignite which includes the new mine, thus, if incentive is not shared with the beneficiaries, it would lead to the Appellant being unjustly enriching the Appellant just because lignite from a new mine was allowed to be used in the Appellant's existing plant without which they wouldn't have been able to better their efficiency in any case, cannot be accepted at this stage.

140. Similar contentions were raised by Respondent No. 2 & 3 and as such are denied.

141. Additionally, the Appellant submitted that Regulation 25(3) of Tariff Regulations, 2009 provides for sharing in gains from secondary fuel oil to be shared by the parties in the ratio of 50:50, wherever any gains are to be shared, it is specifically provided for and there is no such provision for incentive, it needs to be considered by the CERC whether Regulation 25(3) is applicable in case of incentive.

142. Thus, Impugned Order deserves to be set aside as contrary to the CERC Regulations.

143. **The second is issue is regarding the sharing of profit from sale of lignite.**

144. The Appellant argued that the Central Commission has directed the entirety of the profits earned by the Appellant by selling lignite to the third parties to be passed on to the Respondent beneficiaries in proportion to their share of power in the generating stations where the pooled lignite price is applicable for the computation of energy charges, initially in the main order dated 07.05.2015, however, in the Review Order dated 21.01.2016, the Central Commission modified the above direction to the extent of the profit on sale of lignite to outside agencies over and above the capacity utilisation of 85%.

145. The Appellant also argued that the Central Commission is not even the regulator for the mining activities of the Appellant and cannot control the sale of lignite by the Appellant to any person, including the price at which it is sold, with regard to the mining and supply of lignite by the Appellant to any third party, the Appellant acts purely as a fuel supplier and it is not subject to the regulatory jurisdiction of the Central Commission.

146. If, we agree with the above contention of the Appellant then the Central Commission, in the absence of any express provision or directive of MoC, could not have decided the price pooling of Mine-II expansion with other mines and diversion of lignite from this mine to other projects under pooled cost, thus, the CERC is bound to determine the cost of lignite from this mine separately, if it is to be used in other power projects, that to after considering that this mine is integrated to TPS-II expansion project and the entire capacity is allocated to TPS-II expansion project operating at 100% CUF.

147. Further, the contention of the Appellant that the Appellant is diverting any lignite to be used for generation and supply of electricity to the Respondent beneficiaries, and supplying the same to third parties, the entire requirement of the generating stations of the Appellant are being met first and on priority and it is only any excess lignite that is available after meeting the requirement of the generating stations, that is supplied to third parties, have not been examined by the CERC, which the Central Commission is bound to examine.

148. The Appellant is getting the full cost of lignite from Mine-II expansion as part of the integrated project therefore, the Central Commission has rightly allowed sharing of the profit earned from the sale of excess lignite to be passed on to the Respondent beneficiaries.

149. The Appellant also argued that NLC is a commercial entity, after having taken all the risks associated with mining, the effort etc., is left in a situation wherein the entire profit is to be passed on to the Respondent beneficiaries, the Appellant**, in fact, would have been much better off not even mining the excess lignite as available, which mining has in fact resulted in the overall benefit of the economy and availability of lignite to third parties**.

150. We find such an argument totally unacceptable, any Government controlled company is bound by certain norms and need to perform for the benefit of the country, it cannot merely perform for earning profits only, such submissions are unnecessary and are strongly condemned.

151. The CERC argued that any revenue earned by selling lignite to outside agencies should be apportioned to the beneficiaries where pooled lignite price approved by the CERC is applicable for computation of energy charges, also as pointed out herein above, Mine II Expansion and Thermal Power Station-II (Expansion) was an integrated project, total cost of entire project i.e. the generating station and mine were capitalised and paid for by the beneficiaries.

152. Accordingly, the CERC in the Impugned Order after reviewing its finding in the original order held that any additional profit earned by sale of lignite to outside agencies over and above the CUF of 85% as determined by the Ministry of Coal shall be apportioned to the beneficiaries corresponding to their share of power.

153. We agree with the submissions of the Respondents that the CUF of Mine-II Expansion is 85% and the lignite transfer price of mines is arrived at in consideration of the said CUF, therefore, the Appellant recovers the entire cost of Mine-II expansion through the lignite transfer prices from the beneficiaries of Neyveli's power stations at a CUF of 85%, therefore, any additional sale of lignite above CUF of 85% would mean additional benefit to the Appellant at the cost of the beneficiaries, the Mine-II Expansion cost is included in the pooled lignite price and is collected from the beneficiaries and the Appellant does not incur any extra cost in mining and selling more lignite, as such, the beneficiaries bear the cost of mining, therefore the revenue generated from excess generation of lignite ought to be shared with the beneficiaries.

154. Additionally, the CERC argued that generating stations having captive mine are generally not allowed to sell the captive production to outside

agencies, this is done primarily to ensure that mining does not become a separate business and generation business should not in any manner subside the mining operations, while NLC is entitled to sell lignite produced to other users, since the entire cost of mining is considered in the tariff of the generating station, the revenue therefrom should be accounted for to the beneficiaries only.

155. Accordingly, we are satisfied that the CERC has rightly adjudged the issue and deserves to be upheld.

156. As already noted, on the first issue, we agree with the submission of the Appellant for setting-aside the Review Order on the ground that the Impugned Order is contrary to settled principle of law in the light of the judgment of the Supreme Court in ***PTC India Limited V. Central Electricity Regulatory Commission (2010) 4 SCC 603***, ***para 54 to 56***, the Central Commission is bound by its own Regulations, the Review Order is *set aside*.

157. The Central Commission is directed to pass order afresh for pooling of lignite cost under the provisions of law.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 49 of 2016 has merit and is allowed to the extent as concluded herein above.

The Impugned Order dated 21.01.2016 passed by the Central Electricity Regulatory Commission in Review Petition No. 9 of 2015 filed in Petition No 68

of 2013 is set-aside and remanded to the Central Electricity Regulatory Commission for passing the Order afresh.

The Appeal is disposed accordingly, alongwith pending IAs, if any.

PRONOUNCED IN THE OPEN COURT ON THIS 3rd DAY OF JULY, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj