

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 32/RP/2024

in

Petition No. 110/MP/2019

Coram:

Shri Jishnu Barua, Chairperson

Shri Ramesh Babu V, Member

Shri Harish Dudani, Member

Date of Order: 4th March, 2025

In the matter of:

Petition seeking review of the Commission's order dated 22.11.2022 in Petition No.110/MP/2019 to the extent it directs the Petitioner to continue to schedule power to the extent of 200 MW.

And

In the matter of:

1. Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula, Haryana – 134109
2. Uttar Haryana Bijli Vitran Nigam Ltd
Vidyut Sadan, Plot No. C-16,
Sector 6, Panchkula, Haryana- 134109
3. Dakshin Haryana Bijli Vitran Nigam Ltd,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana- 125005

...Review Petitioner(s)

Vs

1. PTC India Limited,
2nd Floor, NBCC Tower, 15, Bikaji Cama Place,
New Delhi – 110066
2. M/s Sikkim Urja Limited
2nd Floor, Vijaya Building, 17, Barakhamba Road,
New Delhi – 110001
3. Power Grid Corporation of India Ltd.
Saudamini, Plot No. 2, Sector-29,
Gurgaon -122 001

...Respondents

Parties Present:

Shri Samir Malik, Advocate, HPPC



Shri Tushar Mathur, Advocate, HPPC
Shri Sakya Singh Choudhary, Advocate, SUL
Ms. Ritika Singhal, Advocate, SUL
Ms. Somya Sahni, Advocate, SUL

ORDER

Background facts

Petition No. 110/MP/2019 was filed by the Review Petitioners for adjudication of the disputes arising out of and in relation to the purchase of 200 MW of power from Teesta-III Hydroelectric Project of Respondent No.2 (SUL) through Respondent No.2 (PTCIL) and the Commission vide its order dated 22.11.2022 (in short, 'the impugned order') holding as under:

- (i) The termination of the PSA dated 21.9.2006 by the Haryana Utilities is invalid;*
- (ii) The Haryana Utilities are required to off-take and schedule 200 MW contracted power;*
- (iii) PTC and Teesta are entitled for payment of the tariff determined by the Commission, corresponding to the declaration made by PTC (and Teesta) for the Haryana Utilities, as verified by the concerned RLDC, from COD of the units, subject to adjustment of any revenue earned by the PTC (and Teesta), from sale of power under short term/ through exchange; (iv) the arrear amounts payable by the Haryana Utilities, as above, shall be with interest, in terms of Regulation 8(13) of the 2014 Tariff Regulations and Regulation 10(7) of the 2019 Tariff Regulations; and (v) the transmission charges, including the relinquishment charges, paid by PTC to Power Grid, to be reimbursed by the Haryana Utilities.*

2. Aggrieved thereby, the Review Petitioners filed an appeal (Appeal No.69/2023) before the Appellate Tribunal for Electricity (in short, the 'APTEL') to set aside the impugned order on various issues. During the pendency of the said appeal, Respondent No.2 SUL filed an execution Petition (Petition No. 290/MP/2023) before the Commission for non-compliance with the Commission's order dated 22.11.2022 by the Review Petitioners (Respondents Nos. 1 to 3 therein) and the same was admitted on 18.10.2023, with directions to issue notice to the Review Petitioners. The parties were also granted liberty to explore the possibilities of an amicable settlement and report the same to the Commission, failing which pleadings were directed to be completed. Subsequently, the



hearing of the petition was adjourned, on the ground that the appeal filed by the Review Petitioner was being listed for hearing before APTEL.

3. According to the Review Petitioner, since the Commission's order dated 22.11.2022 could not be implementable, is so far as the power could not be scheduled from the project, owing to the damage caused due to flash floods in Sikkim on 3.10.2023, HPPC filed an Application (IA No. 82/2024) in the pending appeal (Appeal No.69/2023) before APTEL, seeking a stay of the impugned order and /or any coercive measures taken or to be taken by the Respondents herein, including the disputed invoice uploaded on the PRAAPTI portal on 22.12.2023, in terms of the Electricity (Late Payment Surcharge and Related Matters) Rules, 2022. However, APTEL, vide its order dated 19.4.2024, disposed of the said application as under:

36. As the grant of interim relief is discretionary, exercise thereof is subject to the court/tribunal satisfying itself that its interference is necessary to protect the party from the species of injury. In other words, irreparable injury would ensue before the legal right would be conclusively established. (Dalpat Kumar v. Prahlad Singh, (1992) 1 SCC 719). The Court /Tribunal should satisfy itself that non-interference would result in "irreparable injury" to the party seeking relief and that he needs protection from the consequences of apprehended injury. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. We are, prima facie, of the view that the appellant is liable to make payment, from the date of commissioning of project i.e. 23.02.2017/28.02.2017 and upto termination becoming effective i.e. 27.03.2019 as per termination notice dated 27.03.2018. Even otherwise, as no payment has been released by the Appellant to Respondent ever since commissioning of the project, and the legality of the termination letter based on new contentions raised for the first time during the interlocutory stage of the appellate proceedings, need detailed consideration when the main appeal is finally heard, interference at this stage, with the impugned order, may cause irreparable injury to the Respondents.

37. In view of the above deliberations, we are satisfied that none of the three tests, to be fulfilled for grant of interim relief, are satisfied in the present case. We are therefore not inclined to interfere with the CERC order dated 22.11.2022 in Petition No 110/MP/2019 at the interlocutory stage. However, with a view to protect the interest of Appellants in case they were to succeed in the main appeal, and to ensure that they do not suffer irreparable injury for the inability of the Respondents to repay the amounts which the Appellants shall pay to them in terms of the impugned order, we direct that the payment shall be released by the Appellants to the Respondent, in terms of the impugned order, only subsequent to submission of an unconditional bank Guarantee from a scheduled bank in the Appellant's favour by Respondent No 2. Such a Bank guarantee can either be furnished for the entire amount in one go, or in parts i.e. a maximum of four such parts. The bank guarantees so



furnished by the 2nd Respondent shall be kept alive by them during the pendency of the present appeal.

38. Needless to state that payment, so made by the Appellants to Respondent No 2, shall be subject to the result of main appeal. The second Respondent's claim for payment of the cost of furnishing the Bank Guarantee in favour of the Appellant in the event the Appeal fails, shall along with all other issues, be considered at the time of hearing of main Appeal. The IAs are accordingly disposed of..."

4. In compliance with the said order, Respondent SUL vide letter dated 17.5.2024 forwarded a draft BG to the Review Petitioner, HPPC, for approval on the terms of the same. While the vetting of the draft BG was pending, Respondent SUL filed IA No. 1287/2024 before APTEL, seeking directions against HPPC to make the payments in terms of the APTEL order dated 19.4.2024 (in IA No.82/2024) as above. The said IA was disposed of by APTEL vide order dated 1.8.2024, as under:

"Neither of the parties have chosen to challenge the afore-said order of this Tribunal by way of a further Appeal under Section 125 of the Electricity Act. When the I.A. was listed before us on 30.07.2024, Mr. Basava Prabhu S. Patil, learned Senior Counsel appearing on behalf of the 2nd Respondent, informed us that, despite the 2nd Respondent making repeated requests to the Appellant to approve the format of the bank guarantee to enable them furnish the same, no response was forthcoming from the Appellant. We had acceded to the request of Mr. Tushar Mathur, learned Counsel for the Appellant, for grant of two days' time to enable him to obtain instructions. Today Mr. Tushar Mathur, learned Counsel, states that the Appellant has forwarded a copy of the bank guarantee, furnished to them by the 2nd Respondent, to the Ministry of Finance, Government of Haryana; and they are awaiting approval in this regard.

It does appear that the Appellant is taking advantage of the fact that the order passed by us earlier does not stipulate a timeframe for compliance. We consider it appropriate, in such circumstances, to now direct that the Appellant shall, within two weeks from today, intimate either their approval of, or the changes to be made in, the draft bank guarantee submitted by the 2nd Respondent. They shall, in addition, make payment, in terms of our earlier order dated 19.04.2024 to the 2nd Respondent, within two weeks of receipt of the bank guarantee from them.

Mr. Ravi Kishore, learned Counsel for the 1st Respondent, states that the earlier attempt by the 1st Respondent, to have power supply to the Appellant regulated through the Praapti portal, was unsuccessful in view of the interim order passed by this Tribunal on 19.04.2024; and, unless there is a specific direction from this Tribunal, their remedy of having the power regulated, for non-compliance with the order of the Commission, would be of no avail. Suffice it, in such circumstances, to make it clear that, failure of the Appellant to comply with the afore-said directions, would enable the Respondents, if they so choose, to avail their remedy of having the power supply to the Appellant regulated through the Praapti portal.

