

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 4/RP/2018
in
Petition No. 419/MP/2014**

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member**

Date of Order: 24th of January, 2019

In the matter of:

Petition for review of the order dated 27.6.2016 in Petition No. 419/MP/2014 under Section 94 of the Electricity Act, 2003 read with Order 47 Rule 1 of the CPC and Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 pursuant to order dated 1.12.2017 passed by APTEL in Appeal No.193/2016.

**And
In the matter of**

Raichur Sholapur Transmission Company Private Limited
Patel Estate Road,
Jogeshwari West,
Mumbai – 400102

Review Petitioner

Vs

1. Power Grid Corporation of India Limited
B-9, Qutab Institutional Area,
Katwaria Sarai,
New Delhi -110016

2. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan,
Race Course,
Vadodara -390007
Gujarat, India

3. Madhya Pradesh Power Trading Company limited
Shakti Bhawan, Vidyut Nagar,
Rampur, Jabalpur,
Madhya Pradesh - 482008

4. Chhattisgarh State Power Distribution Company Limited

Energy Info Tech Centre,
Daganiya, Raipur,
Chhattisgarh - 492013

5. Goa State Electricity
Electricity Department,
Government of Goa,
3rd Floor, Vidyut Bhavan,
Tiswadi, GOA - 403001.

6. Electricity Department, Daman,
Plot No.35, OIDC Complex,
Near Fire Station, Somnath
Nani Daman - 396210

7. DNH Power Distribution Corporation Limited
Vidhyut Bhavan, Opp. Secretariat,
Silvassa- 396230

8. Madhya Pradesh Audyogik Kendra Vikas Nigam Limited
3/54, Press Complex,
Free Press House,
Agra-Mumbai Road, Indore,
Madhya Pradesh -452008

9. Jindal Power Limited,
12, Bhikaji Cama Place, New Delhi -110066

10. Torrent Power Limited,
Torrent House, Off Ashram Road,
Ahmedabad - - -380009

11. PTC India Limited,
2nd Floor, NBCC Tower,
15 Bikajji Cama Place,
New Delhi -110066

12. Adani Power Limited
Opp. Mayor Bungalow, Law Garden,
Ahmedabad - 380006
Gujarat, India.

13. Heavy Water Project
Department of Atomic Energy
5th Floor, Vikram Sarabhai Bhavan,
Anushakti Nagar,
Mumbai - 400094

14. Kerala State Electricity Board,
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram-690004

15. Tamil Nadu. Generation and Distribution Corporation Limited
NPKRR Maaligai,
144, Anna Salai,
Chennai – 600002

16. Electricity Department
Govt. of Puducherry,
Cuddalore Road,
Marapalam, Mudaliarpet,
Puducherry - 685004

17. Northern Power Distribution Company of A.P Limited
Vidyut Bhavan, Nakkalgutta, Hanamkonda,
Warangal- 506001

18. Eastern Power Distribution Company of A.P Limited
P& T Colony, Seethammadhara,
Vishakhapatnam - 530013

19. Southern Power Distribution Company of A.P Limited
House No.19-13-65/A,
Behind Srinivasapuram Kalayana Mandapam,
Kesavyanagunta, Tiruchanoor Road,
Tirupati - 517501

20. Central Power Distribution Company of A.P Limited
Asmangadh, New Malakpet,
Hyderabad - 500060

21. Power Company of Karnataka Limited
5th Floor, KPTCL Building, Kaveri Bhavan,
Gandhi Nagar, Bangalore'- 56000

22. Lanco Power Limited
Plot No.4, Software Units
Layout, HITEC City, Madhapur,
Hyderabad - 500081

23. Maharashtra State Electricity Distribution Company. Limited
Hongkong Bank Building, M.G. Road, Fort,
Mumbai - 400001

...Respondents

Parties Present

Shri Raju Ramachandran, Senior Advocate, RSTCPL
Shri Ritin Rai, Advocate, RSTCPL
Shri Rakesh Singh, Advocate, RSTCPL
Shri Samrat Sengupta, Advocate, RSTCPL
Shri Debayan Gosh, Advocate, RSTCPL
Ms Hamsini Sankar, Advocate, RSTCPL
Shri Rakesh Sinha, Advocate, RSTCPL
Ms. Ranjita Ramachandran, Advocate, PGCIL
Shri Sandeep Bajaj, Advocate, MSEDCL
Ms. Aakansha Nehra, Advocate, MSEDCL
Shri Darpan K.M., Advocate, PCKL

