CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:

1. Shri Bhanu Bhushan, Member
2. Shri R. Krishnamoorthy, Member

I.A. No. 49/2008
In Petition No. 157/2004

In the matter of

Approval of tariff in respect of Singrauli Super Thermal Power Station (2000 MW) for the period from 1.4.2004 to 31.3.2009.

And in the matter of

National Thermal Power Corporation Ltd. **……Petitioner**

Vs

1. Uttar Pradesh Power Corporation Ltd., Lucknow
2. Jaipur Vidyut Vitaran Nigam Ltd,Jaipur
3. Ajmer Vidyut Vitaran Nigam Ltd., Ajmer
4. Jodhpur Vidyut Vitaran Nigam Ltd, Jodhpur
5. Delhi Transco Ltd, New Delhi
6. Haryana Vidyut Prasaran Nigam Ltd, Panchkula
7. Punjab State Electricity Board, Patiala
8. Himachal Pradesh State Electricity Board, Shimla
9. Power Development Department, Govt. of J&K, Srinagar
10. Chandigarh Administration, Chandigarh
11. Uttranchal Power Corporation Ltd, Dehradun **...Respondents**

The following were present

1. Shri Shyam Moorjani, Advocate, UPPCL

ORDER
(DATE OF HEARING: 22.1.2008)

The application (IA No. 49/2008) has been made by Uttar Pradesh Power Corporation Ltd, hereinafter referred to as "the applicant", for amendment/modification/regulation of the order dated 9.5.2006 in the light of

averments made therein, with all consequential benefits and for directions to the petitioner to refund and restoration to the beneficiaries of an amount of Rs.15944 lakh recovered by the petitioner as part of the annual fixed charges approved by the Commission.

2. The main petition was filed by the petitioner, a generating company owned or controlled by the Central Government for approval of tariff in respect of Singrauli Super Thermal Power Station (2000 MW) (hereinafter referred to as "the generating station") for the period from 1.4.2004 to 31.3.2009 based on the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, (hereinafter referred to as "the 2004 regulations").

3. After completion of pleadings and hearing the parties, the petition was disposed of vide order dated 9.5.2006 and the following annual fixed charges were awarded:

(Rs. in lakh)

	Particulars	**2004-05**	**2005-06**	**2006-07**	**2007-08**	**2008-09**
1	Interest on Loan	722	330	119	0	0
2	Interest on Working Capital	3906	3934	3902	3936	3969
3	Depreciation	4297	4297	576	0	0
4	Advance against Depreciation	0	0	0	0	0
5	Return on Equity	7979	7979	7979	7979	7979
6	O & M Expenses	19760	20550	21370	22220	23120
	TOTAL	**36664**	**37090**	**33946**	**34135**	**35068**

4. The submissions made by the applicant in the present application in support of the reliefs claimed are summarized hereunder:

(a) As per Regulation 7 of the 2004 regulations, tax on the income of the generating company from its core business, defined in Regulation 6,

shall be computed as an expense and shall be recovered from the beneficiaries.

(b) Section 62(5) of the Electricity Act, 2003 (hereinafter referred to as "the Act") provides that the Commission may require a licensee or a generating company to comply with such procedure as may be prescribed for calculating the expected revenue from tariff and charges it is permitted to recover. No regulation in this regard has been made, despite the enabling power under Section 178(2) (u) of the Act.

(c) All generating companies are required to maintain records relating to the cost, etc. as per Cost Accounting Records (Electricity) Rules, 2001 notified on 21.12.2001.

(d) Despite the above, tariff is determined on ceiling norms, which, according to the applicant are unrealistic and higher than the actuals.

(e) National Tariff Policy envisages reliable and quality power to consumers at competitive rates.

(f) Balance sheet filed by the petitioner vide affidavit dated 23.8.2007 in Petition No. 46/2007 for approval of additional capitalization in respect of the generating station for the period 2004-07 indicates Rs. 142748 lakh as expenditure and Rs. 163301 lakh as income. The difference between income and expenditure, being the profit earned by the petitioner works out to Rs. 20553 lakh.

