CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

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

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

Date of order: 3rd of December, 2018

In the matter of

Petition for review of the order dated 31.5.2018 passed by the Hon'ble Commission in Petition No.97/MP/2017 and IA No. 21 of 2018.

1. Uttar Haryana Bijli Vitaran Nigam Limited
Shakti Bhawan, Sector 6,
Panchkula, Haryana

2. Dakshin Haryana Bijli Vitaran Nigam Limited
Shakti Bhawan, Sector 6,
Panchkula, Haryana **…Review Petitioners**

Versus

Adani Power (Mundra) Limited
Shikar, Near Muthakhali Circle,
Navrangpura, Ahmedabad-390 009 **…..Respondent**

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

ORDER

Uttar Haryana Bijli Vitaran Nigam Limited and Dakshin Haryana Bijli Vitaran Nigam Limited, (hereinafter referred to as “Haryana Utilities” or “the Review Petitioners”) have filed the present Review Petition under Section 94 (1) (f) of the Electricity Act, 2003 (hereinafter referred to as the ‘Act’) read with Order 47 Rule 1 of the Code of Civil Procedure,1908 and Regulation 103 (1) of the Central Electricity Regulatory Commission(Conduct of Business) Regulations, 1999, for review of the order dated 31.5.2018 in Petition No. 97/MP/2017 and IA No. 21 of 2018 (hereinafter referred to as “impugned order”) on the grounds of errors apparent on the face of the record and otherwise for sufficient cause.

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

(a) The Commission proceeded to compute the short fall in demotic coal on the wrong assumption that the bid submitted by Adani Power (Mundra) Ltd (hereinafter referred to as “APMuL” or “the Respondent”) was premised on the availability of domestic coal to the extent of generating and supplying electricity upto the capacity of 1386 MW. However, bid submitted by the APMuL was based on 70% Domestic coal and 30% of imported coal. Therefore, compensation has to be restricted accordingly.

(b) The Commission considered actual shortfall in supply of domestic coal with reference to the Annual Contracted Quantity (ACQ) under the FSA. The compensation can be only for shortfall of coal supply upto 65%, 65%, 67% and 75% in last 4 years of 12th plan. The compensation for reduction in coal supply compared to FSA cannot be granted more than what has been specified in the NCDP, 2013 and MoP letter dated 31.7.2013.

(c) While granting compensation, retrospective operation of the MoP Letter dated 31.7.2013 is not permissible. There cannot be any compensation from 1.4.2013 to 31.7.2013.

(d) Change in law compensation can only be for the difference between landed cost of domestic linkage coal and landed cost of alternate coal

(e) Substitution of Adani Power Mundra Limited in place of Adani Power Limited cannot be allowed merely on the basis of affidavit.

3. During the hearing of the review petition on 18.10.2018, learned counsel for the Review Petitioners made detailed submission on issues captured at sub-para (a), (b), (c) and 2(d) above. With regard to issue at para 2 (e) above, learned counsel did not press the said ground of review. With regard to the submission that compensation should be restricted to 70% of the capacity of 1386 MW, learned counsel submitted that the Commission in Para 30 of the impugned order proceeded on the wrong assumption on the bid given by Adani Power being premised on 100% domestic coal availability which is contrary to the fundamental basis on which Adani Power had approached the

Commission in the year 2012 for redressal in regard to coal cost. On the point raised in Para 2 (b) above, learned counsel for the Review Petitioners further submitted that the decision of the Commission in Paras 32 to 34 of the impugned order with regard to shortage in the supply of domestic coal below the limit prescribed under the New Coal Distribution Policy, 2013 (NCDP) 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 upto 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Learned counsel for the Petitioners submitted that the Commission`s decision in Para 35 allowing compensation to Adani Power from 1.4.2013 is an error apparent on the face of the record. Since, Change in law occurred only in July 2013, the relief granted by the Commission retrospectively is not permissible. In support of his arguments, learned counsel of the Review Petitioners relied on the Judgments of Hon'ble Supreme Court in Board of Control for Cricket, India and Anr. vs. Netaji Cricket Club &Ors. [(2005) 4 SCC 741] and Nabha Power Limited v. Punjab State Power Corporation Limited and Anr. [(CA No. 179 of 2017)].

