

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 3/RP/2016

in

Petition No. 77/GT/2013

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S. Bakshi, Member

Dr. M.K. Iyer, Member

Date of order: 17th March, 2017

In the matter of

Review of Commission's order dated 12.11.2015 in Petition No.77/GT/2013 regarding approval of generation tariff of Kamalanga Power Plant (262.6 MW) for the period from the date of COD of Unit- I (30.4.2013) to 31.3.2014.

AND

In the matter of

GMR- Kamalanga Energy Limited
Skip House, 25/1 Museum Road
Bangalore-560025

.....Petitioner

Vs

1. GRIDCO Limited
Janpath, Bhubaneswar-751 022, Orissa
2. Central Electricity Supply Utility of Orissa
2nd Floor, IDCO Tower,
Janpath, Bhubaneswar-751 022
3. North Eastern Electricity Supply Company of Orissa Limited
Januganj, Balasore, Orissa
4. Western Electricity Supply Company of Orissa Limited
Burla, Sambalpur, Orissa
5. Central Electricity Supply Utility of Orissa
2nd Floor, IDCO Tower, Janpath,
Bhubaneswar-751022

.....Respondents

For Petitioner:

Shri Amit Kapur, Advocate, GKEL
Shri Vishrov Mukerjee, Advocate, GKEL
Shri Rohit Venkat, Advocate, GKEL



For Respondent:

Shri Raj Kumar Mehta, Advocate, GRIDCO
Ms Himanshi Andley, Advocate, GRIDCO

ORDER

This petition has been filed by the petitioner, GMR-Kamalanga Energy Limited for review of order dated 12.11.2015 in Petition No. 77/GT/2013 whereby the tariff of Kamalanga Thermal Power Station (262.6 MW) (hereinafter called as generating station") was determined for the period from the date of COD of Unit-I (30.4.2013) to 31.3.2014 in terms of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 (the 2009 Tariff Regulations)

2. Aggrieved by the said order dated 12.11.2015 the petitioner has filed this petition and has sought review of the said order on the following issues:

- a) *Computation of Non EPC cost;*
- b) *Computation of Pre- operative expenses;*
- c) *Computation of IDC based on time over- run*

3. The matter was heard on 9.2.2016 on 'admission' and the Commission by interim order dated 10.2.2016 admitted the petition on the above issues and issued notice to the respondents. After completion of the pleadings in the matter, the parties were heard on 4.8.2016 and the Commission reserved its orders on the question of 'maintainability' of the review petition.

Submissions of the petitioner

4. The petitioner in the petition has submitted as under:

- (a) As regards computation of Non-EPC cost, the petitioner in the petition has submitted that there is no reasoning given in the order for exclusion of the balance amount of ₹101 crore and the same appear to have been excluded inadvertently. It has further submitted that all cost including Non-EPC cost



capitalized had been claimed duly certified by statutory auditor in balance sheets and in Form-5B of the tariff filing form, as on COD of the project. It has also submitted that the petitioner had claimed ₹361 crore towards capital cost for Non- EPC items in terms of the 2009 tariff Regulation and there is no segregation of claims on account of change in law and other heads. The petitioner has stated that all the components of Non-EPC cost are the expenses incurred towards genuine requirement for the completion of the project. Accordingly, the petitioner has prayed that the amount of ₹361 crore towards Non-EPC cost ought to have been allowed and the disallowance of the same is an error apparent on the face of the record which is required to be reviewed.

(b) As regards pre-operative expenses, the petitioner has submitted that there is a typographical error/ arithmetical error in the order dated 12.11.2015 as the amount allowed towards pre- operative expenses in para 72 is different from the amount indicated in the table under para 54 of the said order. The petitioner has stated that though the Commission in para 54 of the order had approved an amount of ₹394.59 crore towards pre- operative expenses after deduction of ₹122.58 crore towards disallowance of increase in cost on account of time over- run, it had considered an amount of ₹277.68 crore as against the approved amount of ₹394.59 crore in para 72 of the order dated 12.11.2015. Accordingly, the petitioner submitted that the error apparent on the face of the order in respect of pre- operative expenses may be rectified and the tariff for the period 2013-14 may be revised accordingly.

