

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**REVIEW PETITION NO. 5 OF 2020 &  
IA NO. 1661 OF 2020 & IA NO. 2205 OF 2022**

**Dated: 1<sup>st</sup> March, 2024**

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member  
(Electricity)**

**In the matter of:**

**ASSAM ELECTRICITY REGULATORY COMMISSION**

*Through its Chairperson,*  
ASEB Campus, Dwarnadhar,  
G.S. Road, 6<sup>th</sup> Mile, Guwahati – 781 022. ... Petitioner(s)

**VERSUS**

**1. EASTERN INDIA POWERTECH LIMITED**

*Through Vice President-Operations,*  
DLF Galleria Building, 12<sup>th</sup> Floor,  
DLF City, Phase IV, Gurgaon – 122002. ... Respondent No.1

**2. ASSAM POWER DISTRIBUTION COMPANY  
LIMITED**

*Through Managing Director,*  
Bijuji Bhawan, Paltan Bazar,  
Guwahati – 781 001. ... Respondent No.1

Counsel on record for the Petitioner(s) : Mandakini Ghosh  
Ritika Singhal

Counsel on record for the Respondent(s) : Nandini Gore  
Sonia Nigam  
Natasha Sahrawat  
Neha Khandelwal  
Jasvir Singh Sabharwal  
Tahira Karanjawala  
Arjun Sharma  
Karanveer Singh Anand  
for Res.1

Nalin Kohli  
Ankit Roy  
Aastik Dhingra  
Nimisha Menon for Res.2

## **ORDER**

### **PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON**

#### **I. INTRODUCTION:**

1. Assam Electricity Regulatory Commission ("AERC" for short) seeks review of the Order passed by this Tribunal in Appeal No. 294 of 2017 dated 20.10.2020. The said appeal was filed by M/s Eastern India Powertech India Limited (hereinafter referred to as the "first Respondent") against the Order passed by the AERC in Petition Nos. 20 to 31 of 2016 dated 30.12.2016. By the said Order dated 30.12.2016, the AERC had directed the first Respondent to pay additional fees of Rs.2.20 crores, towards processing of its tariff petitions, in accordance with the AERC (Payment of Fees, etc.) Regulations, 2015 (the "**2015 Fee Regulations**" for short). Parties shall, hereinafter, be referred to as they are arrayed in this Review Petition.

2. The grievance of AERC is that, instead of directing that an exercise of truing up of the decided tariffs upto FY 2014-15, be undertaken so that the additional court fees of Rs. 2.20 crores could be permitted as a pass through to be ultimately borne by the end consumers, this Tribunal, by the Order under review dated 20.10.2020, had set aside the Order of the AERC dated 30.12.2016, and had directed them to exercise their power to relax under Regulation 43 of the AERC (Conduct of Business) Regulations, 2004 (the "2004 Regulations" for short), waive the requirement of additional court

fee of Rs. 2.20 crores, and refund the same to the first respondent; the effect of the Order under review dated 20.10.2020 is that the first Respondent has been held to be legally entitled to file one composite petition for six financial years for its two stations at Adamtilla (9 MW) and Banskandi (15.5 MW) by paying court fee of Rs. 20 Lakhs, even though they had filed twelve tariff petitions with respect to which AERC had passed 12 tariff orders (which have subsequently been challenged before this Tribunal in Appeal Nos. 295 to 306 of 2017).

3. Before examining the rival submissions, among others, on whether the first respondent could have been so permitted, it is useful to note the contents of the order passed by the AERC on 30.12.2016, and the order under review passed by this Tribunal in Appeal No. 294 of 2017 dated 20.10.2020.

## **II. ORDER OF AERC DATED 30.12.2016:**

4. The first respondent had initially filed a combined Tariff Petition (Petition No 19/2016) before the AERC for FY 2009-10 to FY 2014-15 for both its Adamtilla and Banskandi plants on 01.12.2015 on payment of fees of Rs 20 Lakhs. The AERC, by its Order dated 16.09.2016, disposed of Petition No. 19/2016 directing them to file separate petitions. The first respondent, thereafter, filed plant wise and year wise separate Tariff Petitions on 24.08.2016 without payment of separate or additional fees. Petition Nos. 20 to 25 of 2016 were the Tariff Petitions filed by the first respondent, for the financial years 2009-10 to 2014-15, with respect to its Adamtilla Plant, and Petition Nos. 26 to 31 of 2016 were the Tariff Petitions filed by the first respondent, for the financial years 2009-10 to 2014-15, for its Banskandi Plant. Thereafter, by Order dated 24.10.2016, the AERC

directed the first respondent to pay the remaining Fee on or before 15.11.2016.

5. The first respondent filed a Miscellaneous Petition, on 18.11.2016, giving two options (1) exemption from deposit of the requisite fees (Rs. 2.40 Crores as per the 2015 Fees Regulations) (2) adjustment of the fees with the pending payment to be received from APDCL for both Adamtilla and Banskandi Gas based power plants for FY 2009-10 to FY 2014-15. The AERC passed another order on 30.11.2016 directing the first respondent to pay the remainings fee of Rs. 2.20 crores on or before 12.12.2016. However, the first respondent failed to deposit the remaining fee. By the said Order dated 30.11.2016, the AERC decided to proceed with the determination of Tariff for the plants of the first respondent from FY 2009-10 to FY 2014-15, in order to comply with the direction of this Tribunal, despite non-payment of the requisite fee.

6. In the impugned order dated 30-12-2016, the AERC observed that, even though the fees of Rs 20 Lakhs was paid along with the disposed of Petition No 19 of 2016, using the power to relax and considering the continuity of the matter, the said amount of Rs 20 Lakhs was considered as the Fees towards Petition Nos 20 of 2016 to 31 of 2016; as there were 12 separate plant wise year wise tariff petitions, the fees of Rs. 20 Lakhs was allotted equally to each Tariff Petition, i.e. Rs 1.67 Lac per petition; hence the pending fee per petition was Rs 18.33 Lakhs, and the total balance fee payable by the first respondent was Rs 220 Lakhs; despite non-payment of fees, it would proceed with determination of Tariff in order to comply with the directions of APTEL regarding determination of Tariff, for the plants of the first respondent, from FY 2009-10 to FY 2014-15; however, determination of tariff by them shall not be considered waiver/relaxation to the first

respondent towards payment of the processing fees of the Tariff Petitions. The first respondent was once again directed to pay the balance fees, for the Tariff Petitions, on or before 16.01.2017, and was informed that, on their failure to do so by 16.01.2017, the AERC would take necessary steps for recovery of the outstanding fees as per Law.

### **III. ORDER OF APTEL DATED 20-10-2020:**

7. Aggrieved by the Order of the AERC dated 30-12-2016, the first respondent filed Appeal No. 294 OF 2017 before this Tribunal. In its order dated 20-10-2020, this Tribunal noted that the 2<sup>nd</sup> Respondent had filed Review Petition No. 6 of 2012 before the AERC on 16.12.2011, aggrieved by the 2008-09 Tariff Order passed by the Commission; in the said Review petition, the AERC passed an Order on 12.02.2013 affirming the 2008-09 Tariff Order, and holding that the Tariff determined therein would be applicable for future years i.e. 2009-10 onwards; aggrieved thereby, the 2<sup>nd</sup> Respondent had filed Appeal No. 76 of 2013, and the first respondent had filed Cross Appeal No. 82 of 2013 before this Tribunal; by its final Order and Judgment dated 12.08.2014, this Tribunal set aside the Review Order to the extent it extended the tariff of FY 2008-09 to FY 2009-10 onwards, in the interest of sustaining generation at the first respondent's Power Plants and maintaining power supply. While directing the 2<sup>nd</sup> respondent to make interim payment for FY 2009-10 to 2014-15, this Tribunal further directed AERC to determine the tariff, for the Power Plants of the first respondent for the period 2009-10 to 2014-15. Aggrieved by the 2<sup>nd</sup> Respondent's failure in making interim payments, the first respondent filed E.P. No. 2 of 2015 before this Tribunal on 01.04.2015, and sought payment of Rs. 165.67 crores. On 16.09.2015, AERC called upon the first respondent to submit the tariff petition, in accordance with the Assam Electricity Regulatory Commission (Conduct of Business)

Regulations, 2004 (the "2004 Regulations" for short), and in compliance with the Judgment of this Tribunal, for determination of tariff for its Power Plants from the financial year 2009-10 till the Power Plants were closed. On 01.12.2015, the first respondent filed common Tariff Petition No. 19 of 2016, for FY 2009-10 to 2014-15 for its Power Plants, and paid Rs. 20 lakhs towards processing fee in respect of the said Tariff Petition. On 05.08.2016, AERC, while dealing with Petition Nos. 3, 4, and 5 of 2016 (pertaining to the calculation of Interim Payments as directed by this Tribunal in the Judgment), directed the first respondent to submit year-wise separate tariff petitions for its power plants at Banskandi and Adamtilla respectively, from FY 2009-10 till the closure of the Power Plants, on or before 24.08.2016. In compliance with the said order, the first respondent filed separate Tariff Petitions for separate financial years. On 01.09.2016, AERC passed orders, in Petition Nos. 3, 4 and 5 of 2016, stating that the plant wise Tariff Petitions would be dealt through separate proceedings. Thereafter, by its Order dated 16.09.2016 passed in Tariff Petition Nos. 20 -31 of 2016, AERC disposed of the Combined Tariff Petitions. On 24.10.2016, AERC passed an order in Petition Nos. 20 to 31 of 2016 directing the first respondent to deposit separate court fee towards processing the separate Tariff Petitions for separate years. On 4.11.2016, the first respondent filed an application before the AERC seeking waiver from filing court fees.