Order

Raichur Sholapur Transmission Company Private Limited, (hereinafter referred to as Review Petitioner) has filed the present Review Petition under Regulation 103 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, for review of the order dated 27.6.2016 in Petition No. 419/MP/2014 pursuant to the liberty granted by the Hon'ble Appellate Tribunal for Electricity vide its order dated 1.12.2017 in Appeal No. 193/2016 to file a Review Petition before this Commission. The Review Petitioner has made the following prayers:

- a. Review and recall the Order dated 27.06.2016 in Petition No.419/MP/ 2014;
- b. Declare that the Commercial Operation Date is extended from 7.1.2014 to 4.7.2014;
- c. Direct the Respondents/ LTTCs to release the Bank Guarantees furnished on behalf of the Petitioner as the Respondents have not suffered any loss or damage; and
- d. Restrain the Respondents from encashing the Bank Guarantees furnished on behalf of the Petitioner until disposal of the review petition.

Background

2. Raichur-Sholapur 765 kV transmission line is a tariff-based competitive bidding project on Build, Own, and Operate and Maintain (BOOM) basis. The Review Petitioner was incorporated on 19.11.2009 by the Bid Process Coordinator i.e. Rural Electrification Corporation Transmission Projects Company Limited (RECTPCL) as its wholly owned subsidiary to initiate work on the Project to build, own, operate and maintain the transmission system for evacuation of power from Krishnapatnam UMPP (4000 MW) and export of power from various IPPs coming in the Southern Region to their target beneficiaries in Western region and Northern Region and for synchronization of Southern Region with the rest of the Indian Grid and subsequently to act as a Transmission Service Provider (TSP) after being acquired by the successful bidder.

3. The Review Petitioner had filed the Petition No. 419/MP/2014 before this Commission for the following reliefs :

(a) The Commission may direct the beneficiaries of the project, i.e. Raichur-Sholapur 765 kV Single Circuit Line-1, to release the performance bank guarantees dated 29.12.2010, issued on behalf of the consortium members by Patel Engineering Limited, and hold that RSTCL is not liable for the delays which occurred in the execution of the project; and/or

(b) In case the Commission comes to the conclusion that the petitioner is not liable for the delays, the Commission may be pleased to change the scheduled COD to 4.7.2014 instead of 7.1.2014.

4. The Commission by its order dated 27.6.2016 disposed off the Petition No. 419/MP/2014 and did not give any relief to the Review Petitioner with the finding that primary requirement of issue of notice under clause 11.5.1 of the TSA has not been complied with by the Review Petitioner for claiming relief under the Force Majeure clause.

5. Aggrieved by the Commission's order dated 27.6.2016 in Petition No. 419/MP/2014, the Review Petitioner approached the Hon'ble Appellate Tribunal for Electricity vide Appeal No. 193/2016. The Review Petitioner had also filed I.A No. 11 of 2017 in Appeal No. 193/2016 seeking permission of the Hon'ble Appellate Tribunal to place on record the additional documents. During the course of hearing, the learned senior counsel appearing on the behalf of the Review Petitioner sought permission of the Hon'ble Appellate Tribunal to withdraws the IAs and the Appeal with liberty to file review petition to review the impugned Order dated 27.06.2016 passed in Petition No. 419/MP/2014. Accordingly, the Hon'ble Appellate Tribunal vide its order dated 1.12.2017 dismissed the IAs and Appeal, as withdrawn and granted liberty to the Review Petitioner to file the instant Review Petition.