(c) As regards Interest During Construction (IDC) and Finance Charges (FC), the petitioner has submitted that there is an error in the calculation of IDC approved by the Commission in the order dated 12.11.2015 and the same



may be reviewed. It has also submitted that in terms of the direction of the Commission and taking into account the time over- run approved by the Commission the IDC works out to ₹530 crore as against the IDC of ₹448.31 crore allowed in the said order. Accordingly, it has submitted that the IDC may be recomputed and the entire amount of ₹530 crore may be allowed.

Reply of GRIDCO

5. During the hearing, the learned counsel for respondent, GRIDCO raised preliminary objections on the issue of maintainability of the review petition and submitted as under:

- (i) The petitioner has filed an appeal against the order dated 12.11.2015 before the Appellate Tribunal for Electricity (the Tribunal) and hence, the present review petition is not maintainable in terms of Order XLVII Rule (1) (a) of Civil Procedure Code 1908.
- (ii) The grounds raised by the petitioner in the petition do not fall within the scope and ambit of error apparent on the face of the record and hence the review petition is liable to be dismissed.
- (iii) The review petition is not maintainable since appeal has been filed by the petitioner before the Tribunal against the same order prior to the filing of this review petition
- (iv) The crucial date for determining as to whether the review petition is maintainable is the date of filing the review petition as per decision of the Hon'ble Supreme Court in Kunhayammed vs. State of Kerala [(2000) 6 SCC 359].
- (v) As appeal filed by the petitioner was pending before the Tribunal at the date of filing the review application, this petition is not maintainable.



Rejoinder of Petitioner

6. In response, the learned counsel for the petitioner argued that the review petition is maintainable and has mainly submitted as under:

(i) As no appeal was pending before the Tribunal at the time of filing this review application, the preliminary objections raised by respondent, GRIDCO are without merit. Though the appeal filed by the petitioner refers that the review petition is being filed, there is no mention of the filing of appeal in the review petition.

(ii) Order 47 Rule 1 (a) of CPC only envisages that the same issues are not agitated before the subordinate court and the appellate court simultaneously. In the present case, the issues raised in the review petition are distinct and independent of the issues raised in appeal. Even though the review petition is allowed, it will have no bearing on any of the claims raised in the Appeal.

(iii) Referring to the judgment of Hon'ble Supreme Court in Steel Authority of India vs. CERC and BCCI vs. Netaji Cricket Club and Others, it has submitted that there is no bar on filing an appeal before the Tribunal and the review petition before the Commission contemporaneously provided that the subject matter in respect of two proceedings are different.

(iv) The doctrine of merger will not be applicable in the present case since the issues raised in both the forum are different. It is settled law that a judgment is an authority on the point of law involved. Both the judgments referred to by the respondent, GRIDCO deals with a situation where the appeal and review have been filed on different dates. The respondent has also not furnished any documentary evidence to indicate that the appeal of the petitioner was pending at the time of filing this review petition.



Written submissions of GRIDCO

7. The respondent, GRIDCO in its written submissions has contended that as per observation of the Hon'ble SC in Thungabhadra Industries Ltd Vs Govt. of AP (1964(5) SCR 174), the crucial date for determining whether or not the terms of Order XLVII Rule 1 (a) are satisfied is the date when the application for review is filed. Accordingly, if on that date no appeal has been filed, it is competent for the court hearing the review petition to dispose of the application on merit notwithstanding the pendency of appeal. Subject to this, if before the application for review is finally decided, the appeal is disposed of, then the jurisdiction of court hearing the review petition would come to an end. Similar observations have been made by the Supreme Court in the case of Kunhayammed vs. State of Kerala. The respondent has further pointed out that in the appeal filed by the petitioner, it has been indicated by the petitioner that "it is also filing a review petition" before the Commission against the said order. It is therefore, evident that the appeal was filed by the petitioner before filing the review petition, otherwise the petitioner would have stated in the appeal that it has also filed a review petition against the said order. Applying the ratio laid down by SC in the above judgments, the respondent has submitted that as on the date of filing of the review petition the petitioner had filed an appeal against the same order and the same was pending before the Tribunal. The respondent has further stated that the principle laid down by the Tribunal in its judgment dated 11.9.2014 in Steel Authority of India vs. CERC and relied upon by the petitioner is not applicable to the present case since the issues involved in that appeal was whether during the pendency of the review petition an appeal can be filed against the very same order on the same issues. The respondent has added that it was noticed in the said case that no appeal against the same order was pending as on the date of filing the review petition. Accordingly, the respondent has contended that the review petition filed by the petitioner was not maintainable.