8. The AERC issued notice dated 18.11.2016 directing Respondents 1 & 2 to appear for a hearing on 30.11.2016 with regards the alleged non-payment of fees for filing its separate year wise Tariff Petitions; on 30.11.2016, the first respondent filed its response to the Notice, and submitted that they were not liable to pay separate fees for the individual Tariff Petitions. During the hearing held on 30.11.2016, the 2<sup>nd</sup> Respondent submitted that the first respondent had not furnished adequate fees for filing the Tariff Petitions. On 02.12.2016, the first

respondent filed a detailed reply, including on the issue of fees payable for filing the Tariff Petitions. On 03.12.2016, AERC communicated its Order dated 30.11.2016 rejecting the submissions of the first respondent, and holding that, though the requisite fee had not been paid, it would determine the tariff in the Tariff Petitions. The first respondent was directed to submit the requisite fees by 12.12.2016. On 30.12.2016, AERC passed the Impugned Order whereby it again directed the first respondent to pay the outstanding fee for the Tariff Petitions, and observed that determination of Tariff in the Tariff Petitions would not be deemed to be a waiver of the fee. On the same day, i.e. 30.11.2016, AERC passed the Tariff Orders in Petition Nos. 20 to 31 of 2016.

9. In the order under review, this Tribunal observed that, subsequent to the tariff order dated . 30.11.2016 in Petition Nos. 20 to 31 of 2016 passed by the AERC, the matter came up for adjudication before this Tribunal in EP No.02 of 2015 wherein, on 09.01.2017, it was informed that the 1<sup>st</sup> Respondent had not yet paid the requisite fee which was directed to be paid by 16.01.2016; in view of the directions of this Tribunal, the 1<sup>st</sup> Respondent, under the cover of its letter dated 09.02.2017, deposited the outstanding fee to the Commission under protest; it emerged that the primary dispute was regarding payment of fees with the tariff petitions, under the notified AERC Fee Regulations, from time to time; it was not in dispute that the 1<sup>st</sup> Respondent owned two generating stations in the State of Assam namely at Adamtilla and at Banskandi, and determination of tariff for the same related to the period FY 2009-10 to FY 2014-15; while the 1<sup>st</sup> respondent claimed that the 2009 Fee Regulations notified by the State Commission shall apply to its petition, the Commission was of the view that the revised 2015 Regulations was applicable as far as the fees payable was concerned; this Tribunal, while disposing of EP No.2 of 2015, had

directed the 1<sup>st</sup> Respondent to deposit the outstanding fees which was subsequently complied with by them; and the 1<sup>st</sup> Respondent had deposited an additional fee of Rs.2.20 crores on 09.02.2017 under protest.

10. After referring to Regulations 3.1, 6.5 and 8 of the Fee Regulations, and Regulation 43 of the 2004 Regulations, this Tribunal held that Regulation 31 made it amply clear that the components, involved in determination of tariff for a generating station, were auxiliary energy consumption, availability, declared capacity, gross calorific value etc, and these parameters referred to almost all generating stations having the same type of fuel; what thus transpired was that a generating company may file a composite petition with station wise detailed information, and also separate plant wise petitions giving relevant information; for the tariff petition, pertaining to FY 2008-09, the Commission had considered a composite tariff petition for both the generating plants of the 1<sup>st</sup> Respondent, but subsequently it desired plant wise and year wise petitions to be submitted by the same 1<sup>st</sup> Respondent; under such a dispensation by the State Commission, while the evaluation of plant parameters may involve similar exercise in tariff determination, but the only difference was to be in payment of fee i.e. in place of Rs.20 lakhs, the 1<sup>st</sup> Respondent would need to pay Rs.2.40 crores; it was noticed from Regulation 8 that such fee or charge paid/payable fees by the 1<sup>st</sup> Respondent would be a pass through in the tariff, and would ultimately be shared by the end consumers; the tariff order dated 30.12.2016, passed by the State Commission in Petition Nos.20 to 31 of 2016, did not account for the fee paid /payable by the 1<sup>st</sup> Respondent to the tune of Rs.2.40 crores; this may perhaps be due to the reason that the tariff order was issued on 30.12.2016, while the outstanding fee was paid by the 1<sup>st</sup> Respondent on 09.02.2017; as determination of tariff, for the

period under reference (01.04.2009 to 31.03.2015), had already been completed, and a tariff order had been passed by the Commission on 30.12.2016, the additional deposited fee of Rs.2.20 crores had remained with the State Commission only; the same may either be recovered through the revised tariffs during true up proceedings, or otherwise waived of by the State Commission by exercising its powers under Regulation 43; the generating plant of the 1<sup>st</sup> Respondent stood closed, and the second Respondent/APDCL owed considerable outstanding dues to be paid to the Appellant; in that view of the matter, and keeping in mind principles of natural justice, they were of the opinion that the State Commission, instead of trueing up the decided tariffs up to FY 2014-15 by considering the additional paid up fees of Rs. 2.20 crores which ultimately shall be borne by the end consumers, may exercise its general powers under Regulation 43, to waive the requirement of the additional fee of Rs.2.20 crores, and refund the same to the 1<sup>st</sup> Respondent; this was more prudent due to the fact that the plant of the 1<sup>st</sup> Respondent had closed, and the discom/APDCL owed considerable outstanding dues to the 1<sup>st</sup> Respondent in lieu of its supplied power for the past period.

11. This Tribunal concluded holding that, for the foregoing reasons, they were of the considered view that the Appeal should be allowed, and the impugned order dated 30.12.2016, passed by the Assam Electricity Regulatory Commission in Petition Nos. 20 to 31 of 2016, should be set aside to the extent challenged in the Appeal and their findings indicated above

#### **IV. RIVAL CONTENTIONS:**

12. Elaborate submissions, both oral and written, have been put forth by Ms.Mandakini Ghosh, Learned Counsel for the AERC, and Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first respondent (ie the Appellant in Appeal No. 294 OF 2017). It is convenient to examine the rival submissions under different heads.

## **V. IS AERC DISENTITLED TO SEEK REVIEW?**

13. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that the Impugned Order is a fair and equitable order, passed in the unique and peculiar facts of the present case, which ought not be reconsidered much less interfered with in the exercise of the review jurisdiction by this Tribunal, especially at the instance of the AERC. a quasi-judicial authority, which is expected to conduct itself in an objective and dispassionate manner; the thrust of the Review Petition is merely an attempt to maximize the collection of fees payable on tariff petitions; while the dicta of the Supreme Court, in **GRIDCO v. Western Electricity Supply Co. of Orissa & Ors.** (Judgment dated 05.10.2023 in Civil Appeal No. 414/2007), is in the context of an appeal filed by a Commission against an Order passed by this Tribunal before the Supreme Court, the underlying principle would apply to the present facts as well, where the AERC is seeking to review the Impugned Order for no reason other than to collect additional court fees from the first Respondent; and, contrary to the averments made in the Review Petition, operation of the Impugned Order would not cause any prejudice to the AERC, since the Impugned Order turns on its own unique and peculiar facts.

### **A. JUDGEMENT OF THE SUPREME COURT IN “GRIDCO VS WESC”:**

14. In **GRIDCO v. Western Electricity Supply Co. of Orissa & Ors.** (Judgment in Civil Appeal No. 414/2007 dated 05.10.2023), the Supreme Court opined as under:-

*“26. There is one more aspect of the matter. As held by the Constitution Bench, under Section 62, the Commission exercises quasi-judicial powers. There are appeals preferred by the Commission against the orders of the Appellate Tribunal in appeals under Section 111 of the Electricity Act. **The Appellate Tribunal in appeals has dealt with the legality and validity of the decisions of the Commission rendered in the exercise of quasi-judicial power. In short, the Appellate Tribunal has tested the correctness of the orders of the Commission. The Commission is bound by the orders of the Appellate Tribunal. Therefore, we have serious doubt about the propriety and legality of the act of the Commission of preferring appeals against the orders of the Appellate Tribunal in appeal by which own orders have been corrected. The Commission cannot be the aggrieved party except possibly in one appeal where the issue was about the non-compliance by the Commission of the orders of the Appellate Tribunal. If the Commission was exercising legislative functions, the position would have been different”***

*(emphasis supplied)*

## **B. IS AERC DISENTITLED TO SEEK REVIEW?**

15. The law declared by the Supreme Court, in **GRIDCO**, is that the State Commission, against whose quasi-judicial order an appeal has been preferred to the Appellate Tribunal, cannot, unlike a person aggrieved, question the validity of the order of this Tribunal in a second appeal before the Supreme Court. It must, however, be borne in mind that, apart from exercising its adjudicatory or quasi-judicial powers, the State Commission also exercises regulatory and quasi-legislative functions. In the exercise of its powers under Section 181 of the Electricity Act, the AERC has made Regulations prescribing fees to be paid with respect to tariff petitions filed by generators, transmission and distribution licensees. AERC claims to be entitled for separate fees for each of the 12 tariff petitions filed by the second Respondent before it, and which had resulted in 12 separate tariff orders being passed by the Commission. As it is they alone who would be aggrieved, on being deprived of the fees which they claim they are entitled to in terms of the applicable Regulations, it is only the Commission which can review of the order passed by this Tribunal earlier, whereby they have been held disentitled to receive the prescribed fees.

16. While the stipulated parameters, for exercise of the review jurisdiction by this Tribunal, must no doubt be satisfied, we see no reason to hold that the AERC is not entitled even to seek review of the earlier order of this Tribunal whereby it has been held disentitled to the fees which it claims to be entitled to in terms of the applicable Regulations.

## **VI. IS THE REVIEW PETITION MAINTAINABLE?**

17. In support of his submission that the Review Petition is not maintainable, Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that, in order to justify invocation of the

jurisdiction of this Tribunal under Section 120(2)(f) of the Electricity Act, the AERC has sought to urge that the Impugned Order suffers from a 'mistake of fact and law'; however, in the Review Petition, no ground has been advanced to the effect that there is any 'error apparent on the face of the record' in the Impugned Order; a cursory glance at the grounds would reveal that the entire basis for seeking review is predicated on an alleged erroneous understanding of the applicable Regulations, and the underlying facts, in the Impugned Order; the purport and connotation of the expression 'error apparent on the face of the record' has been explained by the Supreme Court in ***State of West Bengal & Ors. vs Kamal Sengupta & Anr. (2008) 8 SCC 612***; seen in this light, the AERC's attempt to review the Impugned Order, by virtually re-agitating the entire matter, as though this Tribunal is sitting in appeal over the Impugned Order, is misconceived; a review petition cannot be an appeal in disguise; and, if the AERC is aggrieved by the Impugned Order on any count, the remedy is to file an appeal in accordance with law; the judgment of the Supreme Court, in ***BCCI vs v. Netaji Cricket Club, (2005) 4 SCC 741*** relied upon by the AERC, is distinguishable since the same was passed in the context of a mistake committed by the High Court in understanding the nature and purport of an undertaking given to it by the counsel for one of the parties; and this is evident from the reported decision.