The IA is disposed of accordingly"

5. According to the Review Petitioner, since the issue of payment by HPPC to SUL is



being considered in the appeal filed by it before APTEL and the issue of implementation of the directions regards scheduling of power is not being considered at all, HPPC approached the Hon'ble High Court of Punjab & Haryana by filing Writ Petition (CWP No. 20731/2024) challenging the order dated 22.11.2022 to the extent it directed HPPC to schedule power from the project of SUL. The Hon'ble High Court, vide its order dated 27.8.2024, disposed of the said Writ Petition as under:

"In view of the above, the present writ petition is accordingly disposed of at this juncture without commenting on the merits of the case with liberty to the petitioners to take recourse to the appropriate remedies, as available in accordance with law and if so advised and subject to respondent no.2 having the right to take all objections to the nature of the proceedings initiated by the petitioners.

Needless to mention that in the event of filing any Review Petition, the Central Electricity Regulatory Commission may take an expeditious decision on the same as well on the objection(s) with respect to the maintainability within a period of 4 months of submission of any such Review Petition."

6. In terms of the liberty granted by the Hon'ble High Court as above, the present Review Petition has been filed by the Review Petitioners on 29.10.2024, limited to the extent of directing HPPC to continue to schedule power to the extent of 200 MW, i.e. the contracted capacity of HPPC from SUL, as being unimplementable, on account of the damage suffered by the hydroelectric Project of SUL, thereby making it impossible to generate power. In this background, the Review Petitioners, in the Review Petition, have submitted the following:

(a) It is an admitted position that subsequent to the passing of the order dated 22.11.2022 during the flash floods that occurred in Sikkim in October 2023, the hydro project of SUL suffered heavy damage and was unable to generate any power. As such, the direction to HPPC that under the PSA it is obligated to schedule power to the extent of 200 MW (contracted capacity) has clearly been rendered unimplementable. Being in no position to schedule power from the project, compelling HPPC to make payment of arrears of tariff under the order dated 22.1.2022 would be arbitrary.

(b) Even otherwise, while passing the order under review, this Commission has omitted to consider that the substratum and the fundamentals, on the basis of which the Haryana Utilities entered into the PSA dated 21.9.2006 and the PPA



dated 28.7.2006, entered into between PTC and SUL, has been completely changed with substantial time overrun, cost overrun, disputes and differences which had arisen between the Govt. of Sikkim and the consortium; the decision of the Govt. of Sikkim to take over the shareholding from others and make Teesta as a wholly owned undertaking of the Govt. of Sikkim. This is more so in the wake of heavy damage to the hydro project, rendering it completely incapable of even generating any power now.

- (c) The Commission also omitted to consider that even after the passing of the order dated 9.1.2020 in Petition No.249/GT/2016 (despite substantial time overrun and cost overrun), the Haryana Utilities had the right to terminate the PSA, when the fundamentals of the purchase envisaged got substantially altered with a cost overrun of 245% and time overrun of more than 5 years. The purchase of power has thus, become not conducive to the interest of the consumers in the State of Haryana. The direction to HPPC to schedule power and pay the arrear in tariff has been issued from an external purpose to be achieved and not from the express dominant guiding factor under Section 61 (d) of the Electricity Act, 2003, namely, safeguarding the consumer's interest.
- (d) If HPPC is constrained to schedule power from a station that generates no power as on date and at the same time pays arrears in tariff to the same generating station, the same would mean that the power project has been established for the protection of the interest of others and not the consumers, namely, a factor contrary to the commercial agreement entered into by PTC with the Haryana Utilities and other Procurers and the entire objective of the Electricity Act, 2003. The PPA dated 28.7.2006 envisages Teesta to act as a prudent utility and adopt the prudent utility practices
- (e) It cannot be permitted that Teesta first delays the execution of the Project, continue with the implementation of the Project despite substantial time and cost over-run, proceed with the station despite disputes with the shareholders, and thereafter stop all operations on account of a natural disaster and above all, for the Govt. of Sikkim to acquire the shareholding of Teesta for a different objective of salvaging the interest of the lenders and financial institutions, and still seek not only payment of arrears in tariff but also compel HPPC to schedule power from the station which is clearly not possible, instead of considering the execution of the Project with the overall objective of safeguarding the interest of the consumers who are being serviced by the Procurers such as the Haryana Utilities. As such, this Commission, in these peculiar facts and circumstances, ought to exercise its regulatory powers of adjudication in a manner to save Haryana Utilities from bearing the consequences of the above.
- (f) The impugned order, while holding that Haryana Utilities is liable to pay the tariff