Written submissions of Petitioner

8. The petitioner has contended that the submissions of the respondent, GRIDCO that the review petition is not maintainable is erroneous. It has submitted that the review petition was filed prior to the filing of appeal *albeit* on the same day i.e. 18.1.2016. To substantiate, the petitioner has submitted that though the appeal refers to the review petition, there is no mention of appeal in the review petition. Accordingly, the petitioner has stated that since there was no appeal pending at the time of filing the review petition, the objection of the respondent is without any merit. The petitioner has further submitted that the intent behind Order XLVII Rule 1 (a) is that the same issue is not agitated before the subordinate and the appellate forum simultaneously. The petitioner has also pointed out that in the instant case the issues raised in the review petition are distinct and independent of the issues raised in the appeal. It has further submitted even if the review petition is allowed it will have no bearing on any of the claims raised in the appeal. The petitioner has added that a party is permitted to pursue both remedies as long as the subject matter of review and appeal are different. Reiterating the submissions made in the petition, the petitioner has stated that the outcome of the review petition would not render the appeal infructuous since the issues raised in the review petition are different from those raised in the appeal. Accordingly, the petitioner has submitted that the review petition is maintainable.

9. Heard the learned counsel for the parties and the documents available on the record. We examine the issue of maintainability of the review petition as stated in the subsequent paragraphs.

Analysis and decision

10. We have considered the submissions of the petitioner and the respondent. Admittedly, the review petition and the appeal has been has been filed by the



petitioner on 18.1.2016. However, the respondent, GRIDCO has submitted that the review petition is not maintainable since the petitioner has filed appeal before the Tribunal on 18.1.2016 against the same order. Referring to the judgments of Hon'ble in Kunhayammed vs. State of Kerala[(2000) 6 SCC 359] and Thungabhadra Industries Ltd Vs Govt. of AP (1964(5) SCR 174), the respondent has pointed out that the crucial date for determining whether review petition is maintainable is the date of filing of review petition. Referring to the appeal filed by the petitioner before the Tribunal, the respondent has pointed out that the petitioner has indicated in the relevant column of the appeal that "it is also filing a review petition before the Commission against the impugned order...." which evidence the fact that the appeal was filed by the petitioner before filing the review petition or otherwise the petitioner would have stated in the appeal that "it has also filed a review petition". The petitioner has, however, clarified that though the appeal refers to the review petition there is no mention of appeal in the review petition and this indicate that no appeal was pending at the time of filing the review petition.

11. We find force in the submission of the respondent, GRIDCO. Rule 1 (a) of Order XLVII of CPC 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. The Hon'ble Supreme Court in Kunhayammed vs State of Kerala [(2000) 6 SCC 359] had observed as under:

"36.For our purpose it is clause (a) sub-rule 1 which is important. It contemplates a situation where an appeal is allowed but no appeal has been preferred. The rule came up for consideration of this Court Thungabhadra Industries Ltd. Vs. Govt. of A.P in the context of Article 136 of the Constitution of India.....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 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....."



Admittedly, the review petition and appeal has been filed by the petitioner on 18.1.2016. While the respondent has contended that the statement of the petitioner in the appeal that “it is also filing a review petition before the Commission” evidences the fact that the appeal was filed before filing of the review petition, the petitioner has contended that there is no mention of the pending appeal ‘in the review petition’ though the appeal refers to the review petition. However, none of the judgments referred to by the parties deal with a situation wherein the review petition and appeal have been filed on the same date. In our considered view, the statement of the petitioner in appeal that “it is also filing a review petition before the Commission’ is indicative of the fact that appeal has preceded the filing of the review petition before the Commission. Also, the submission of the petitioner that the said statement should be construed as “review petition filed” cannot hold water, since the petitioner if so, could have indicated in clear terms that the review petition has been filed and /or pending before the Commission. Having not done so, we are not inclined to agree with the said submissions of the petitioner. In this background, we hold that the review petition was admittedly not filed/pending before the Commission at the time of filing of appeal before the Tribunal. Accordingly, the prayer of the petitioner for review of the order dated 12.11.2015 fails and the petition is therefore not maintainable.