**A. JURISDICTION OF THIS TRIBUNAL TO REVIEW ITS ORDERS:**

18. Section 120(2)(f) of the Electricity Act, 2003 stipulates that the Appellate Tribunal shall have, for discharging its functions under the Electricity Act, the same powers as are vested in the Civil Court under the Code of Civil Procedure while trying the suit in respect of reviewing its

decisions. Section 114 of the Civil Procedure Code relates to review and provides that any person considering himself aggrieved – (a) by a decree or order from which an appeal is allowed by the Civil Procedure Code, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed by the Civil Procedure Code, or (c) by a decision on a reference from a Court of Small Causes, may apply for a review of the judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

19. Order XLVII CPC relates to review and Rule 1 thereunder to an application for review of judgment. Sub-rule (1) of Order XLVII Rule 1 CPC provides that any person, considering himself aggrieved (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, (b) by a decree or order from which no appeal is allowed, or (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

**B. REVIEW PERMISSIBLE ONLY ON GROUNDS REFERRED TO IN ORDER 47 RULE 1 CPC:**

20. Power is conferred by Section 120(2)(f) of the Electricity Act, read with Section 114 and Order XLVII Rule 1 CPC, on this Tribunal to review its earlier order passed in Appeal No. 294 of 2017 dated 20.10.2020. The scope of an application for review is much more restricted than that of an appeal.

Under Order 47 Rule 1 of the Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. The words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". (**Chhajju Ram v. Neki : LR 49 IA 144; Bisheshwar Pratap Sahi v. Parath Nath: LR 61 IA 378; Hari Shankar Pal v. Anath Nath Mitter : (1949) FCR 36; Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius, 1954 SCC OnLine SC 49**).

21. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure. A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except 'where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility' (**Chandra Kante v. Sk Habib [(1975) 1 SCC 674; Lily Thomas v. Union of India, (2000) 6 SCC 224**). A party is not entitled to seek review of a judgment merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. (**Sajjan Singh v. State of Rajasthan: AIR 1965 SC 845; Lily Thomas v. Union of India, (2000) 6 SCC 224 and Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2**

**SCC 167)**. The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**).

22. The power of review can be exercised for correction of a mistake, but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**). Error contemplated under the rule must be such which is apparent on the face of the record, and not an error which has to be fished out and searched. It must be an error of inadvertence. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**).

23. The term 'mistake or error apparent' signifies an error which is evident from the record of the case, and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident, and detection thereof requires a long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the power of review, the concerned Court/Tribunal cannot sit in appeal over its judgment/decision. (**State of West Bengal & Ors. vs Kamal Sengupta & Anr: (2008) 8 SCC 612, para 15**).

### **C. REVIEW PERMISSIBLE WHERE THE INTEREST OF JUSTICE SO DEMANDS:**

24. The power of review extends to correct all errors to prevent miscarriage of justice. Courts should not hesitate to review their own earlier order when there exists an error on the face of the record and the interest of justice so demands in appropriate cases. (**Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289**). The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice (**O.N. Mohindroo v. Distt. Judge, Delhi :(1971) 3 SCC 5 ; Lily Thomas v. Union of India, (2000) 6 SCC 224**).

**D. “ANY OTHER SUFFICIENT REASON”: ITS SCOPE:**

25. Order 47 Rule 1 of the Civil Procedure Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason. What would constitute “sufficient reason” would depend on the facts and circumstances of the case. The words “sufficient reason” in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. (**Board of Control for Cricket in India v. Netaji Cricket Club, (2005) 4 SCC 741**)

26. The words “any other sufficient reason, appearing in Order 47 Rule 1 CPC”, must mean “a reason sufficient on grounds at least analogous to those specified in the rule” (**Chhajju Ram v. Neki : AIR 1922 PC 112; Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius: AIR 1954 SC 526; Lily Thomas v. Union of India, (2000) 6 SCC 224**). The expression, ‘for any other sufficient reason’, has an expanded meaning and

a decree or order passed under misapprehension of the true state of circumstance is sufficient ground to exercise the power of review. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**).

**E. AN ORDER PASSED CONTRARY TO, OR IN IGNORANCE OF, STATUTORY PROVISIONS CAN BE REVIEWED:**

27. Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**). If the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment. (**Girdhari Lal Gupta v. D.H. Mehta: (1971) 3 SCC 189; Lily Thomas v. Union of India, (2000) 6 SCC 224**). If a mistake of fact apparent from the record can be rectified, there is no reason why a mistake of law which is glaring and obvious cannot be similarly rectified. An order, inconsistent with statutory provisions, must be deemed to suffer from a mistake apparent from the record. (**M.K. Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd., AIR 1958 SC 875**).

28. Where several vital issues were raised and documents placed, but were not considered, it is a fit case for the order to be reviewed. (**Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289**). If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice, nothing would preclude the Court from rectifying the error. (**Lily Thomas v. Union of India, (2000) 6 SCC 224**).

29. In ***Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289***, the Supreme Court held that the impugned judgment did not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal; the High Court was not justified in ignoring the material on record which, on proper consideration, may justify the claim of the appellant; the High Court was not correct in overlooking the documents relied on by the appellant and the respondents; review jurisdiction was available in the present case since the impugned judgment was a clear case of an error apparent on the face of the record and non-consideration of relevant documents; the power of review of its own order extends to correct all errors to prevent miscarriage of justice; courts should not hesitate to review their own earlier order when there exists an error on the face of the record, and the interest of justice so demands in appropriate cases; the grievance of the appellant was that, though several vital issues were raised and documents placed, the High Court had not considered the same in its review jurisdiction.

30. The order passed by the High Court, in the review petition, was set aside, the appeal from the order refusing review was allowed, and the Writ Petition before the High Court was restored to file.

31. In the light of the law declared by the Supreme Court, in ***Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289***, failure of this Tribunal to deal with the contentions, which it has itself noted in the Order under review, would constitute an error apparent on the face of the record.

32. AERC has sought review of the Impugned Order on the following, among other, grounds: - (a) the Impugned Order has wrongly relied on the

fact that a composite tariff petition filed by the first Respondent for FY 2008-09 for both its generating stations was entertained by the AERC when the applicable AERC (Terms & Conditions for Determination of Tariff) Regulations, 2006 (“**2006 Tariff Regulations**”) provide for separate year wise (annual) tariff petitions to be filed in respect of each generating station; (b) the impugned Order has failed to consider that, in view of the fact that the composite tariff petition (in respect of both the generating stations for FY 2009-10 to 2014-15) was only filed on 01.12.2015 i.e., after the AERC (Fees) Regulations 2015 (“**2015 Fee Regulations**”) came into force *w.e.f.* 31.08.2015, the 2015 Fee Regulations would apply and, consequently, the filing fee of Rs. 20 lakh per year per generating station was payable; in other words, the filing fee of Rs. 10 lakh per tariff petition as per the 2009 Fee Regulations was inapplicable; and (c) the impugned Order could not have directed AERC to exercise its powers under Regulation 43 of the 2004 Conduct of Business) Regulations, as the same had no application to the present case. The afore-said grounds are raised on the premise that the impugned order is either contrary to the applicable statutory regulations, or was passed in ignorance thereof, both of which are grounds for invoking the review jurisdiction of this Tribunal.

33. Let us now consider each of the above contentions and examine whether the conclusions arrived at by this Tribunal, in the order under review, was either contrary to, or was arrived at without considering the purport of, the applicable Regulations.

## **VII. IS A TARIFF PETITION REQUIRED TO BE FILED ANNUALLY?**

34. In support of her contention that the Impugned Order is erroneous and suffers from a mistake of law and fact, Ms. Mandakini Ghosh, Learned Counsel for the Review Petitioner, would submit that this Tribunal, in passing the Impugned Order, has failed to appreciate that the 2006 Tariff Regulations require filing of an annual tariff petition by the generating company; in upholding filing of a composite tariff petition for six financial years from 2009-10 to 2014-15, the Impugned Order has failed to appreciate Regulation 6.1 of the 2006 Tariff Regulations; despite recording the submissions urged on behalf of AERC regarding the requirement of filing annual tariff petitions, this Tribunal failed to return a finding thereon or to deal with the submissions regarding the requirement of tariff petitions being filed annually; failure of this Tribunal to do so, calls for review of the Impugned Order; in RP No. 1 of 2021 dated 13.07.2023, this Tribunal has held, relying on the judgement of the Supreme Court in **Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289**, that failure of this Tribunal to deal with the contentions, which it has itself noted in the Order under review, would constitute an error apparent on the face of the record; and, therefore, failure to deal with the submissions of AERC, regarding annual tariff filing, would constitute an error apparent on the face of the record.

35. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that this Tribunal, *vide* Judgment dated 12.08.2014, had directed AERC to undertake determination of tariff for FY 2009-10 and beyond, given the long delay in tariff fixation; it was observed that the tariff for FY 2008-09 was determined after 2 ½ years of commencement of FY 2008-09, and further tariff for FY 2009-10 onwards had not been determined by the AERC even though FY 2013-14 was already over and FY 2014-15 was already running; in order to abide by the aforesaid

directions of this Tribunal in true letter and spirit, the AERC ought to have determined the tariff for FY 2009-10 to FY 2014-15 in a composite manner in the interest of justice and saving time, since the corresponding years for each of such tariff petitions had already elapsed; the AERC, *vide* its Order dated 17.02.2016 and 05.08.2016, erred in directing the first respondent to file separate petitions, as it was not in consonance with the 2006 Tariff Regulations, and the same was done for no other ostensible reason but to obtain additional fees for the determination of tariff; the AERC, while directing the first Respondent to file separate tariff petitions, has actually determined tariff as a combined exercise which is evident from the AERC holding a combined public hearing for noting objections against the determination of tariff for six financial years for both the generating stations, accepting combined objections from Bidyut Grahek Mancha, accepting combined written submissions from the 2<sup>nd</sup> Respondent, and combined response of the first Respondent against Bidyut Grahak Mancha and the 2<sup>nd</sup> Respondent; it is also significant that there is no bar under the 2006 Tariff Regulations on filing a composite tariff petition for multiple tariff years by a generating company; there is also no legal requirement that separate tariff petitions are required to be filed for different tariff years; what weighed with this Tribunal, while passing the Impugned Order, was that a bulk of the tariff period i.e., FY 2009-10 till FY 2014-15 had already expired by the time the remand order was passed on 12.08.2014; in the meantime, the two generating stations of the first respondent had shut down in the years 2010 and 2013 respectively; in respect of a closed down plant, there could have been no pass-through or true-up of tariff by the AERC; in view of this fact, this Tribunal has rightly concluded, in the Impugned Order, that the Tariff Order dated 30.12.2016, passed by the State Commission in Petition Nos. 20 to 31 of 2016, does not account for the fees paid/payable by the Appellant

to the tune of Rs. 2.40 crores, and they were of the opinion that, as determination of tariff for the period under reference (01.04.2009-31.03.2015) had already been completed, and the tariff order had been passed by the Commission on 30.12.2016, the additional deposited fee of Rs. 2.20 crores had remained with the State Commission only; the AERC has relied on Regulation 6 of the 2006 Tariff Regulations to contend that a tariff petition has to be filed annually by a generating company; the ordinary principle, under Regulation 6.1 of the Tariff Regulation 2006, that a generating company is required to file a tariff petition annually with the Commission no later than 1<sup>st</sup> December, cannot be applied to the present case where tariff fixation for six years had to be done by the AERC which period had already elapsed by the time the Judgment dated 12.08.2014 was passed by this Tribunal; and, in the facts and circumstances of the present case, a composite petition in respect of the total tariff period of six years was maintainable, and the AERC could not have insisted on separate fees for each of the six tariff years.

**A. 2006 TARIFF REGULATIONS: ITS SCOPE:**

36. The Assam Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2006 (the “2006 Tariff Regulations” for short) were made by the AERC in the exercise of its powers under Section 61 read with Section 181 (zd) of the Electricity Act. The 2006 Regulations came into force from the date of its publication in the Assam Gazette on 24.05.2006. In terms of Regulation 1.2 thereof, the 2006 Regulations applies to the persons referred to therein operating in the State of Assam. Clause 1.2(d) relates to generating companies which are not subject to the jurisdiction of the Central Electricity Regulatory Commission.

37. Regulation 2 of the 2006 Tariff Regulations is the definition clause. Regulation 2(k), thereunder, defines “generating company” to mean any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or maintains a generating station. Regulation 2(l) defines “Generation Tariff” to mean the tariff for ex-bus supply of electricity from a generating station. Regulation 2(q) defines “Tariff period” to mean the period for which tariff or the annual revenue requirement is determined by the Commission under the 2006 Regulations. Regulation 2(v) defines “Year” to mean financial year ending on 31<sup>st</sup> March.

38. Regulation 3 relates to determination of tariff, and Regulation 3.1 thereunder stipulates that the Commission shall determine the tariff in accordance with Sections 61 and 62 of the Electricity Act, 2003. Regulation 4 relates to preparation and submission of Annual Accounts, Reports etc. Regulation 4.1 stipulates that every licensee and generating company shall submit audited Annual Accounts with schedules, as per the Companies Act, 1956 or in such other form as the Commission may specify, within the time allowed. Regulation 4.2 requires the accounts of the licensee or the generating company to be closed on 31<sup>st</sup> March every year unless otherwise permitted by the Commission. Even in case the licensee/generating company prepares annual accounts based on a year which closes on any other date, they are required to submit the annual accounts to the Commission for the period 1<sup>st</sup> April to 31<sup>st</sup> March. Regulation 5 relates to periodicity of tariff determination. Regulation 5.1 stipulates that no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except with respect to fuel surcharge.

39. Regulation 6 of the 2006 Tariff Regulations relates to the petition for determination of tariff. Regulation 6.1 stipulates that the generating company shall file a tariff petition annually with the Commission, to determine changes to the current tariff, not later than 1<sup>st</sup> December unless an extension is granted by the Commission upon application. Regulation 6.4 provides that, if a person holds more than one licence and /or is deemed to be a licensee for more than one area of distribution or transmission, he shall submit separate petitions in respect of each licence or area of transmission or distribution. Regulation 6.5 stipulates that, in its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station. Regulation 11 relates to publication of the tariff order, and Regulation 12 relates to communication of the tariff order.

#### **B. ANALYSIS:**

40. It is clear from Regulation 4.2 of the 2006 Tariff Regulations that the accounts of the generating company should be closed on 31<sup>st</sup> March every year, and from Regulation 6.1 thereof that a generating company is required to file a tariff petition annually with the Commission, to determine changes to the current tariff, not later than 1<sup>st</sup> December.

41. As shall be detailed later in this order, this Tribunal, in its Order in Appeal Nos 76 and 82 of 2013 dated 12.08.2014, had faulted the AERC for extending the tariff, determined for FY 2008-09, to the subsequent years, and in not determining the tariff of the 1<sup>st</sup> Respondent from FY 2009-10 onwards in accordance with Section 62 and 64 of the Act, even though FY 2013-14 was already over and the current FY 2014-15 was almost over. AERC was directed, by the order of this Tribunal dated 12.08.2014, to

determine, at the earliest, the tariff for the 1st Respondent's projects for the period 2009-10 to 2014-15.

42. While the AERC may have erred in not determining the tariff of the 1st Respondent, from FY 2009-10 till FY 2014-15, each year, and in undertaking this exercise only after this Tribunal had directed them to do so by its order dated 12.08.2014, the fact remains that, in terms of Regulation 6.1 of the 2006 Tariff Regulations, the 1st Respondent - a generating company- was required to file a tariff petition annually with the AERC. The 2006 Tariff Regulations are statutory in character, and have the force of law. These Regulations are binding on the AERC, the 1st Respondent as also this Tribunal. The AERC was legally obligated to determine the tariff of the 1st Respondent each year, and their insistence that the 1st Respondent file separate tariff petitions for each year is to ensure compliance with Regulation 6.1 of the 2006 Tariff Regulations. That the tariff of the 1st Respondent for a period of six years, from FY 2009-10 till FY 2014-15, was being determined at the same time did not absolve the 1st Respondent of its statutory obligation to file separate tariff petitions for each year. While a common hearing may have been held, and common written submissions may have been permitted to be filed, it cannot be lost sight of that the AERC has passed separate tariff orders for each financial year FY 2009-10 till FY 2014-15.

43. We find it difficult, therefore, to agree with the submission of Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the 1st Respondent, that Regulation 6.1 of the 2006 Tariff Regulations cannot be applied to the present case where tariff fixation for six years had to be undertaken by the AERC, in compliance with the order of this Tribunal dated 12.08.2014, after the said period had already elapsed.

44. The order of this Tribunal dated 12.08.2014 did not require AERC to determine the 1st Respondent's tariff, for FY 2009-10 to FY 2014-15, in a composite manner in the interest of saving time. All that this Tribunal had directed the AERC to do was to determine the tariff for the 1st Respondent's projects, for the period 2009-10 to 2014-15, at the earliest. Such an exercise of determination could only have been undertaken by the AERC in accordance with law, and their insistence that separate tariff petitions should be filed for each year is evidently to ensure compliance with Regulation 6.1 of the 2006 Tariff Regulations. As shall be detailed later in this order, the Fee Regulations (which have statutory force) mandate separate fees being paid for each tariff petition. Therefore the submission, urged on behalf of the 1st Respondent, that insistence on separate petitions being filed for each year was for no other ostensible reason other than to obtain additional fees for determination of tariff, is only to be noted to be rejected.

45. We find considerable force in the submission of Ms. Mandakini Ghosh, Learned Counsel for AERC, that this Tribunal, despite recording in the order under review the submissions urged on behalf of AERC regarding the requirement of filing annual tariff petitions, has failed to consider the said submissions and record its finding thereon. As held by the Supreme Court, in **Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands, (2005) 13 SCC 289**, failure of this Tribunal to deal with the contentions, which it has itself noted in the Order under review, would constitute an error apparent on the face of the record, necessitating review of the Impugned judgement.

46. We conclude our analysis under this head holding that the 1<sup>st</sup> Respondent was statutorily obligated to file separate tariff petitions, for each financial year, in terms of Regulation 6.1 of the 2006 Tariff Regulations.

### **VIII. IS COURT FEE PAYABLE IN TERMS OF THE EARLIER 2009 OR THE PRESENT 2015 FEE REGULATIONS?**

47. Ms. Mandakini Ghosh, Learned Counsel for the Petitioner, would submit that the Petitioner is seeking review of the order directing refund of court fees; the question is – *whether one court fee can be paid for twelve tariff petitions or twelve court fees are payable considering twelve separate tariff orders?*; the 2015 Fee Regulations came into force with effect from 31.08.2015; the first Respondent had filed its tariff petition, for 2009-2015, on 01.12.2015 belatedly, despite the directions of this Tribunal, in Appeal No. 76 and 82 of 2013 dated 12.08.2014, holding that the AERC should undertake the tariff determination process from 2009-10 onwards at the earliest, the first respondent deliberately delayed filing the tariff petitions within time; they filed incomplete tariff petitions on 01.12.2015 after a 16-month delay from the date on which directions were issued by this Tribunal; the first respondent had paid court fees of Rs. 20 Lakhs while filing one petition for six financial years for both generating stations of Adamitilla and Banskandi; thereafter, in 2016, the first Respondent filed twelve separate petitions without paying any additional court fees despite the directions of the AERC asking them to do so.

