

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 24/RP/2018
in Petition No. 97/MP/2017**

Subject : Petition for review of the order dated 31.5.2018 in Petition No. 97/MP/2017.

Date of hearing : 18.10.2018

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

Petitioners : Uttar Haryana Bijli Vitaran Nigam Ltd. & Another

Respondent : Adani Power (Mundra) Limited

Parties present : Shri M.G. Ramachandran, Advocate, Haryana Utilities
Ms. Poorva Saigal, Advocate, Haryana Utilities
Shri Shubham Arya, Advocate, Haryana Utilities
Shri Pulkit Agarwal, Advocate, Haryana Utilities
Ms. Poonam Verma, Advocate, Adani
Ms. Abiha Zaidi, Advocate, Adani
Shri Tarul Sharma, Advocate, Adani

Record of Proceedings

At the outset, the learned counsel for the Review Petitioners argued at length and submitted that present Review Petition has been filed for rectification of the order dated 31.5.2018 in Petition No. 97/MP/2017. Learned counsel for the Review Petitioners further submitted as under:

(a) The Commission has proceeded on the wrong assumption of the bid given by Adani Power being premised on 100% domestic coal availability. The decision of the Commission in Para 30 of the order is contrary to the fundamental basis on which Adani Power had approached the Commission in the year 2012 for redressal in regard to the coal cost. In this regard, learned counsel relied on the submissions made by APMuL in 97/MP/2017 and related Petitions/appeals/orders in the past to contend that it is the admitted stand of APMuL before the Commission, APTEL and the Supreme Court that the bid submitted by Adani Power to the Haryana Utilities was premised on 70% of the coal availability from domestic sources and 30% being imported coal.

(b) The decision of the Commission in Paras 32 to 34 with regard to shortage in the supply of domestic coal below the limit prescribed under the NCDP 2013 is an error apparent on the face of the record and contrary to the decision taken by the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 in case of GMR Kamalanga. Change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. In this regard, learned counsel relied on the Hon'ble Supreme Court judgement dated 5.10.2017 in Civil Appeal No. 179 of 2017 [*Nabha Power Limited v. Punjab State Power Corporation Limited and Another*] to contend

that supply of coal less than the prescribed percentage by MCL to Adani Power is a contractual issue to be sorted out between Adani Power and the Coal Company. Such supply less than 65%, 65%, 67% and 75% etc. is not on account of any Change in Law aspect and accordingly, cannot be considered.

(c) The decision of the Commission in Para 35 to allow compensation to Adani Power from 1.4.2013 is an error apparent. It is admitted fact that the change in law occurred only in July, 2013. The Change in Law is for the remaining four years which means July, 2013 to 31.3.2017. The relief as granted by the Commission applies the law retrospectively, which is not permissible.

(d) Significant cause for rectification has been indicated in terms of respondent's admission that the bid was premised on the mixture of 70% domestic coal and 30% imported coal. Learned counsel for the Review Petitioners relied upon the Hon'ble Supreme Court Judgment in *Board of Control for Cricket, India and Anr. v. Netaji Cricket Club & Ors.* [(2005) 4 SCC 741] and submitted that Haryana Utilities have successfully established a sufficient reason in the facts and circumstances of the case to make it a case fit for review.

2. Learned counsel for the respondent submitted as under:

(a) The Review Petition is not admissible as it doesn't meet the requisite conditions of error apparent on the face of record, new facts or sufficient cause for rectification.

(b) The Review Petitioners seeks to re-argue the matter on merit which is beyond the scope of a Review Petition and is intended to substitute the view. Learned counsel relied on the following judgements of Hon'ble Supreme Court:

(i) Para 56 of *Lily Thomas & Ors. vs. Union of India & Ors.* (2000) 6 SCC 224 [Power to review cannot be used to substitute a view]

(ii) Paras 9 and 23 of *Union of India vs. Sandur Manganese and Iron Ores Limited & Ors* [Matter cannot be reheard in review]

(iii) Para 42 of *M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India* (2000) 6 SCC 224 [Power of review is not like appellate power]

(iv) Paras 12 and 22 of CERC Order dated 05.07.2018 in Review Petition No. 35/RP/2017 [Scope of review is limited and cannot be expanded in the nature of appeal]

(c) The decision of the Commission to allow compensation for 100% domestic coal availability in Para 30 of the order was a considerate view and not a *prima facie* view as observed in Paras 30, 43 and 46 of the impugned order. Therefore, in light of the detailed and reasoned decision by the Commission, there is no requirement of the review of the impugned order. Haryana Utilities may prefer an appeal before APTEL as review is not the appropriate recourse to "substitute a view".

(d) The Commission took a considered view in para 35 of the order that "the remaining four year period of the 12th Plan" shall cover the period 1.4.2013 to 31.3.2017. If 1.8.2013 is taken as the date of commencement of change in law,

then the period of remaining four years will go beyond the end of 12th Plan which will be against the letter and spirit of the MoP letter dated 31.7.2013 read with Tariff Policy, 2016. Further, Article 13.2 of the PPA provides that the effective date to be decided by the Commission. Therefore, the Review Petitioners have not pointed out any sufficient cause for rectification of the order.

(e) The relief granted by the Commission is in terms of Article 13 of the PPA and, therefore, actually follows the judgment of the Hon'ble Supreme Court in Nabha Power.

3. After hearing the learned counsels for the Review Petitioners and the respondent, the Commission reserved order on the maintainability of the Review Petition.

By order of the Commission

**Sd/-
(T.D. Pant)
Deputy Chief (Law)**