(g) The above profit works out to 36.12% of Rs. 56894 lakh, which is the amount of equity deployed for the generating station. It has been urged that since the petitioner is entitled to return on equity only @ 14%, the profit of Rs.20553 lakh earned by the petitioner is far in excess of the specified return which works out to Rs.7979 lakh only.

(h) In addition, it is averred, the petitioner is claiming incentive for generation beyond 80% PLF. Energy bill issued by the petitioner in August 2005 indicates the incentive as Rs. 3970 lakh.

(i) Income-tax on the admissible return on equity of Rs. Rs.7979 lakh @ 35% works out to Rs.2792 lakh. The petitioner has in fact recovered Rs.12924 lakh, and is thus making an excess recovery of Rs.10132 lakh on this account.

(j) Against the actual expenditure of Rs.142748 lakh reflected in the balance sheet, normative expenditure considered by the Commission for computation of tariff is Rs.148560 lakh, and, therefore, the petitioner is enjoying return on an amount of Rs.5812 lakh not incurred by it.

(k) The petitioner is liable to refund the excess amount of Rs.15944 lakh; Rs.10132 lakh on account of excess recovery of income-tax and Rs.5812 lakh over and above the allowable return on equity.

5. We heard Shri Shyam Moorjani, Advocate for the applicant on admission of the application.

6. The substantive grievance of the applicant as it transpires from the prayers made in the application is that the petitioner has recovered an excess amount, as income-tax and return on equity. As noted above, the tariff for the generating station was determined in terms of the 2004 regulations on normative basis. There is no whisper in the application that while fixing tariff, the Commission made any deviations from those regulations. The 2004 regulations have been framed by virtue of powers under Section 61 of the Electricity Act, 2003. In effect, the applicant seeks review of the 2004 regulations in the present application in the garb of seeking amendment/modifications of the order dated 9.5.2006. In our view it is not permissible. It appears that the applicant is aware of the legal position that it cannot question the statutory regulations in the present proceedings and hence has made the application to seek modification of the tariff order.

7. Therefore, in the first instance, we proceed to consider the question of maintainability of the application.

8. Rule 3, Order XX of the Code of Civil Procedure (the Code) lays down that once the judgement has been signed, it “shall not afterwards be altered or added to, save as provided by Section 152 or on review”.

9. It may be pointed out that the proceedings before the Commission are not strictly regulated under the Code except to the extent laid down under Section 94 of the Act. Nevertheless, the basic principles are extendable to the proceedings before the Commission. The provisions of Rule 3, Order XX of the Code are based on the well known principle of civil jurisprudence that the court after passing the judgement becomes *functus officio* and has got no power to revive its own judgement. The principle has been considered by the Hon'ble Supreme Court in its recent judgment titled the Deputy Director Land Acquisition vs Malla Atchinadu and others (AIR 2007 SC 740), wherein the Hon'ble Court held as under:

> "45. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal……"

10. Earlier, the Hon'ble Supreme Court in UP SRTC vs Imtiaz Hussain [(2006) 1 SCC 380] also laid down a similar proposition of law, as under:

> "The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues or remedies provided in respect of the same and the very court or the tribunal, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to th e conditions or limitations provided therein".

11. In yet another recent judgement, the Hon'ble Supreme Court in Narpat Singh Vs. Rajasthan Financial Corporation AIR 2008 SC 77 has pointed out that no IA lies after a case is finally disposed of and that an IA is maintainable only in a pending case. The extract from the judgement of the Hon'ble Supreme Court are placed below:

> "IAs No. 15-16 for clarification and direction of Court's order dated 3.5.2007 are totally misconceived. Moreover, ordinary no. I.A lies after a case is finally disposed of. Ordinarily, an I.A is maintainable only in a pending case. Once a case is finally disposed of the Court becomes functus officio, and thereafter an I.A. lies ordinarily only for correcting clerical or accidental mistakes. The same are accordingly dismissed".