48. Learned Counsel would further submit that, while filing the tariff petition, the first Respondent had contended that court fees was to be computed under the AERC (Payment of Fees, etc.) Regulations, 2009 (the “2009 Fee Regulations” for short); the said 2009 Fee Regulations prescribed a minimum court fee of Rs. 10 lakhs per tariff petition filed by a generating company; the first Respondent paid court fees for its two generating stations even though it had filed one composite petition; court fees were to be computed under the 2015 Fee Regulations which had repealed the 2009

Fee Regulations as on 31.08.2015; since the first Respondent had filed its tariff petition, with considerable delay, on 01.12.2015, the 2015 Fee Regulations were applicable; the Fees payable by a generating company for one tariff petition, under the 2015 Fee Regulations, was a minimum of Rs. 20 Lakhs; AERC had, accordingly, directed the first Respondent to pay court fees of Rs. 2.40 crores for twelve tariff petitions; the first Respondent only paid the court fees on 09.02.2017 under protest, after the directions of this Tribunal in EP No. 2 of 2015 dated 09.01.2017; in the Impugned Order, this Tribunal took note of the 2015 Fee Regulations, and that the first Respondent had paid Rs. 20 lakhs for one petition; after holding that the first Respondent could have filed one composite tariff petition, this Tribunal directed AERC to retain Rs. 20 Lakhs and refund Rs. 2.20 crores to the first Respondent; on a combined reading of Para 4.4, 7.20 & 7.23 of the Impugned Order, it is clear that this Tribunal has held that the 2015 Fee Regulations were applicable, and Rs. 20 Lakhs would be the applicable court fees for one composite tariff petition filed by the first Respondent; and the applicability of the 2015 Fee Regulations has not been challenged by any party and has attained finality.

49. In support of his contention that the 2015 Fees Regulations is not applicable, Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that the 2015 Fees Regulations notified on 20.08.2015 came into force from 31.08.2015 i.e., the date of their publication in the official gazette; on its coming into effect, the 2015 Fees Regulations repealed the 2009 Fees Regulations; thus the 2009 Fees Regulations applied during the entire period for which the tariff had to be fixed i.e., FY 2009-10 to 2014-15 i.e., the period from 01.04.2009 to 31.03.2015; the 2015 Fees Regulations cannot be applied retroactively to

the tariff periods for the financial years preceding the 2015 Fees Regulations; further, the fact that the tariff petitions were filed by the first Respondent on 01.12.2015 would not, *ipso facto*, invite the applicability of the 2015 Fees Regulations, since the primary and determinative fact would be the fees which was payable during the subsistence of the tariff period, and not when the tariff petitions came to be filed; it was contended on behalf of AERC that the Impugned Order had itself held that the 2015 Fee Regulations were applicable and, as such, this issue has attained finality; and there is nothing in the Impugned Order which even impliedly suggested that this Tribunal has, *vide* the Impugned judgement, upheld the applicability of the 2015 Fees Regulations.

**A. ORDER IN APPEAL NOS 76 AND 82 OF 2013 DATED 12.08.2014:**

50. In its Order in Appeal Nos 76 and 82 of 2013 dated 12.08.2014, this Tribunal observed that determination of tariff from FY 2009-10 onwards had to be carried out by the State Commission according to Sections 62 and 64 of the Electricity Act, after obtaining objections and suggestions from the public on the proposal of the generating company; there had been an inordinate delay in determination of tariff for FY 2008-09; the tariff for FY 2008-09 was only determined on 20.10.2011 i.e. after 2½ years of commencement of FY 2008-09; the tariff for FY 2009-10 onwards had not been determined by the State Commission even though FY 2013-14 was already over, and the current FY 2014-15 was almost over; till now only provisional tariff was being paid by the Assam Discom, which had resulted in financial crunch for EIPL; and, therefore, they were directing the State Commission to determine the tariff for EIPL's projects for the period 2009-10 to 2014-15 at the earliest.

51. This Tribunal then summarized its findings holding that the State Commission had erred in extending the scope of review beyond the review petition, and even beyond the main order, by extending the tariff determined for FY 2008-09 to the subsequent years; the tariff for FY 2009-10 onwards had to be determined according to Sections 62 and 64 of the Act, after obtaining objections and suggestions from the public on the proposal of the generating company; in view of the above, the impugned order of the State Commission was being set aside only to the extent of the tariff for FY 2009-10 onwards; however, since the tariff for FY 2009-10 and onwards had not been determined so far, they had given some interim directions for payment of tariff to ensure operation of the plant for the interim period till the tariff was determined by the State Commission. The State Commission was directed to determine the tariff for the period 2009-10 to 2014-15 at the earliest.

52. In short, this Tribunal, in its Order in Appeal Nos 76 and 82 of 2013 dated 12.08.2014, faulted the AERC for the inordinate delay of 2½ years in determining the tariff of the 1<sup>st</sup> Respondent for FY 2008-09; for extending the tariff, determined for FY 2008-09, to the subsequent years; and for their failure to determine the tariff of the 1<sup>st</sup> Respondent from FY 2009-10 onwards even though FY 2013-14 was already over and the current FY 2014-15 was almost over. It is only in compliance with the directions of this Tribunal, in its order dated 12.08.2014, that AERC undertook the exercise of determining the tariff, for the 1<sup>st</sup> Respondent's projects, for the period 2009-10 to 2014-15.

#### **B. ORDER IN E.P. NO.2 OF 2015 DATED 09.02.2017:**

53. In its order in "**Eastern India Powertech Ltd vs Assam Power Distribution Co. Ltd**" (Order in E.P.No.2 of 2015 dated 09.02.2017), this

Tribunal noted that, as directed, the State Commission had passed an order dated 31.12.2016; they were informed by the Learned Senior Counsel for the State Commission that the Petitioner (1<sup>st</sup> Respondent herein) has not paid the court fees; and the State Commission had to pass orders because of the directions given by this Tribunal, but that did not mean that the Petitioner (1<sup>st</sup> Respondent herein) need not pay the court fees. This Tribunal directed the Petitioner (1<sup>st</sup> Respondent herein) to deposit the court fees with the State Commission before the next date of hearing, and observed that, if the court fees were not paid, they would not consider any prayers made by the Petitioner (1<sup>st</sup> Respondent herein) on the next date of hearing.

**C. 2009 FEES REGULATIONS: ITS SCOPE:**

54. Section 64(1) of the Electricity Act stipulates that an application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by the Regulations.

55. The Assam Electricity Regulatory Commission (Fees) Regulations, 2009 (the “2009 Fees Regulations” for short) were made by the AERC in the exercise of its powers under Section 181(1) read with Section 181(2) (zo) and (zp), Section 86(1)(g) and Section 127(1) of the Electricity Act, 2003. While Section 181 confers power on the State Commission to make Regulations, Section 86(1)(g) requires the State Commission to discharge the function of levying fees for the purposes of the Electricity Act.

56. The 2009 Regulations came into force on 22.01.2010 on its publication in the Assam Gazette. Regulation 3 of the 2009 Regulations relates to Fees on Petitions, Applications etc. Regulation 3.1 stipulates that

every petition/application etc, filed before the Commission, shall be accompanied by the fee as specified in the “Schedule of Fees” appended to these Regulations. Regulation 5 stipulates that the fee shall be paid by Account Payee draft/pay order/ banker’s cheque payable at Guwahati in favour of the Assam Electricity Regulatory Commission. Regulation 8 provides that the licensee shall be entitled to take into account any fee or charge paid by it under these Regulations as an expense in the determination of tariff. Regulation 9 relates to utilisation of the amounts and, thereunder, the Commission is entitled to utilise the amounts deposited with the bank for the discharge of its functions.

57. Clause 3 of the Schedules of Fees relates to fees to be paid for determination of tariff. Serial Number 3.2, in the table thereunder, relates to applications for determination of tariff for supply of electricity to any distribution licensee, including a deemed licensee, by a generating company of the categories mentioned thereunder. Clause 3.2(1) relates to applications for determination of tariff for supply of electricity by a conventional fuel (coal, gas, oil etc.) based plant except captive generating plant. The fees payable for such applications is stipulated as Rs.2,000 per MW of installed capacity or part thereof, subject to a minimum of Rs.10 lakhs.

#### **D. 2015 FEES REGULATIONS: ITS SCOPE:**

58. The Assam Electricity Regulatory Commission (Payment of Fees etc.) Regulations, 2015 (the “2015 Fees Regulations” for short) were made by the AERC in the exercise of the very same powers conferred on it for making the 2009 Regulations. The 2015 Regulations came into force from the date of their publication in the Assam Gazette on 31.08.2015. Regulation

3 thereunder relates to Fees on petitions, applications etc. Regulation 3.1 thereunder stipulates that every petition, application or grievance filed before the Commission shall be accompanied by such fee as specified in the “Schedule of Fees” appended to the 2015 Regulations. Regulation 3.3 stipulates that all fees received by the Commission under the 2015 Regulations shall be credited to the fund, which is defined in Regulation 2(d) to mean the State Electricity Regulation Commission fund constituted under Section 103 of the Electricity Act.

59. Regulation 6 of the 2015 Fees Regulations relates to payment of fees and, under Regulation 6.1, the fees shall be paid by Account payee draft/pay order/banker’s cheque/ E-Transfer payable at Guwahati in favour of the Secretary, Assam Electricity Regulatory Commission. Regulation 9 relates to inclusion in tariff and, thereunder, the licensee shall be entitled to take into account any fee or charge paid by it under these Regulations as an expense in the determination of tariff. Regulation 10 relates to utilisation of fund and, thereunder, the Commission is entitled to utilise the Fund for the discharge of its functions. Regulation 11 relates to repeals and amendments and thereunder, with the coming into force of the 2015 Regulations, the AERC (Fees) Regulations, 2009 and the “Schedule of Fees” appended to the said Regulations, stand repealed. Consequently, the 2009 Regulations remained in force till its repeal by the 2015 Regulations with effect from 31.08.2015.

60. Clause 5 of the “Schedules of Fees” appended to the 2015 Regulations relates to application for determination of tariff under Section 62(1)(a) of the Electricity Act, which relates to determination of tariff for supply of electricity by a generating company to a distribution licensee. Clause 5.2(i), in the table thereunder, relates to application for determination of tariff for supply of electricity to any distribution licensee, including a

deemed licensee, by a generating company, i.e. by a conventional fuel (coal, gas, oil etc.) based plant except captive generating plant. The fees payable for such applications is Rs.5,000 per MW of installed capacity or part thereof subject to a minimum of Rs.20,00,000/- (Rupees twenty lakhs).