since COD of the Project till the passing of the order for the power declared by Teesta, but not scheduled by the Haryana Utilities (subject to adjustment of revenue earned from the sale of power under short term/through exchange) has omitted to consider that in the order dated 18.6.2007 passed by HERC, approving the power from Teesta, it had approved the power procurement from Teesta with a specific condition that “5. *Deemed generation payment should not apply to HPGCL if power is sold to other beneficiaries/third party and there is no spillage of water*”. While the above has been omitted from the consideration of this Commission by the gross situation that exists today is that while the issue of scheduling of owner from Teesta has been rendered unimplementable, HPPC is being coerced into making payments to Teesta, which is manifestly arbitrary.

- (g) In view of the judgments of the Hon'ble Supreme Court (Lily Thomas and Others vs. Union of India and Others' AIR 2000 SC 1650, Board of Control for Cricket in India and Another vs. Netaji Cricket Club and Others' (2005) 4 SCC 741), this Commission may exercise its powers under Section 94(1)(f) of the Electricity Act, 2003 and review the impugned order to the extent it directs the Petitioners to continue to schedule power to the extent of 200 MW i.e. the contracted capacity of the Petitioner from Respondent No.2 as being unimplementable on account of the damage suffered by the hydro plant of Respondent No.2 thereby making it impossible to generate any power.

Hearing dated 14.1.2025

7. During the hearing, the learned counsel for the Review Petitioner, HPPC, and the learned counsel for the Respondent, SUL, argued at length on the issue of 'maintainability' of the Review Petition. However, the Commission, at the request of the learned counsel for the parties, permitted them to file written submissions on 'maintainability' and, accordingly, reserved its orders in the Review Petition.

Written submissions of the Respondent SUL

8. Respondent SUL, in its written submissions dated 24.1.2025, submitted the following:

Petition is not maintainable under Order 47 Rule 1 of CPC

(a) The Review Petition is not maintainable in the light of Order 47 Rule 1 of CPC read with Regulation 52 of the CERC (Conduct of Business) Regulations, 2023. Order 47 Rule 1(a) of the CPC clearly states that an aggrieved person may apply for review of a decree or order from which no appeal has been preferred.



(b) Evidently, under the provisions of the CPC, no review can be filed where an appeal has already been preferred against the said order. Further, a similar provision is also there in Regulation 52 of the Conduct of Business Regulations, 2023, which states that “any person aggrieved by a direction, decision, or order of the Commission, from which no appeal has been preferred, may file a review petition.”

(c) It is, thus, evident that no review can lie against an order which has already been challenged in appeal. The same has been held by the Hon’ble Supreme Court in para 36 of Kunhayammed and Ors. v. State of Kerala and Anr. (2000) 6 SCC 359; para 7 of Thungabhadra Industries Ltd. v. Government of AP (1964) 5 SCR 174.

(d) Since, in the present case, the Review Petitioner has already preferred Appeal No. 69/ 2023 against the same order, i.e., the order dated 22.11.2022 in Petition No. 110/MP/2019, the present review petition is not maintainable. Appeal No. 69 of 2023 is currently pending adjudication before the APTEL.

(e) Even otherwise, the grounds on which the review is sought are the same as the grounds raised in Appeal No. 69/2023, which is evident from the table below:

GROUND IN REVIEW	GROUND IN APPEAL
Para 43 on pg. 24	Ground A of Appeal (pg. 599)
Para 44 on pg. 25	Ground B of Appeal (pg. 599-600)
Para 45 at pg. 25	Ground C, at pg. 600
Para 46 at pg. 26	Ground D at pg. 601
Para 46 at pg. 26	Ground E, at pg. 601-602
Para 47 at pg. 27	Ground I, at pg. 604 & Para 18 at pg. 805

(f) It is therefore evident that the Review Petitioner is raising the same grounds in the review petition, which are already pending adjudication before the APTEL in Appeal No. 69/2023. Since an appeal is already pending, the only forum wherein the Review Petitioner can seek any relief is the APTEL. The Petitioner cannot, having already filed an appeal and application seeking a stay of the impugned order, now approach this Commission and seek review on the same grounds it has filed the appeal.