12. One more contention of the petitioner is that the reliance of the judgments of the Hon’ble Supreme Court in Kunhayammed vs. State of Kerala and Thungabhadra Industries Ltd Vs Govt. of AP by the respondent GRIDCO is misplaced as both these cases deal with appeal and review being decided in respect of the same subject matter/issues. To substantiate, the petitioner has referred to the judgment dated 11.9.2014 of the Tribunal in Appeal No. 41/2014 (Steel Authority of India vs CERC) and has contended that there is no bar in filing an appeal before the Tribunal as well as review petition before this Commission at the same time, provided that the grounds



raised in these petitions are different before the respective forums. The relevant portion of the judgment is extracted as under:

“it is open to the appellant to file a review with regard to the issues which satisfy the ingredients of the apparent error committed in the impugned order before the Regulatory Commission. While the said review petition is pending, the appellant is at liberty to file the appeal against the impugned order raising the various other issues as the grounds of appeal other than which could be raised in the review petition..... If the issues raised before the Appellate Forum are distinct from those raised before the review forum then, in that case, the Appeal as well as the review proceedings may simultaneously proceed....”

Accordingly, the petitioner has contended that if the issues raised in Appeal before the Tribunal are distinct from the issues raised in Review petition before the Commission, in that event, the appeal as well as the review proceedings may simultaneously be proceeded before the respective forums. Referring to the grounds raised in the review petition, the petitioner has pointed out that the review petition has been filed on limited grounds and these grounds were not a subject matter in the appeal filed by the petitioner before the Tribunal. Accordingly, it has prayed that the review petition is maintainable and the Commission has the power to adjudicate the issues raised therein. The respondent, GRIDCO has submitted that the judgment relied upon by the petitioner is not applicable to the present case as the issues involved in that appeal was “whether during the pendency of the review petition, the appeal against the very same order on same issues’ could be filed. The petitioner has however argued that the doctrine of merger will apply only with respect to proceedings in review and appeal if they are on the same issues and contended that in the present case, the doctrine of merger would not be applicable as the issues were different.

13. The matter has been examined. The issues on which review has been sought by the petitioner has been indicated in Para 2 of this order. However, on a careful perusal of the appeal filed by the petitioner before the Tribunal, it is noticed that the petitioner has challenged the Commission’s order dated 12.11.2015 on various grounds, including the disallowance of time over-run in the completion of the project on the



ground that same is not attributable to the petitioner. It has also prayed for granting consequential increase in capital cost, IDC and Financing cost. Since the decision of the Tribunal on the issue of time over-run would necessarily have an impact on the computation of IDC, we are of the considered view that the correction of errors in the order, if any, as stated by the petitioner, in the review petition could be undertaken only after a final decision of the Tribunal in the said appeal. We are therefore not inclined to consider the relief prayed for by the petitioner at this stage.

14. As stated, the petitioner has submitted that the review petition has been filed for correction of errors in the computation of Non- EPC cost, pre operative expenses and computation of IDC. In this regard, Section 152 CPC provides as under:

“Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

15. It has been given to understand that the appeal filed by the petitioner is pending before the Tribunal. In line with the above provision of CPC, the errors, if any, in the order dated 12.11.2015 would be undertaken after the final decision of the Tribunal in the said appeal filed by the petitioner. Alternatively, the petitioner will be at liberty to approach the Commission for rectification of the errors pursuant to the judgment of the Tribunal in the said appeal.

16. Petition No. 3/RP/2016 is disposed of in terms of the above.

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

Sd/-
(A.S. Bakshi)
Member

Sd/-
(A.K. Singhal)
Member

Sd/-
(Gireesh B. Pradhan)
Chairperson