#### **E. ANALYSIS:**

61. Regulation 3.1 of the 2009 Fees Regulations stipulates that every petition/application etc, filed before the Commission, shall be accompanied by the fee as specified in the “Schedule of Fees” appended to the said Regulations. Clause 3 of the Schedule of Fees relates to fees to be paid for determination of tariff. Clause 3.2(1), in the table thereunder, relates to applications for determination of tariff for supply of electricity by a conventional fuel (coal, gas, oil etc.) based plant except captive generating plant. The minimum fees payable for such applications is stipulated as Rs.10 lakhs.

62. Regulation 6 of the 2015 Fees Regulations relates to payment of fees. Clause 5 of the “Schedules of Fees” appended to the 2015 Regulations relates to application for determination of tariff under Section 62(1)(a) of the Electricity Act. Clause 5.2(i), in the table thereunder, relates to application for determination of tariff for supply of electricity to any distribution licensee by a generating company, and the minimum fees payable for such applications is Rs.20,00,000/- (Rupees twenty lakhs).

63. It is no doubt true that by the time the 1<sup>st</sup> Respondent filed its tariff petition, for the six year period 2009-10 till 2014-15, on 01.12.2015, the 2015 Regulations had come into force with effect from 31.08.2015, and the fees payable thereunder is Rs.20 lakhs per tariff petition. The AERC has charged the 1<sup>st</sup> Respondent fee of Rs.2.40 crores with respect to the 12 tariff petitions

filed by them i.e. two tariff petitions (one each for its two generating stations) for each of the six financial years 2009-10 till 2014-15. For the very same 12 tariff petitions, the fees payable in terms of the 2009 Regulations, which remained in force till it was repealed by the 2015 Fee Regulations on 31.08.2015, was Rs.1.20 crores (Rs.10 lakhs for each of the 12 tariff petitions filed by the 1<sup>st</sup> Respondent).

64. As noted hereinabove, Regulation 6.1 of the 2006 Tariff Regulations required the 1<sup>st</sup> Respondent (a generating company) to file a tariff petition annually with AERC not later than 1<sup>st</sup> December. For the Financial Year 2009-10, the 1<sup>st</sup> Respondent was required, in terms of Regulation 6.1 of the 2006 Tariff Regulations, to file its tariff petitions not later than 1<sup>st</sup> December 2008. Even for the Financial Year 2014-15, Regulation 6.1 required the 1<sup>st</sup> Respondent to file its tariff petitions latest by 1<sup>st</sup> December 2013. Compliance with its statutory obligations, under Regulation 6.1 of the 2006 Tariff Regulations, would have only entailed the 1<sup>st</sup> Respondent having to pay fees of Rs.10 lakhs per tariff petition, in which event their total liability towards court fees would have only been Rs.1.20 crores, and not Rs.2.40 crores as demanded and received by the AERC.

65. While highlighting the delay on the part of the 1<sup>st</sup> Respondent in filing its tariff petitions, the AERC has glossed over its failure to determine the tariff, for the 1<sup>st</sup> Respondent's generating stations, annually from 2009-10 onwards, as also with respect to the fact that they undertook the exercise of determining the tariff, for the six year period 2009-10 till 2014-15, only because of the directions of this Tribunal in its order in Appeal Nos. 76 and 82 of 2013 dated 12.08.2014. While both the 1<sup>st</sup> Respondent and the Appellant must share the blame for the tariff of the 1<sup>st</sup> Respondent not being determined annually, what is of relevance is that the statutory obligation

placed, by Regulation 6.1 of the 2006 Tariff Regulations, on the 1<sup>st</sup> Respondent is to file its tariff petition, and on the AERC is to determine the tariff of the 1<sup>st</sup> Respondent, on an annual basis. Consequently, if the tariff petitions had been filed and determined in accordance with law, then the 1<sup>st</sup> Respondent's liability with respect to payment of fees would only have been Rs.1.20 crores under the 2009 Regulations, and not Rs.2.40 crores under the 2015 Regulations. Compliance with Regulation 6.1 of the 2006 Tariff Regulations would have resulted in the 2009 Fee Regulations covering the entire six-year period 2009-10 till 2014-15, and not the 2015 Regulations which only came into force a few months after expiry of the last of the six Financial Years, ie FY 2014-15, on 30.08.2015.

66. It is true that the 1<sup>st</sup> Respondent paid Rs.2.40 crores (at Rs.20 lakhs per petition) only after the order of this Tribunal in EP No.02 of 2015 dated 09.01.2019. The fact, however, remains that, ever since 09.02.2017 when court fees of Rs.2.40 crores was paid by the 1<sup>st</sup> Respondent, the said amount is lying with the AERC. In the absence of any specific finding in this regard, we must express our inability to agree with the submission of Ms. Mandakini Ghosh, Learned Counsel for the AERC, that this Tribunal, in the Judgement under review, has upheld the applicability of the 2015 Regulations. While the directions issued by the Tribunal in the Judgement under review, for the AERC to retain Rs.20 lakhs and return Rs.2.20 crores to the 1<sup>st</sup> Respondent, may not be justified, we are of the view that, since the fees to which the AERC is entitled to is only Rs.1.20 crores, they are liable to refund a sum of Rs.1.20 crores out of the total sum of Rs.2.40 crores paid to them by the 1<sup>st</sup> Respondent on 09.02.2017.

**IX. IS A SEPARATE TARIFF PETITION REQUIRED TO BE FILED FOR EACH GENERATING STATION?**

67. Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that the impugned Order failed to consider that separate tariff petitions are required to be filed for each generating station; Regulation 2(k) of the 2006 Tariff Regulations is a verbatim reproduction of Section 2(28) of the Electricity Act, 2003; as the 2006 Tariff Regulations defines a generating company as owning/ maintaining a single generating station, it goes without saying that it must file tariff petitions annually; in the instant case, as the first Respondent has two generating stations, it had necessarily to file separate petitions for its two stations for each financial year; this Tribunal erred in holding that the first Respondent could file *one* petition for both stations for the six financial years; such an interpretation would mean that generating companies like NTPC can file one common tariff petition for all its generating stations; despite having noted this submission, no finding has been recorded on this aspect; and failure to do so constitutes a mistake of law which is a ground for review.

68. Learned Counsel for the AERC would further submit that the first Respondent had itself paid two separate court fees for each generating station while filing the tariff petition on 01.12.2015; the first Respondent paid court fees of Rs. 20 Lakhs under the 2009 Fee Regulations, which prescribes a minimum of Rs. 10 Lakhs for the tariff petitions filed by conventional generating companies; and the first Respondent was aware that it had to file station-wise tariff petitions as is the prevailing practice in the State of Assam which is followed by all generating companies.

69. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that this Tribunal, in the order under review, took note of Regulation 6.5 of the 2006 Tariff Regulations; Regulation 6.5 of the 2006 Tariff Regulations is liable to be contrasted with Regulation 6.4 of

the same Tariff Regulations; the latter requires a licensee to file separate tariff petitions in respect of each license or area of transmission or distribution; thus, separate tariff petitions are only required to be filed by a transmission or a distribution licensee and not by a generating company, which is permitted to file a single composite tariff petition in respect of more than one generating station; the AERC's reliance on Regulation 2(k) of the 2006 Tariff Regulations, which defines a "generating company", to contend that the same shows that a tariff petition is required to be filed in respect of each generating station is misconceived; there is nothing in the language of Regulation 2(k) which leads to the conclusion that a generating company is required to file separate tariff petitions in respect of each of the generating stations owned, operated or maintained by it; and, even otherwise, a fee of Rs. 20 Lakhs (i.e., Rs. 10 lakh each per generating station) under the 2009 Fees Regulations was paid by the first Respondent for determination of tariff for both the generating stations for the total tariff period.

#### **A. ANALYSIS:**

70. Section 62(1)(a) of the Electricity Act requires the State Commission to determine the tariff, in accordance with the provisions of the Electricity Act, for supply of electricity by a generating company to a distribution licensee. Section 2(28) of the Electricity Act, 2003 defines "generating company" to mean any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station. Regulation 2(k) of the 2006 Tariff Regulations is identically worded, and defines "generating company" to mean any company or body corporate or association or body of individuals whether incorporated or not, or artificial juridical person which owns or operates or maintains a generating station. Section 2(30) of the

Electricity Act, 2003 defines “generating station” to mean any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment. Regulation 2(l) of the 2006 Tariff Regulations defines “Generation Tariff” to mean the tariff for ex-bus supply of electricity from a generating station.

71. On a conjoint reading of Section 62 with Sections 2(28) and 2(30) of the Electricity Act and Regulation 2(k) and 2(l) of the 2006 Tariff Regulations, it is evident that, since the generation tariff of the 1<sup>st</sup> Respondent generating company was to be determined, a separate tariff petition was required to be filed for each of its generating stations by a generating company. This is further clarified by Regulation 6.5 of the 2006 Tariff Regulations which stipulates that, in its tariff petition, a generating company shall submit information to support the determination of tariff for each generating station. Consequently, a separate tariff petition is required to be filed with respect to each generating station, and not one tariff petition for the generating company as a whole. The analogy drawn on behalf of the AERC to the tariff determination exercise undertaken with respect to NTPC is apposite. Accepting the submission urged on behalf of the 1<sup>st</sup> Respondent, by Shri Gopal Jain, Learned Senior Counsel, would require the AERC to permit NTPC also to file one common tariff petition for all its generating stations, which would make little sense.

72. Regulation 6.4 of the 2006 Tariff Regulations provides that, if a person holds more than one licence and /or is deemed to be a licensee for more than one area of distribution or transmission, he shall submit separate petitions in respect of each licence or area of transmission or distribution. Regulation 6.5 stipulates that, in its tariff petition, a generating company shall

submit information to support the determination of tariff for each generating station.