(g) The Review Petitioner’s contention that since liberty was granted to it by the Hon’ble High Court of Punjab & Haryana to approach this Commission by way of a review petition, the review petition is maintainable, is denied as incorrect. From a bare perusal of the order dated 27.8.2024 of the Hon’ble High Court, it is evident that the Petitioner was granted liberty to take recourse to the appropriate remedies as available in accordance with law. Further, the order of the Hon’ble High Court indicates that review, if filed, will be subject to objections regarding maintainability. Therefore, the Review Petitioner cannot take recourse to the aforementioned order



of the Hon'ble High Court to argue that the review petition is maintainable, even though it is not maintainable in law.

(h) Even otherwise, it is a settled principle of law that jurisdiction cannot be conferred. The Hon'ble Supreme Court in Rajasthan State Road Transportation Corporation v. Bal Mukund Bairwa (2), (2009) 4 SCC 299 held that the court cannot confer jurisdiction where there is none. Accordingly, the review petition is not maintainable before this Commission and may be dismissed at the stage of admission itself.

Review Petition is barred by limitation

(i) Without prejudice, the review petition is barred by limitation. Under Regulation 52(2) of the CERC (Conduct of Business) Regulations, 2023, the limitation for filing a review petition is forty (40) days. However, the Review Petitioner filed the present petition only in September 2024, i.e., nearly 2 years after the passing of the order under review. The Petitioner has simpliciter relied on the aforementioned order of the Hon'ble High Court of Punjab & Haryana to contend that there is no delay in filing the review petition, however, the Hon'ble Court has not condoned the delay.

(j) There is no provision in the CERC (Conduct of Business) Regulations, 2023, that empowers this Commission to condone the delay in filing the review petition. Therefore, the present review petition cannot be admitted by this Commission.

9. Accordingly, the Respondent has prayed that the Review Petition is not maintainable and may be dismissed at the admission stage.

Written Submissions of the Review Petitioner HPPC

10. The Review Petitioner, HPPC, in its written submissions dated 28.1.2025, has mainly reiterated its submissions made in the review petition. In addition, the Review Petitioner has submitted the following:

Review Petition is maintainable in view of the liberty granted by the Hon'ble High Court of Punjab & Haryana.

(a) The Review Petitioner approached the Hon'ble High Court of Punjab and Haryana by filing a Writ Petition [CWP No.20731/2024] challenging the impugned order dated 22.11.2022, to the extent it directed the Petitioner to schedule power from the hydro project of Teesta. By order dated 27.8.2024, the Hon'ble High Court was pleased to dispose of the said Writ Petition, granting liberty to the Review Petitioners to approach this Commission by filing a Review Petition, seeking review of the said order to the extent it directs the Petitioners to offtake power from Teesta, on account of the fact that



owing to the severe damage to the project of Teesta, no power can be scheduled from the same. As such, the present Review Petition has been filed by the Petitioner.

Review Petition even otherwise, is also maintainable.

(b) This Commission can exercise the power of review under Section 94 of the Electricity Act on the principles contained in Order 47 Rule I of the CPC, 1908. The Review Petitioner has demonstrated, hereinabove, sufficient cause for this Commission to review and rectify the above errors in the impugned order dated 22.11.2022. The present Review Petition has been filed within 30 days from the date of disposal of the said Writ Petition vide order dated 27.8.2024 granting liberty to the Petitioner to approach this Commission and is within limitation.

(c) The judgments of the Hon'ble Supreme Court above unequivocally establish that a Review Petition is not only maintainable for error apparent on the face of the record but would also be maintainable on grounds that the impugned order would not have been passed but for erroneous assumption, which in fact did not exist, some mistake or for any other sufficient reason. The word 'sufficient reason' is wide enough to include a misconception of fact or law by a court. The power to exercise the review jurisdiction has been specifically vested with the Commission under Section 94(1)(f) of the Electricity Act 2003

Analysis and Decision

11. Based on the submissions of the parties and documents on record, the issue for consideration is:

“Whether the Review Petition filed by the Review Petitioner, HPPC for review of order dated 22.11.2022 in Petition No. 110/MP/2019, is maintainable?”