6. The specific aspects of the impugned order of which review has been sought are as under:-

(a) The delay in achieving COD is attributable to delay in award of transmission licence and delay in grant of permission under Section 164 of the Electricity Act, 2003.

(b) The RTI response dated 26.9.2016 issued by Power System Operation Corporation Limited established that the power flow through the parallel Raichur-Sholapur 765 KV S/C Line (2000 MW) operated by Respondent No.1 (PGCIL) ranged between 0.1 MW to 37 MW during January 2014 to July 2014. This Transmission Line was made commercially operational by PGCIL on 31.12.2013. The certificate dated 14.7.2016 issued by PGCIL shows that even after July 2014 and till July 2016, the power flow through the transmission line operated by the Review Petitioner has been much below the full capacity of 2000 MW. The under-

utilization of the Raichur-Sholapur Lines had been due to the Grid disruption and/ or backing down of power generation in western region and the same is evident from the order dated 2.7.2014 passed by this Commission in Petition No. 103/MP/2014. Hence, no loss was suffered by the LTTCs as even the operational Raichur-Sholapur Line operated by PGCIL remained underutilized much less than its capacity of 2000 MW. Because of the technical limitations, it is apparent that the LTTCs were not in a position to utilize even one of the Transmission Line to evacuate power to its maximum capacity of 2000 MW. Hence, the delay in commissioning of Transmission Line of the Petitioner from 7.01.2014 to 4.7.2014 did not cause any loss to the LTTCs.

(c) The LTTCs cannot be permitted to unjustly enrich themselves by appropriating the Bank Guarantees in the garb of liquidated damages without actually suffering any loss.

(d) The Petitioner vide Monthly Progress Report dated 3.11.2011 had duly given notice to the Lead LTTC, MSEDCL, that the delay in grant of the authorization u/s 164 by the MOP was causing major hindrance in the field activity. Due to lack of such permission u/s 164 the Petitioner was unable to approach the District Administration for obtaining the right of way required for the project. Further, the Minutes of the Meeting dated 7.6.2012 chaired by the CEA shows that PGCIL was yet to finalize the layout of Raichur Substation and the coordinates were yet to be provided to the Petitioner. The said events have also contributed to the delay in achieving the scheduled COD of 7.1.2014.

7. The Review Petitioner has also submitted that during the course of completing the project, the Review Petitioner also encountered various difficulties in the nature of blockades such as concerned farmers were reluctant to allow the officials of the Review Petitioner to enter their fields, right of way issues, adverse climatic conditions, incessant untimely rail fall, cyclones and presence of black cotton soil preventing access to many towers locations. The Review Petitioner has also submitted that CEA was kept informed regarding delay in the commissioning of the project.

8. Notices were issued to the Respondents to file their replies. MPPMCL, MSEDCL, GUVNL, PCKL have filed their replies and the Petitioner has also filed its Rejoinder to the replies filed.

9. MPPMCL vide its affidavit dated 17.12.2018 has submitted that the Article 11.5.1 of the TSA makes it obligatory upon the Review Petitioner to serve a written notice to all LTTC's for seeking relief under force majeure, which the Review Petitioner had failed to do so. Therefore, the Commission has rightly held that the Review Petitioner is not entitled for any relief as the notice of the force majeure has not been served. MPPMCL has further submitted that the Petition for the grant of transmission licence was filed by the Review Petitioner on 10.1.2011 and the same was allowed by this Commission on 24.8.2011 and the first attempt for requesting the expeditious disposal of the application was made only on 27.6.2011 i.e. after a delay of more than five and half months. Further, the Review Petitioner has not placed on record any document to show that the matter for the grant of permission under Section 164 of the Electricity Act has been pursued with the Govt. of India for an early issuance of the same. The permission was conveyed to the Review Petitioner on 24.11.2011. Therefore, the contention of the Review Petitioner pertaining to

the delay in approval under Section 164 of the Act is irrelevant. MPPMCL has also submitted that the argument that the beneficiaries are not suffering any loss is a new issue which has not been raised earlier by the Review Petitioner. Therefore, the new argument cannot be raised at this stage. Further, the additional documents relied upon by the Review Petitioner relates to the period prior to the Commission's order dated 27.6.2016 and hence could have been placed by the Review Petitioner and therefore same cannot be allowed for the first time in the Review Petition.