73. Reliance placed by Shri Gopal Jain, Learned Senior Counsel appearing on behalf of the 1<sup>st</sup> Respondent, on Regulation 6.4 of the 2006 Tariff Regulations is misplaced. Regulation 6.4 relates to a licensee or a deemed licensee. The 1<sup>st</sup> Respondent is a generating company and is neither a transmission licensee nor a distribution licensee. For that matter, it is also not a deemed transmission/distribution licensee. Regulation 6.5 of the 2006 Tariff Regulations relates to generating companies and, consequently, it is Regulation 6.5 which is applicable to the 1<sup>st</sup> Respondent, and not Regulation 6.4 of the 2006 Tariff Regulations. We find force in the submission of Ms. Mandakini Ghosh, Learned Counsel for AERC, that the understanding of the 1<sup>st</sup> Respondent was also that separate fees were required to be paid for each generating station, and it is for this reason that they paid a court fee of Rs.20 lakhs when they initially filed a composite tariff petition, for both its generating stations, on 01.12.2015.

74. We, therefore, hold that the 1<sup>st</sup> Respondent was required in law to file a separate tariff petition for each of its generating stations and, since the tariff petitions were required to be filed for six financial years with respect to each generating station, the 1<sup>st</sup> Respondent was rightly called upon to file 12 tariff petitions. Consequently, separate court fee for each of the 12 tariff petitions was payable by the 1<sup>st</sup> Respondent.

**X. IS THE DIRECTION NOT TO UNDERTAKE TRUE UP EXERCISE CONTRARY TO THE TARIFF REGULATIONS?**

75 Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that this Tribunal has held that AERC should not proceed with the true-up

exercise and pass on the Rs. 2.20 crores to the consumers as part of the tariff; this finding is not only contrary to the AERC Tariff Regulations which provides for true-up, but also restricts the powers of the Commission under the Electricity Act, 2003 and the Regulations made thereunder; since the first Respondent did not pay the complete fee at the time of tariff determination (ARR), the same was not passed on to the consumers; and the tariff regulations require the Commission to pass on the court fees as the O & M cost of the first Respondent.

76. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that the narrow question, in the present review petition, is whether, pursuant to the Order passed by this Tribunal on 12.08.2014 remanding the matter to the AERC for determination of tariff for the first Respondent's two generating stations from FY 2009-10 till 2014-15, the first respondent was required to pay separate court fee for each of the six tariff years in respect of each generating station, and that too at the higher rate of Rs. 20 lakhs per petition as per the 2015 Fee Regulations even when:- (i) Adamtilla generating station had closed down in the year 2010 and Banskandi generating station had closed down in the year 2013; (ii) bulk of the tariff period was over by 12.08.2014 when the aforesaid remand Order was passed by this Tribunal; and (iii) in view of the above, neither a pass through in the tariff nor a true up of fees was possible.

#### **A. ANALYSIS:**

77. The order of this Tribunal, in Appeal Nos. 76 and 82 of 2013 dated 12.08.2014, required AERC to determine the 1<sup>st</sup> Respondent's tariff for six financial years from 2009-10 till 2014-15. While a tariff determination exercise is undertaken to determine the Annual Revenue Requirement of the 1<sup>st</sup> Respondent (a generating company), it is required to be trued up later

on the basis of the actual figures reflected in its books of accounts. The 1<sup>st</sup> Respondent has not objected to the tariff being determined for the Financial Years 2009-10 till 2014-15, despite its claims that both its plants were closed during this period. As the order of this Tribunal in Appeal No. 76 and 82 of 2013 dated 12.08.2014, a Judgement inter-parties, is binding both on the AERC and the 1<sup>st</sup> Respondent, it is impermissible for either of them to now turn around and contend that the exercise undertaken, of tariff determination, is not in accordance with law. Consequent on determination of its tariff, a true up exercise would automatically follow later to consider the 1<sup>st</sup> Respondent's requirement based on actuals in terms of its audited books of accounts.

78. The submission that the court fees so paid is neither a pass through in the tariff, nor is a true up of the fees possible, does not merit acceptance as it falls foul of the express stipulation in Regulation 8 of the 2009 Fee Regulations. As the court fees were paid by the 1<sup>st</sup> respondent, after the tariff orders were passed by the AERC, they could not be extended the benefit of a pass through at that stage.

#### **XI. REGULATION 43 OF THE 2004 CONDUCT OF BUSINESS REGULATIONS: ITS SCOPE:**

79. Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that this Tribunal has committed a mistake of law by directing the Commission to waive the requirement of court fees by exercising its powers under Regulation 43 of the 2004 Conduct of Business Regulations, though such a power is not available to the Commission; under Regulation 43 of the 2004 Regulations, the AERC can only waive the provisions of the 2004 Conduct of Business Regulations, and not the provisions of the Fee

Regulations; further, the power of waiver can only be exercised on an order being passed by the AERC recording reasons therefor; and, hence, the Impugned Order may be reviewed, and the direction to the AERC to waive the requirement of fees, by exercising powers under Regulation 43, be set aside.

80. In support of his contention that no exception can be taken to the invocation of powers under Regulation 43 of the COB Regulations, Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that the 2004 COB Regulations have been framed by the AERC in the exercise of its powers under Section 181 of the Electricity Act, 2003; the said Regulations provide for filing of all applications and petitions including tariff petitions before the AERC, and the manner of disposal thereof; Regulation 43 empowers the Petitioner Commission to “*dispense with the requirement of any of the Regulations*”; the word ‘Regulations’ has not been defined expressly in the 2004 COB Regulations, but the said COB Regulations provide that words and expressions not expressly defined therein would bear the meaning ascribed to them under the Electricity Act, 2003; the Electricity Act, 2003, in turn, defines the term “Regulations” in Section 2 (57) as “*regulations*” means regulations made under this Act”; a combined reading of all the above, would indicate that the word “Regulations”, in Regulation 43, would include the Fees Regulations as well; it is incorrect to state that the power of dispensation/relaxation under Regulation 43 is restricted only to the specific regulations in the COB Regulations; and, in any case, the issue of exercise of powers under Regulation 43 is not germane to the disposal of the present Review Petition.

81. Learned Senior Counsel would further submit that the Impugned Order was passed in an appeal under Section 111 of the Electricity Act, 2003

against the order dated 30.12.2016 passed by the AERC directing the first Respondent to pay the outstanding fees of Rs. 2.20 crores; as an appellate forum, exercising powers under Section 111 of the Electricity Act, 2003, it was always open to this Tribunal to pass any order confirming, modifying or setting aside the order of the AERC dated 30.12.2016; this is clear from Section 111(3) of the Electricity Act, 2003; even assuming, without conceding, that Regulation 43 has been erroneously applied, the same would make no difference to the Impugned Order since the order of refund of Rs. 2.20 crores, *vide* the Impugned Order, could have been passed even without resorting to Regulation 43 of the COB Regulations, simply pursuant to Section 111(3) of the Electricity Act; and it is not even the case of the AERC that the order of refund could not have been passed *de hors* Regulation 43 of the COB Regulations.

**A. RELEVANT STATUTORY PROVISIONS:**

82. Section 111(3) of the Electricity Act, 2003 enables this Tribunal, on receipt of an appeal under sub-section (1), after giving the parties to the appeal an opportunity of being heard, to pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

83. In the exercise of its powers under Section 181 of the Electricity Act, the AERC made the Assam State Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 (the “2004 Regulations” for short). These Regulations came into force on 30.08.2004 when it was notified. It was later published in the Assam Gazette on 14.02.2005. Regulation 2(2) of the 2004 Regulations stipulates that “words or expressions” occurring in these Regulations, and not defined therein, shall bear the same meaning as in the Electricity Act. Since the word “Regulations” is not defined in the 2004 Regulations, its definition, under Section 2(57) of the Electricity Act, would

be the definition which the word “regulations” would bear under the 2004 Regulations. Section 2(57) of the Electricity Act defines “Regulations” to mean regulations made under the Electricity Act. Regulation 3 of the 2004 Regulations relates to the Commission’s offices, office hours and sittings. Regulation 4 relates to the language of the Commission, Regulation 5 to the seal of the Commission, Regulation 6 to the functions and duties of the Secretary of the Commission, and Regulation 7 to the authorised representative entitled to appear before the Commission.

84. Chapter II of the 2004 Regulations prescribes the General Rules concerning proceedings before the Commission. Regulation 11 thereunder relates to petitions before the Commission. Regulation 14 relates to presentation, scrutiny and admission of petitions. Regulation 17 relates to hearing of the matter, and Regulation 21 to orders of the Commission.

85. Chapter III provides for Arbitration of disputes, Chapter IV relates to investigation, inquiry, collection of information etc. Chapter V relates to fines and charges. Chapter VI provides for application of certain provisions of the Indian Penal Code and the Criminal Procedure Code, and Chapter VII is the Miscellaneous Chapter. Regulation 40, thereunder, relates to the saving of inherent powers of the Commission, Regulation 41 relates to the general power to review and rectify, and Regulation 42 relates to the power to remove difficulties.

86. Regulation 43 relates to the power to dispense with the requirement of the Regulations and, thereunder, the Commission shall have the power, for reasons to be recorded in writing and with notice to the parties, to dispense with the requirement of any of the Regulations in a specific case

or cases subject to such terms and conditions as may be directed by the Commission.

**B. ANALYSIS:**

87. The 2004 Regulations were made by the AERC for the conduct of its proceedings, and the discharge of its functions. Regulation 43, thereunder, relates to the power of the Commission to dispense with the requirement of the Regulations, meaning thereby the 2004 Regulations. In terms of the said provision, the Commission has the power to dispense with the requirement of any of the Regulations in a specific case. The power conferred on the Commission, under Regulation 43, is to dispense with the requirement of any of the regulations of the 2004 Regulations, and not either the 2009 or the 2015 Fee Regulations.

88. Reliance placed on behalf of the first Respondent, on Regulation 2(2) of the 2004 Regulations, is also misplaced. All that Regulation 2(2) of the 2004 Regulations states is that the expressions occurring in the 2004 Regulations, which are not defined therein, shall bear the same meaning as in the Electricity Act, 2003. Since Section 2(57) of the Electricity Act, 2003 defines 'regulations' to mean Regulations made under the Act, it is clear that the power conferred by Regulation 43 is only to dispense with the requirement of the 2004 Regulations, and not any other regulations such as the 2009 or the 2015 Fees Regulations.