12. The Review Petitioner has contended that the Review Petition is maintainable, as the same has been filed in terms of the liberty granted to it by the Hon'ble High Court to approach this Commission by filing a Review Petition, seeking review of the impugned order dated 22.11.2022, to the extent that it directs the Review Petitioners to offtake power from Teesta. We note that in the Writ Petition (CWP No. 20731/2024) filed by the Review Petitioner before the Hon'ble High Court of Punjab & Haryana, challenging the Commission's order dated 22.11.2022, the Hon'ble Court vide its order dated 27.8.2024 (*as quoted in para 5 above*), disposed of the same granting liberty to the Review Petitioners herein, to seek recourse to appropriate remedies in accordance with law,



subject to the right of the Respondent herein, to raise all objections as to the nature of the proceedings to be instituted by the Review Petitioners. The Hon'ble Court also directed the Commission to take an expeditious decision on the Review Petition, if filed by the Review Petitioners, including the objections with regard to the maintainability of the same. Since the order of the Hon'ble High Court granting liberty to file the Review Petition subject to the question of maintainability raised by the Respondents herein, being examined and decided, it cannot be said that the Review Petition is maintainable. The Review Petitioner cannot, in our view, take shelter under the Hon'ble High Court's order to argue that the Review Petition is maintainable. The submission of the Review Petitioner, on this count, is not tenable. Accordingly, we proceed to examine the objections with regard to the maintainability of the Review Petition, as stated in the subsequent paragraphs.

Maintainability

13. Under Order 47 Rule 1 of CPC, a person aggrieved by the order of a Court can file a review on the following grounds:

"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) xx

(c) xx

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."

14. Section 94 of the Electricity Act 2003 provides that the Appropriate Commission shall, for the purposes of any inquiry or proceedings under the Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of the matters specified in that Section. Sub-section 1(f) of Section 94 deals with the review of



decisions, directions, and orders. As regards the review jurisdiction, we refer to the judgment of the Hon'ble Supreme Court in BCCI v. Netaji Cricket Club & Ors. [(2005) 4 SCC 741], wherein it was observed as under:

"89. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

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

15. In light of the above, we proceed to consider whether the Review Petitioner has made a case for review, in terms of Order 47 Rule I of the CPC read with Section 94 of the Act and Regulation 52 of the 2023 CBR.

16. The Review Petitioner, HPPC, has contended that after the passing of the impugned order dated 22.11.2022, the flash floods that occurred in Sikkim in October 2023 heavily damaged the hydro project of SUL and the project is unable to generate any power and, therefore, the direction of the Commission to HPPC to schedule the contracted capacity of 200 MW from the project, has been rendered unimplementable and as such, compelling it to make the payment of arrears of tariff under the order dated 22.11.2022 is manifestly arbitrary and liable to be modified as unimplementable. It has also submitted that the Commission has omitted to consider (a) the basis upon which the PPA/PSA, which was executed by the parties, had completely changed with substantial time over-run of 5 years and cost over-run of 245%, etc., and that the Haryana Utilities had the right to terminate the PSA (b) the HERC order dated 18.06.2007 approving the power procurement from the Project with a specific condition that '*Deemed generation payment*



should not apply to HPGCL if power is sold to other beneficiaries/third party and there is no spillage of water". The Review Petitioner had added that if HPPC is constrained to schedule power from a Project that generates no power as on date and at the same time pays tariff arrears, the same would mean that the Project has been established for the protection of the interest of others and not the consumers, a factor contrary to the PPA and the entire objective of the Electricity Act, 2003. According to the Review Petitioners, since it has demonstrated a sufficient cause, the Commission, in the exercise of the powers under Section 94 of the Electricity Act 2003, read with the principles contained in Order 47 Rule I of the CPC 1908, rectify the errors in the impugned order dated 22.11.2022. In its rebuttal, the Respondent, SUL, submitted that in terms of the provisions of the CPC and Regulation 52 of the CERC (Conduct of Business) Regulations, 2023, no Review Petition can be filed where an appeal has already been preferred against the said order. Referring to the judgments of the Hon'ble Supreme Court in Kunhayammed & ors. v. State of Kerala & anr (2000) 6 SCC 359 and Thungabhadra Industries Ltd. v. Government of AP (1964) 5 SCR 174, the Respondent SUL has contended that as, in the present case, the Review Petitioner has already preferred Appeal No. 69/2023 against the impugned order dated 22.11.2022, before APTEL and is pending, the Review Petition is not maintainable. The Respondent has further stated that the grounds on which the review is sought are the same as the grounds raised in Appeal No. 69/2023 (as indicated in the table under para 8(e) above), and therefore, the Review Petition may be dismissed.