10. GUVNL vide its affidavit dated 12.3.2018 has mainly submitted as under :

(a) The Review Petitioner is seeking to raise new issues and grounds not taken earlier and further seeking to rely on new documents not filed during the proceedings in Petition No. 419/MP/2014. However the Review Petitioner has not established that such new documents could not be produced by it despite due diligence at the time when the Order dated 27.06.2016 was passed. Further, the Review Petitioner is seeking a rehearing of the Petition and has not pointed out any error apparent on the face of the record or any sufficient reason for review.

(b) The Review Petitioner has for the first time raised an issue that the Respondents are not entitled to any liquidated damages since none of them have suffered any loss or damage during the period 7.1.2014 to 4.7.2014. In the original petition before this Commission, the Review Petitioner had proceeded on the basis that if the delay is attributable to the Review Petitioner, then liquidated damages would have to be paid.

(c) The Additional Evidence sought to be furnished by the Review Petitioner relate to the period from January 2014 onwards. The Review Petitioner could have

produced the same before this Commission during the original proceedings with a reasonable endeavour being made.

(d) The reliance on Right to Information (RTI) response dated 26.09.2016 to claim that it is a new document not earlier available is again misleading. The response under RTI related to period from January 2014. Since the information was sought only on 19.9.2016, the same was given on 26.9.2016. This does not mean that the information was available only on 26.09.2016. Further, the RTI application has not been filed by the Review Petitioner. The Review Petitioner has not stated how it came to know about the facts as claimed in the RTI Application.

(e) The Certificate dated 14.7.2016 also relates to the period from August 2014. In fact PGCIL (which has signed the Certificate) was a party before this Commission being Respondent No. 1 in the original proceedings and the Review Petitioner could have filed appropriate applications to summon the information/documents in accordance with law. However the Review Petitioner did not raise any issue on the power flow and did not seek any information.

(f) The Review Petitioner has repeated the facts and issues which have already been considered by this Commission in the original proceedings and therefore, the Review Petitioner cannot seek a rehearing under the guise of a Review Petition.

(g) The Review Petitioner has not provided any details of the other factors which allegedly contributed to the delays. Merely asserting that there were impediments and vaguely referring to issues of law and order or right of way is not sufficient. It is further submitted that in the absence of any details, it cannot be assumed that the

delays were not attributable to the Review Petitioner itself. There was no notice to the beneficiaries-Respondents as per the TSA and therefore no relief can be claimed.

(h) The Appellate Tribunal has not passed any order permitting the Review Petitioner to place on record any other additional document. The new grounds and additional documents cannot be permitted to be relied upon for the first time in the Review proceeding. The Review Petitioner has repeated the facts and issues which have already been considered by this Commission in the original proceedings and the Review Petitioner cannot seek a rehearing under the guise of a Review Petition. Further, the Review petitioner has failed to show how the documents were not within its knowledge, despite due diligence. The Review Petitioner has not pointed out any error apparent on the face of the record or otherwise.

11. MSEDCL in its reply vide affidavit dated 13.3.2018 has submitted as under :

(a) The Review Petitioner is seeking to raise new grounds and is further relying upon new documents not filed during the proceeding in Petition No. 419/MP/2014. However, the Review Petitioner has not established that the new documents could not be placed on record despite due diligence at the time when the order dated 27.6.2016 was passed. A Review Petition cannot be brought on the basis of new grounds and new facts which were not raised earlier in the original petition.

(b) There is neither any mistake nor any error apparent on the face of record nor there is any discovery of any new and important matter or evidence, which could not have been discovered earlier, or which was not within the knowledge of the review

petitioner. The documents now being sought to be placed on record was very much within the knowledge of the Review Petitioner or could have been obtained by exercising due diligence, which the Review Petitioner has failed to do. Most of the documents were in the possession of the Review Petitioner except the reply to RTI. The Review Petitioner could have obtained the reply to RTI, which the Review Petitioner has failed to obtain.