89. Further the power, conferred on it under Section 43, is hedged by the requirement of the Commission recording reasons in writing for its exercise, and on putting the affected parties on notice. Exercise of the power to dispense with the requirement of the 2004 Regulations is also circumscribed by such exercise being subjected to such terms and conditions as may be

directed by the Commission. The power conferred under Regulation 43 can only be exercised by the AERC, that too on fulfilment of the conditions stipulated therein, and not by this Tribunal.

90. The power conferred on this Tribunal under Section 111(3) of the Electricity Act, to confirm, modify or set aside the order appealed against, must be read in conjunction with Section 111(1) which enables a person aggrieved to prefer an appeal against an order made by the Appropriate Commission under the Act. While an appeal may also lie against the order, if any, passed by the Commission under Regulation 43 of the 2004 Regulations, the power conferred on this Tribunal under Section 111(3) cannot extend to this Tribunal exercising the powers conferred by statutory regulations on the Commission. The impugned judgment, whereby this Tribunal directed the AERC to exercise its power under Regulation 43 to waive the requirement of additional fees of Rs. 2.20 Crores, suffers from an error apparent on the face of record necessitating its review. The directions issued by this Tribunal, in the impugned judgment, to the AERC to exercise its general powers under Regulation 43 to waive the requirement of additional fees of Rs. 2.20 Crores and to refund the same to the first Respondent, is therefore set aside.

## **XII. FAILURE TO FOLLOW PAST METHODOLOGY: ITS EFFECT:**

91. In support of her submission that this Tribunal has erroneously depended on past methodology, Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that this Tribunal had erred in holding that AERC had allowed the first Respondent to file one composite petition for FY 2008-09, and therefore a composite petition could be filed for two generating stations for FY 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15;

even if this argument is accepted, the first Respondent would still be required to file six petitions for six financial years in line with Regulation 6.1 of the 2006 Tariff Regulations; the Impugned Order suffers from an error apparent in placing reliance on the first Respondent's tariff filing for FY 2008-09; the Impugned Order, if not reviewed, will set a precedent for the State of Assam and for the country; other similarly placed generating companies in the State of Assam, have been filing separate tariff petitions, for each generating station, from 2015 onwards; in view of the Impugned Order, the state generating companies may have to be given the same treatment; this would cause grave prejudice to the functioning of the Commission; and the current budget does not also permit such refund.

92. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that a combined tariff petition for both generating stations was permissible; the AERC had entertained a composite tariff petition for the said two generating plants for FY 2008-09, and had passed a tariff order on the same, accepting fees payable only for one single petition; therefore, insistence by AERC that separate petitions, in respect of each generating station, should be filed is not in consonance with its own past practice; and this Tribunal has, in paragraphs 7.18, 7.19, 7.20 and 7.21 of the Impugned Order, considered the aforesaid past practice of the AERC.

#### **A. ANALYSIS:**

93. As noted hereinabove, the relevant statutory provisions require the first respondent, a generating company, to file separate tariff petitions for each of its generating stations annually. The mere fact that the AERC had permitted the first Respondent to file one composite petition for FY 2008-09, would not justify a similar practice being followed for all subsequent financial years, since it is evident that the procedure adopted by the AERC, for the

Financial Year 2008-09, is contrary to the applicable laws governing the field. The illegality committed by the AERC earlier, in permitting a composite petition to be filed for the FY 2008-09, cannot be allowed to be perpetuated.

**XIII. ORDER OF THIS TRIBUNAL IN IA.NO.38 OF 2021 IN APPEAL NO.294 OF 2017: ITS EFFECT:**

94. On the effect of the order of this Tribunal in IA No. 38 of 2021 in Appeal No. 294 of 2017 dated 19.09.2023, Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that, in the impugned Order, this Tribunal had directed AERC to refund court fees of Rs. 2.20 crores to the first Respondent as the Discom-APDCL owed considerable outstanding dues to the first respondent in lieu of its supplied power for the past period; these findings have now been expunged, by the order of this Tribunal dated 19.09.2023, in an application moved by the 2<sup>nd</sup> Respondent-distribution licensee; the basis of the Impugned Order has now been removed by this Tribunal; and the Impugned Order may be reviewed in view of the order of this Tribunal dated 19.09.2023.

95. Sri Gopal Jain, Learned Senior Counsel appearing on behalf of the first Respondent, would submit that AERC's attempt to draw mileage from the Order dated 19.09.2023 passed by this Tribunal, by which two sentences in the Impugned Order to the effect that "APDCL owes considerable outstanding dues to the first Respondent" have been deleted, is misplaced; it is evident from a reading of the Order dated 19.09.2023, that the observations in question were deleted on a concession made by the counsel for the first Respondent, only to put a *quietus* to the controversy arising in I.A. No. 38 of 2021 filed by Respondent No. 2; the fact that these observations have been deleted do not either impair the validity of the

Impugned Order or warrant exercise of the review jurisdiction as sought by AERC; the Impugned Order sustains itself on the facts, circumstances and reasons contained therein; and deletion of the observations in question do not further the case of AERC at all.

**A. ORDER IN IA NO. 38 OF 2021 IN APPEAL NO. 294 OF 2017 DATED 20.10.2020:**

96. IA No. 38 of 2021 was filed by the 2<sup>nd</sup> Respondent in Appeal No. 294 of 2017 seeking modification of the observations made in para 7.22 and 7.23 of the Judgement of this Tribunal in Appeal No. 294 of 2017 dated 20.10.2020. The observations in para 7.22 and 7.23, with which the applicant/2<sup>nd</sup> Respondent was aggrieved by, read as under:-

*Para 7.22: "APDCL owes considerable outstanding dues to be paid to the Appellant"; Para 7.23: "APDCL owes considerable outstanding dues to the Appellant in lieu of its supplied power for the past period".*

97. In its Order, in IA No. 38 of 2021 in Appeal No. 294 of 2017 dated 19.09.2023, this Tribunal observed that these sentences, which found place in para 7.22 and 7.23, were said to have been recorded by this Tribunal without any material on record in support of such a conclusion; it was unnecessary to delve into this aspect, since Mr. Gopal Jain, learned Senior Counsel, had, on instructions, stated that, since the impugned order did not disclose the basis for arriving at such a conclusion, the said sentences in the Order/Judgement, modification of which was sought, may be deleted; accordingly, the sentence "*APDCL owes considerable outstanding dues to be paid to the Appellant*" and "*APDCL owes considerable outstanding dues to the Appellant in lieu of its supplied power*

for the past period”, in paras 7.22 and 7.23 of the judgement, shall stand deleted; and a corrected copy of the said order shall be made available to both the parties. The IA for modification stood disposed of accordingly.

**B. ANALYSIS:**

98. The observations, in the judgement under review, that the Assam Discom owed considerable outstanding dues to the first Respondent in lieu of the power supplied for the past period, were deleted as such observations were made without there being any material on record in support of such a conclusion. Further, the afore-said order was passed on the basis of a concession made by Mr. Gopal Jain, Learned Senior Counsel, that, since the impugned judgment did not disclose the basis for arriving at such a conclusion, the sentences, with reference to the second Respondent, be deleted.

99. No reliance can therefore be placed on the earlier order of this Tribunal, in IA No.38 of 2021 in Appeal No. 294 of 2017 dated 19.09.2023, more so as they have no application to the issues arising for consideration in the present review proceedings.

**XIV. DO THE AFORE-SAID ASPECTS JUSTIFY EXERCISE OF THE JURISDICTION TO REVIEW?**

100. Ms. Mandakini Ghosh, Learned Counsel for the AERC, would submit that the Impugned Order has failed to recognise that the 2006 Tariff Regulations mandates annual tariff filing by the generating company; no finding has been recorded on the submission, urged on behalf of AERC, that Regulation 6.1 of the 2006 Tariff Regulations mandates annual tariff filings; Regulation 2(k) of the 2006 Tariff Regulations mandates separate station-wise tariff petitions which has also not been dealt with; this Tribunal has also

erred in placing reliance on Regulation 43 of the 2004 Conduct of Business Regulations; and the Impugned Order necessitates being reviewed as it suffers from a mistake of law and an error apparent on the face of the record.

**A. ANALYSIS:**

101. As noted hereinabove, the applicable statutory provisions required the first Respondent to file a separate petition for each of its two generating stations annually. The first Respondent was, therefore, statutorily obligated to file twelve Tariff Petitions for its two generating stations for the six year period FY 2009-10 to FY 2014-15. Further, the 2009 Fee Regulations required payment of fees of Rs. 10 lakhs for each tariff petition and, consequently, the first Respondent was required in law to pay a total court fees of Rs. 1.20 Crores, at Rs. 10 lakhs for each of the Tariff Petitions filed by them. The impugned judgment, directing the AERC to exercise its powers under Regulation 43 of the 2004 Regulations to waive the requirement of payment of court fees and to refund Rs. 2.20 Crores to the first Respondent, suffers from an error apparent on the face of the record necessitating review of the impugned judgment.

**XV. CONCLUSION:**

102. In the light of the aforesaid observations, the impugned judgment is partially set aside to the extent it suffers from an error apparent on the face of record. As a result of the order now passed by us, the first Respondent is liable to pay a total court fees of Rs. 1.20 Crores (Rs. 10 lakhs for each of the 12 Tariff Petition filed by them). As they have already deposited Rs. 2.40 Crores with the AERC on 17.02.2017, in terms of the order passed by this Tribunal in EP No. 02 of 2015 dated 17.01.2017, the Review Petitioner is directed, forth with, to refund Rs. 1.20 Crores to the first Respondent towards

the excess court fee paid by them earlier. The Review Petition is disposed of accordingly. The pending IAs shall also stand disposed of.

Pronounced in the open court on this the **First day of March, 2024.**

(Sandesh Kumar Sharma)  
Technical Member (Electricity)

(Justice Ramesh Ranganathan)  
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

*tpd/mk*