12. In the light of the above principle, the Commission cannot revisit the tariff already decided in the order dated 9.5.2006, unless the conditions laid down under Rule 3 order XX of the Code are satisfied.

13. It was contended by the learned counsel that the Commission can intervene in the matter in terms of powers analogous to Section 152 of the Code. In our considered view the submission of the learned counsel is misplaced.

14. In Jayalakshmi Coelho v. Oswald Joseph Coelho, [(2001) 4 SCC 181], the Hon'ble Supreme Court held that the inherent powers under Section 152 are available to all courts and authorities irrespective of the fact whether the provisions contained under Section 152 of the Code may or may not strictly apply to any particular proceeding. However, the exact scope of Section 152 has been considered by the Hon'ble Supreme Court in a number of cases and it has been

held that the power is available only for correction of accidental or unintended errors in the judgement or order. In Jayalakshmi Coelho vs Oswald Joseph Coelho (supra) it was held that:

> "13. So far as the legal position is concerned, there would hardly be any doubt about the proposition that in terms of Section 152 CPC, any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the court. The principle behind the provision is that no party should suffer due to mistake of the court and whatever is intended by the court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing the cause of justice……."
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> "14. In a matter where it is clear that something which the court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the court to rectify such mistake. But before exercise of such power the court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits something which was intended to be otherwise, that is to say, while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed. ……"

15. A similar view was taken by the Hon'ble Supreme Court in the case of State of Punjab Vs Darshan Singh [(2004) 1 SCC 328], wherein it held that:

> "12. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or

the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion or part of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 as if it is looking into it for the first time, for which the proper remedy for the aggrieved party, if at all, is to file an appeal or revision before the higher forum or review application before the very forum, subject to the limitations in respect of such review. It implies that the section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the Code even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order".

16. The judgement of the Hon'ble Supreme Court in Dwaraka Das Versus State of M.P. And Another [(1999) 3 SCC 500] is also to the same effect, as noted from the portions of the judgement extracted below:

"6. Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the section cannot be pressed into service to

correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the lis pending before them. No court can, under the cover of the aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial court had specifically held the respondent-State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the Court had rejected the claim of the appellant insofar as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial court vide order dated 30-11-1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

17. What constitutes a clerical or arithmetical error was also considered by the Hon'ble Supreme Court in Master Construction Co. (P) Ltd v. State of Orissa (AIR 1966 SC 1047). The Hon'ble Supreme Court in this case held as under:

"An arithmetical mistake is a mistake of calculation; a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. The accidental slip or omission is an accidental slip or omission made by the court. The obvious instance is a slip or omission to embody in the order something which the court in fact ordered to be done. This is sometimes described as a decretal order not being in accordance with the judgment. But the slip or omission may be attributed to the Judge himself. He may say something or omit to say something which he did not intend to say or omit. This is described as a slip or omission in the judgment itself. The cause for such a slip or omission may be the Judge's inadvertence or the advocate's mistake. But, however wide the said expressions are construed, they cannot countenance a reargument on merits on questions of fact or law, or permit a party to raise new arguments which he has not advanced at the first instance."

18. In UP SRTC vs Imtiazh Hussain (supra), the Hon'ble Supreme Court held that the powers under Section 152 cannot be equated with power of review or cannot be used to modify any part of its order, in the following words:

> "The powers under section 152 CPC are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgement earlier referred, modify in its entirety or any portion or part of it".

19. In the light of above legal position, it would follow that the application cannot be entertained under Section 152 of the Code since the applicant has failed to point out any clerical or ministerial or arithmetical error in the tariff order dated 9.5.2006. Thus, the tariff determined strictly in terms of the 2004 regulations cannot be re-opened based on the submissions made in the application.

20. The applicant has not sought, and perhaps rightly so, review of the tariff order dated 9.5.2006, and, therefore, this aspect does not merit further consideration.

21. In the light of above discussion, the present application, IA No.49/2008 is not maintainable and is dismissed in limine.

Sd/-
(R KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

New Delhi dated 20th February, 2008