(c) As per TSA, the Review Petitioner is obliged to pay the liquidated damages owing to delay in commissioning. Further, it is settled principle of law that no loss needs to be proved by a party who is entitled to liquidated damages on the basis of terms and conditions contained in the relevant contract. Therefore, the bank guarantee has been rightly invoked by the respondent.

(d) The ground of under utilization has no bearing on the fact and circumstance of the instant petition. The PGCIL line which the Review Petitioner has referred to was built for the evacuation of power from the Krishnapatnam power plant. Whereas, the Review Petitioner operated transmission line was built for synchronous inter-connection between southern region and western region. The purpose of both these lines is separate and distinct and therefore these lines are not comparable so far as losses are concerned.

(e) The Review Petitioner cannot be permitted to reopen the concluded judgment. The Review Petitioner by raising new grounds is seeking re-hearing of the present matter. Therefore, the present Review Petition is not maintainable.

12. PCKL in its reply vide affidavit dated 23.3.2018 has submitted as under :

(a) The Review Petition is not maintainable as there is no error apparent on the face of record and the Review Petitioner is seeking to get the rehearing of the present matter on merits, which cannot be allowed. This Commission in its order dated 27.6.2016 in Petition No. 419/MP/2016 has already observed that none of the reasons of delay constitute a Force majeure event. Therefore, re-consideration of the said facts is not permissible in the present review petition. The Review Petitioner has not given notice of Force Majeure within the period of 7 days from the date of commencement of the force majeure event and therefore, cannot claim any consequence of the Force Majeure.

(b) As per Article 6.5.1 of the TSA, if the Transmission Service Provider fails to achieve CoD of any of the element as per their respective SCoD, the LTTC's shall have right to encash the contract performance Guarantee and appropriate in their favour as liquidated damages an amount specified in Article 6.4.1 without prejudice to other rights of the LTTC's.

(c) The issue that whether any losses have been suffered or not by the LTTC's were not the subject matter of the original petition i.e. 419/MP/2014. The LTTC's are claiming liquidated damages as per the provisions of TSA and have rightly sought to invoke the bank guarantee towards liquidated damages for delay in commissioning of the transmission project.

13. The Review Petitioner in its Rejoinders has reiterated its submissions of the Review Petition. The Review Petitioner has mainly submitted as under :

a) The LTTC's have not suffered any loss due to delay in achieving CoD from 7.1.2014 to 4.7.2014. Further, none of the respondents have raised any demand crystallizing the amount of actual loss or damages suffered by them.

(b) The transmission line of PGCIL of 2000 MW was originally envisaged for the purpose of evacuation of power from Krishnapatnam UMPP. However, subsequently the purposes of the said line changes from evacuation of power to synchronization of inter- regional system as the UMPP did not come up in the Southern Region. Therefore, the PGCIL line that was available to LTTC's for supply of power to the Southern Region during January 2014 to July 2014, remained under- utilized. The LTTC's could have utilized the PGCIL line for the transmission of the electricity but the same was not done.

(c) It cannot be accepted that the LTTC's could not supply electricity to the Southern region because of non- commissioning of the Petitioner's transmission line during the period January 2014 to July 2014. The reasons for non- supply is also evident from this Commission's order dated 2.7.2014 in Petition No. 103/MP/2014, wherein the Commission observed that works on the backend transmission line network at Sholapur i.e. 765 kV Wardha- Aurangabad D/C line, 765 kV Pune- Sholapur (PG) D/C line and 765 kV Aurangabad- Sholapur D/C was incomplete and was not available for transmission. Thus due to non- availability of backend transmission line, none of the Respondents in the Western Region were in a position to supply power to the Southern Region. Had the backend transmission lines been commissioned, the LTTC's would have utilized the PGCIL line for the supply of power to the Southern Region during the period January, 2014 to July, 2014.