17. We have examined the rival contentions. As regards the maintainability of the Review Petition vis-à-vis pendency of the appeal, we note that the Hon'ble Supreme Court in Thungabdra Industries Ltd v Govt of AP (1964) 5 SCR 174 and Kunhayammed v State of Kerala (2000) 6 SCC 359, held that a Review Petition, filed prior to the appeal against the



same order, is only maintainable under law. The relevant portion of the judgments is extracted below:

Thungabdra Industries Ltd v Govt of AP

"... Order 47 Rule 1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order from which an appeal is allowed but from which no appeal has been preferred." In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore, the terms of Order 47 Rule 1(1) did not stand in the way of the petition for review being entertained.

xxxx.

The crucial date for determining whether or not the terms of Order 47 Rule 1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.

Kunhayammed v State of Kerala

".....This Court held that the crucial date for determining whether or not the terms of Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

18. Order 47 Rule 1 (1) (a) of the CPC provides that a Review can be filed against an order if no appeal against the same order has been filed. On perusal of the records, we note that the Review Petition challenging the order dated 22.11.2022 has been filed by the Review Petitioner on 29.10.2024. However, the Review Petitioners have, vide affidavit dated 21.12.2022, filed Appeal No. 69/2023 before APTEL, challenging the said order dated 22.11.2022 on various grounds. On this ground alone, and in terms of the aforesaid judgments, the Review Petition is not maintainable. Be that as it may, we take note that the Review Petitioner, in its appeal before APTEL, has raised the following grounds:

A...The Central Commission has ignored that the substratum and the fundamentals, on the basis of which the Haryana Utilities entered into the PSA dated 21.9.2006 and the PPA dated 28.7.2006, entered into between PTC and SUL, has been completely changed with substantial time overrun, cost overrun, disputes and differences which had arisen between the Govt. of Sikkim and the consortium; the decision of the Govt. of Sikkim to take over the shareholding from others and make Teesta as a wholly owned undertaking of the Govt. of Sikkim.

B. The Central Commission has not considered that even though the Central Commission had



passed the order dated 09.1.2020 in Petition No.249/GT/2016 despite substantial time overrun and cost overrun, the Haryana Utilities still have the right to terminate the PSA, when the fundamentals of the purchase envisaged got substantially altered with a cost overrun of 245% and time overrun of more than 5 years.....The purchase of power had become not conducive to the interest of the consumers in the State of Haryana, safeguarding the consumer's interest being the paramount consideration under the Electricity Act, 2003.

C.....The Central Commission has therefore proceeded to consider the issue from an external purpose to be achieved and not from the express dominant guiding factor under Section 61 (d) of the Electricity Act, 2003, namely, safeguarding the consumer's interest. Section 61(d) of the Electricity Act, 2003, inter-alia, reads as under:

D. That the Central Commission failed to consider that the Government of Sikkim, PTC and Teesta have proceeded in a manner that the Power Project has been established for protection of the interest of others and not the consumers, namely, a factor contrary to the commercial agreement entered into by PTC with the Haryana Utilities and other Procurers and the entire objective of the Electricity Act, 2003. The PPA dated 28.07.2006 envisages Teesta to act as a prudent utility and adopt the prudent utility practices. The term 'prudent utility practices' is defined in the PPA dated 28.07.2006 as under:

E. The same is also the principal under Section 61 and 62 of the Electricity Act, 2003. It is not open to Teesta to delay the execution of the Project, continue with the implementation of the Project despite substantial time and cost over-run, proceed with the Project despite disputes with the Shareholders, and above all, for the Govt. of Sikkim to acquire the shareholding of Teesta for a different objective of salvaging the interest of the lenders and financial institutions, and still seek not only payment of arrears in tariff but also compel HPPC to schedule power from the station which is clearly not possible, instead of considering the execution of the Project with the over-all objective of safeguarding the interest of the consumers who are being serviced by the Procurers such as the Haryana Utilities.

I. That the Central Commission while holding that Haryana Utilities to be liable to pay the tariff since COD of the Project till the passing of the Order for the power declared by Teesta but not scheduled by the Haryana utilities (subject to adjustment of revenue-earned from sale of power under short term/through exchange) has omitted to consider that in the Order dated 18.06.2007 passed by the Haryana Commission, approving the power from Teesta. The Haryana Commission had approved the power procurement from Teesta with a specific condition that *"5. Deemed generation payment should not apply to HPGCL if power is sold to other beneficiaries/third party and there is no spillage of water"*

19. Further, in the IA 82/2024 (in Appeal No.69/2023) filed by the Review Petitioner before APTEL on 11.1.2024, seeking a stay of the impugned order dated 22.11.2022/disputed invoices, etc., the following ground has been raised by the Review Petitioner HPPC:

"18. At this juncture, it becomes relevant to state that the impugned order cannot be implemented (is so far as the power cannot be scheduled) owing to damage caused to the Project due to flash flood in Sikkim on 3.10.2023"

20. Thus, the grounds raised by the Review Petitioner in the main Appeal as well as in the IA are the same/similar to the issues raised in the Review Petition. Having filed the Appeal/IA before the APTEL, which is pending consideration of APTEL, it is not open to



the Review Petitioner to file a Review Petition on the same before this Commission. We are of the view that the Review Petition filed by the Review Petitioner is barred by Order 47 Rule 1 (1) (a) of the CPC and, hence, is not maintainable.

21. Another contention of the Review Petitioner is that the Review Petition has been filed within 30 days from the date of disposal of the said Writ Petition vide order dated 27.8.2024, granting liberty to the Review Petitioner to approach this Commission, and therefore, the same is within limitation. This has been objected to by the Respondents, pointing out that the Review Petition has been filed nearly 2 years from the date of the impugned order (22.11.2022). While pointing out that the Hon'ble High Court has not condoned the delay, the Respondent SUL submitted that there is no provision in the CERC (Conduct of Business) Regulations, 2023, that empowers this Commission to condone the delay in filing the review petition. We agree with the submissions of the Respondents. As stated earlier, Petition No.110/MP/2019 was disposed of by the Commission, vide its order dated 22.11.2022 (as in para 1 above), and the timeline for seeking a review against this order, in terms of the then existing Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (as amended) was 45 days from the date of the order. Admittedly, the Review Petitioner had not filed any Review Petition against the said order before this Commission within the said timeline of 45 days but has instead preferred an appeal (Appeal No.69/2023) before the APTEL against the said order, which is pending. Moreover, the Hon'ble High Court, in its order dated 27.8.2024, has not condoned any delay, but has only observed that the Review Petition, if filed by the Review Petitioner herein, will be subject to the decision on its maintainability. Against this background, the present Review Petition filed by the Review Petitioner belatedly, i.e., after a period of about 2 years, is barred by limitation



and cannot, therefore, be maintainable. The submission of the Review Petitioner, on this count, stands rejected. Even otherwise, the issue of limitation assumes less significance, keeping in view that the present Review Petition is barred under Order 47 Rule 1 (1) (a) of the CPC due to the pending appeal before APTEL.

22. Further, the contention of the Review Petitioner that the issue of payments by HPPC to SUL is only being considered in the appeal/IA filed by it before APTEL and not the issue of implementation of the directions for scheduling of power by HPPC, is contrary to the records/interim order of APTEL. Though the events subsequent to the issue of the impugned order (issue of flash floods damaging the project in October 2023, the non-scheduling /generation of power due to floods resulting in the Commission's order being rendered non-implementable) as raised in the Review Petition, was raised before APTEL by the Review Petitioner in IA 82/2024, the APTEL vide its interim order dated 19.4.2024, while directing the Review Petitioners to make payment to the Respondent SUL, has apparently, in para 33 of the said order, takes note of the following:

'As put forth by Respondent No 2, the generation project has suffered significant damage as a result of flooding, and it is urgently in need of funds to restore the project and resume power supply. In the circumstances...'

23. In case the Review Petitioner felt aggrieved that the issue of floods damaging the project, etc., was not examined by APTEL, it was at liberty to seek a review of the said order before APTEL, rather than seeking a review of the impugned order, by approaching this Commission. In our view, since the issues raised by the Review Petitioners are pending consideration of the APTEL in the said appeal with interim orders passed as stated aforesaid, we find no reason to entertain the Review Petition filed by HPPC. Even otherwise, the Review Petitioner, in the Review Petition, apart from raising issues being considered by APTEL in the said appeal, has not pointed out any error apparent on the



face of the impugned order dated 22.11.2022 or any sufficient cause in order to attract the provisions of Order 47 Rule 1 of CPC, warranting review. For these reasons, the Review Petition is not maintainable.

24. Based on the above discussions, we hold that the Review Petition filed by the Review Petitioner, HPPC, for review of the order dated 22.11.2022 in Petition No. 110/MP/2019 is not maintainable.

25. Petition No. 32/RP/2024 in Petition No. 110/MP/2019 stands disposed of at the admission stage.

Sd/-
(Harish Dudani)
Member

Sd/-
(Ramesh Babu V)
Member

Sd/-
(Jishnu Barua)
Chairperson