Analysis and Decision

14. We have considered the submissions of the parties and perused the documents on record. Now, we proceed to deal with each of these aspects on which the Review Petitioner has sought review in the light of the provisions of Order 47 Rule 1 of the Code of Civil Procedure, the decision in the impugned order and submission of parties. The Review Petitioner has mainly raised the following ground for the review of the order dated 27.6.2016 in Petition No. 419/MP/2014 :

(a) Delay on account of grant of transmission licence and grant of permission under Section 164 of the Electricity Act, 2002;

(b) The RTI response dated 26.9.2016 issued by Power System Operation Corporation Limited established that the power flow through the parallel Raichur-Sholapur 765 KV S/C Line (2000 MW) operated by Respondent No.1 (PGCIL) ranged between 0.1 MW to 37 MW during January 2014 to July 2014. The certificate dated 14.7.2016 issued by PGCIL shows that even after July 2014 till July 2016, the power flow through the transmission line operated by the Review Petitioner has been much below the full capacity of 2000 MW.

(c) LTTC's have not suffered any loss due to delay in achieving CoD during 7.1.2014 to 4.7.2014;

15. The respondents have mainly contended that there is neither any mistake nor any error apparent on the face of record nor there is discovery of any new and important matter or evidence, which could not have been discovered earlier, or which was not within the knowledge of the review petitioner. The documents now being sought to be placed on

record were very much within the knowledge of the Review Petitioner or could have been obtained by exercising due diligence, which the Review Petitioner has failed to do. The Respondents have also submitted that the Review Petitioner is seeking re-hearing of the matter , which cannot be allowed.

16. Order 47, Rule 1 of the Code of Civil Procedure, 1908, provides for filing an application for review. Order 47, rule 1 is extracted as under :

“1. Application for review of judgment:-

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the Appellate Court the case on which he applies for the review.

Under Order 47, Rule 1 of the CPC, 1908, 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. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an Advocate.

17. In *Haridas Das v. Usha Rani Banik* (2006) 4 SCC 78, the Court observed as under :

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulates a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favorable verdict."

18. In *M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India* 2018 SCC Online SC 930, the Hon'ble Supreme Court held as under:

"In this behalf, we must remind ourselves that the power of review is a power to be sparingly used. As pithily put by Justice V.R. Krishna Iyer, J., "A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon"

2. The power of review is not like appellate power. It is to be exercised only when there is an error apparent on the face of the record. Therefore, judicial discipline requires that a review application should be heard by the same Bench. Otherwise, it will become an intra court

appeal to another Bench before the same court or tribunal. This would totally undermine judicial discipline and judicial consistency”.

19. In Lily Thomas & Ors. vs. Union of India &Ors. [(2000) 6 SCC 224], the Hon’ ble Supreme Court has held as under:

“56. It follows, therefore, that the power of review can be exercised for correction of a mistake and 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 as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review....”

Thus the Review Petition permits rectification of any error apparent on the face of the record and not to substitute view.

20. The term 'mistake or error' apparent' by its very connotation signifies an error which is evident per se 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 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. In other words, it must be an error of inadvertence. It should be something more than a mere error and it must be one which must be manifest on the face of the record. When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials placed before the court. Under the guise of review, the parties are not entitled to rehearing of the same issue but the issue can be decided just by a perusal of the records and if it is manifest can be set right by reviewing the order. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its

power of review under Order 47 Rule 1 CPC. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise.

21. This Commission in its order dated 27.6.2016 in Petition No. 419/MP/2014 observed that the primary requirement of issue of notice under clause 11.5.1 of the TSA had not been complied with by the Review Petitioner for claiming relief under the Force Majeure clause. Therefore, this Commission held that the since, the Review Petitioner had not complied with the provisions of the TSA before approaching the Commission and the petition is dismissed. The relevant portions of the order dated 27.6.2016 in Petition No. 419/MP/2014 is extracted as under :

“40. It is an admitted fact that no such notice as mandated under the above clause was issued by the Petitioner. The Petitioner was only contending that its other actions are equivalent to the above notice. The Petitioner in para 7.3 of the Rejoinder has made a feeble attempt to cover up its lapse contending that all the issues raised with respect to force majeure were brought to the notice of this Commission by the Petitioner during the hearings held on 7.1.2014, 13.2.2014, 13.3.2014, 15.4.2014, 22.5.2014 and 11.7.2014. MSEDCL which was put on notice by this Commission filed its response in the matter in Petition No. 331 of 2013 and chose not to appear. According to the Petitioner, there was no further requirement of a notice for force majeure under the TSA. Even otherwise, the difficulties faced by the Petitioner during the pendency of Petition No. 331 of 2013 were in the nature of force majeure provided for under section 56 of the Indian Contract Act, 1872 and therefore, no separate notice is necessary.

41. We do not find any force in the submission of the petitioner. By the Petitioner’s own averments, events of the nature of Force Majeure occurred in 2011 as explained hereunder:

(a) Delay in issue of Transmission licence: Petition No. 5/2011 was filed on 10.1.2011 and heard on 18.8.2011. Commission vide its order dated 24.8.2011 granted Transmission licensee which was intimated to the petitioner vide letter dated 13.9.2011.

(b) Permission under Section 164 of the Electricity Act, 2003: The petitioner has submitted that it had, vide letter dated 10.1.2011, applied for permission under section 164 of Electricity Act, 2003 which was granted by Ministry of Power vide its letter dated 24.11.2011.

42. In either case it is evident that no notice was issued to the beneficiaries within the prescribed statutory period as mandated by clause 11.5.1 of the TSA. Under these circumstances, we have no hesitation to hold that the primary requirement of issue of notice under clause 11.5.1 of the TSA has not been complied with in the present case for claiming relief under the Force Majeure clause. Therefore, we hold that the petitioner has not complied with the provisions of the TSA before approaching the Commission and accordingly the petition is dismissed.”

22. The Review Petitioner has contended that the Review Petitioner vide Monthly Progress Report dated 3.11.2011 had duly given notice to the Lead LTTC pertaining to delay in grant of the authorization u/s 164 by the MoP causing major hindrance in the field activity. Article 11.5.1 of the TSA requires the affected party to send force majeure notice to the other parties. The notice under Article 11.5.1 of the TSA cannot be substituted with the 'Monthly Progress Report'. Therefore, we do not find any error apparent in the order in so far as the decision with regard to notice under Article 11.5.1 of the TSA is concerned and accordingly, review on this ground is dismissed.

23. The Review Petitioner is relying upon the Power System Operation Corporation Limited RTI response dated 26.9.2016 and PGCIL certificate dated 14.7.2016 to show that under-utilization of Raichur-Sholapur Lines had been due to the Grid disruption and even

after July 2016, the power flow through the transmission line operated by the Review Petitioner has been much below its full capacity of 2000 MW. Based on these two documents, the Review Petitioner has submitted that since the LTTCs were not in a position to utilize even one transmission line (Raichur- Sholapur transmission line of PGCIL) to evacuate power to its maximum capacity, the delay in commissioning of the transmission line executed by the Review Petitioner from 7.1.2014 to 4.7.2014 did not cause any loss to the LTTCs and hence, the SCOD of the transmission line should be extended and thereby the Contract Performance Guarantee given by the Review Petitioner should not be encashed. These two documents have been relied upon by the Review Petitioner for the first time in the review Petition. Therefore, it needs to be considered whether these documents satisfy the condition of 'discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the Review Petitioner. In Ramaswami Padeyachi v Shanmuga Padayachi, [(1959) 2 Mad Lj 201], the Hon'ble High Court of Madras has held that :

“When a review is sought under O. 47, R 1, Civil Procedure Code, on the ground of discovery of new evidence, such evidence must be (1) relevant and (2) of such a character that, if it had been given in the suit, it might possibly have altered the judgment. The new evidence must be at least such as is presumable to be believed, and if believed, would be conclusive. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made. The party seeking a review should prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive. A bare assertion in the affidavit that the party could not trace the documents earlier will not do. It is not the proper function of a review application to supplement the evidence or to make it serve the purpose of merely introducing evidence which might possibly have had some effect upon the result.”

Therefore, the relevant consideration to make out a case for review under the above ground are that (a) the documents are relevant, (b) are of such character that the document had been introduced in the original petition, it might have possibly altered the judgment;

and (c) the discovery of any new and important matter was not within the knowledge of the party when the order was made.

24. In the instant case, the letter of POSOCO dated 26.9.2016 and the letter of PGCIL dated 14.7.2016 were issued after the issue of the order dated 27.6.2016 which is sought to be reviewed. The letter of POSOCO dated 26.9.2016 states that the power flow through the parallel Raichur- Sholapur 765 kV S/C line of PGCIL ranged between 0.1 MW to 37 MW during the period from January, 2014 to July, 2014. The power flow on the ISTS lines are recorded and maintained by concerned RLDCs. The Review Petitioner could have obtained and submitted the power flow information on the 765 kV Raichur- Sholapur transmission line executed by the Petitioner. As regards the certificate dated 14.7.2016 issued by PGCIL, we observe that the said certificate gives the information about the power flow on the Review Petitioner's line from July, 2014 to July, 2016. The Review Petitioner could have obtained the said information from PGCIL and submitted the same in the Petition No. 419/MP/2014. Therefore, the above mentioned letter and certificate cannot be considered as "new and important matter of evidence" which was not within the knowledge of the Review Petitioner as the Review Petitioner could have obtained the said information from POSOCO and PGCIL. As regards the relevance of the POSOCO's letter dated 26.9.2016, we are of the view that under-utilization of the 765 kV Raichur- Sholapur transmission line of PGCIL due to grid constraint has no connection with the delay in COD of the transmission line of the Review Petitioner. The transmission line of PGCIL is not a pre-requisite for the COD of the transmission line of the Review Petitioner and both transmission lines are to be executed as per their respective timelines. Therefore, we do not consider this document as relevant which if produced during the proceedings of Petition No. 419/MP/2014 would have altered our decision. As regards, the certificate of PGCIL

dated 14.7.2016, the information relate to the utilization of the Review Petitioner's transmission line between July, 2014 and July, 2016 which is beyond the actual COD of the transmission line of the Review Petitioner and therefore, is not relevant and conclusive for determining the reasons for delay in the COD of the transmission line of the Review Petitioner beyond the SCOD.

25. The Review Petitioner has also contended that no loss has been suffered by the LTTCs on account of the delay in COD of the 765 kV Raichur- Sholapur transmission line executed by the Review Petitioner. We have gone through the TSA and find that as per the TSA, the Review Petitioner is obliged to pay the liquidated damages if actual COD is delayed beyond the SCOD in terms of the TSA. The SCOD of the transmission line was 7.1.2014 whereas the transmission line was put under commercial operation on 4.7.2014 which was beyond SCOD and therefore, the LTTCs were entitled to invoke the Articles 6.4.1 and 6.4.4 of the TSA irrespective of whether any loss has been suffered by them or not. In this connection, the following observation of the Hon'ble Supreme Court in ONGC Ltd v Saw Pipes Limited [(2003) 5 SCC 705] are relevant :-

“64..... Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre- estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.”

26. As per the above judgment, if the parties have agreed in the contract to a pre-estimate of loss as compensation for breach of the terms of the contract, there is no need to prove the loss. In the present case, the Review Petitioner and the LTTCs have agreed in the TSA that in case of breach of the terms of the TSA on account of non- adherence to the

SCOD, LTTCs are entitled to encash the Contract Performance Guarantee which is a pre estimate of loss. Therefore, the LTTCs are not required to prove the loss suffered by them on account of the delay in achieving the COD of the transmission line by the Review Petitioner beyond the SCOD as per the TSA for the purpose of claiming compensation in terms of the TSA in the form of encashment of Contract Performance Guarantee.

27. In the light of the discussion hereinabove, we do not find any substance in the present Review Petition and accordingly, the review Petition No. 4/RP/2018 is dismissed.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(P. K. Pujari)
Chairperson