4. Learned counsel for the Respondent submitted that there is neither any error apparent on the face of record nor any new fact is pointed out nor any sufficient cause for rectification is made out. The Review Petitioners are in fact seeking to re-argue the matter which is not permissible in review. In support of her contention, learned counsel of the Respondents relied on the Judgments of Hon'ble Supreme Court in (i) Lily Thomas & Ors. vs. Union of India &Ors.[(2000) 6 SCC 224], (ii) Union of India vs. Sandur Manganese and Iron Ores Limited & Ors. [(2013) 8 SCC 337], (iii) M/S Goel

Ganga Developers India Pvt. Ltd. vs. Union of India [2018 SCC Online SC 930]. In addition, learned counsel also relied on the Commission`s Order dated 5.7.2018 in Review Petition No. 35/RP/2017. Learned counsel for the Respondent submitted that the decision of the Commission to allow compensation for 100% domestic coal availability in Para 30 of the order was a considered 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 case made out for review of the impugned order. The Petitioners should prefer an appeal before APTEL as review is not the appropriate recourse to 'substitute a view'. Learned counsel further argued that the Commission in Para 35 of the impugned order took a considered view that 'the remaining four year period of 12th plan' shall cover the period of 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.

Analysis and Decision

5. We have considered the submissions of the parties and perused the documents on record. Now, we proceed to deal with each of the these aspects on which the Review Petitioners have 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.

(A) Bid submitted by Adani Power Ltd was based on 70% Domestic coal and 30% of imported coal. Therefore, compensation has to be restricted accordingly.

6. According to the Review Petitioners, the Respondent has willfully and voluntarily assumed a proportion of 70% of domestic coal and 30% imported coal in regard to the

generation and supply of electricity from Units 7, 8 and 9 of Mundra Power Project to the Haryana Utilities in its various submissions in the earlier proceedings in the same matter. In this connection, the Review Petitioners have relied upon the orders of the Commission dated 2.4.2013 and 21.2.2014 in Petition No. 155/MP/2012, order dated 31.5.2018 in Petition No. 97/MP/2017, the judgment dated 7.4.2016 of the Appellate Tribunal in Appeal No.100 of 2013. The Review Petitioners have submitted that it is well settled that admission is the best evidence. The Review Petitioners have submitted that contrary to the said admitted position that generation and supply of power from Mundra to Review Petitioners was based on 70% domestic coal and 30% imported coal, the Commission has proceeded on the assumption that the bid is based on 100% of domestic coal availability which is not correct. The Review Petitioners have submitted that the finding at Para 30 of the impugned order is clearly contrary to the admitted position and this being a mistake of fact, the matter falls under the purview of review. The Review Petitioners have placed their reliance upon the Hon'ble Supreme Court Judgment in the Board of Control for Cricket, India and Anr. vs. Netaji Cricket Club &Ors. [(2005) 4 SCC 741] and submitted that a mistake of fact or law by the Court amounts to sufficient reason for review of the decision.

7. According to the Respondent, the Commission has taken a considered view with regard to the use of coal for supply of electricity to the Haryana Utilities by the Respondent from Units 7, 8 and 9 of Mundra which is manifested in Paragraph Nos. 30, 43 and 46 of the impugned order. Learned counsel for the Respondent submitted during the hearing that the decision of the Commission is a detailed and reasoned one and the

review sought by the Review Petitioners would amount to “substitute a view” which is not permissible under review in the light of the judgments quoted in para4 above.

8. We have considered the submissions made by both the parties on this ground of review. The contention of the Review Petitioners that the Respondent’s bid was based on 70% domestic coal and 30% imported coal was already raised by Prayas and was dealt with in the impugned order as under:

> “29. Prayas in its affidavit dated 13.7.2017 has submitted that the Petitioner has wilfully and voluntarily assumed a proportion of 70% domestic coal and 30%imported coal for running the concerned units under the PPAs. Therefore, the claim of the Petitioner that PPA tariff assumed 100% domestic coal allocation based on NCDP 2007 is erroneous. The Petitioner could sign FSA with MCL on account of the PPAs with Haryana Utilities and therefore, all the coal supplied by MCL should be used for meeting generation obligations as per the PPAs. Further, the Petitioner is to generate and sell electricity to the Haryana Utilities qua the contracted capacity of1424 MW and the target availability of 80% works out to 1139 MW. FSA with MCL provides for supply of domestic coal to the extent of 70% of unit capacity which works out to 1386 MW (70% of 1980 MW). The assured quantum is 80% of 70%which works out to 1109 MW (80% of 1386 MW). After excluding 30% of the generation of electricity based on imported coal, the targeted PLF for generation and supply to Haryana Utilities require domestic coal availability of 70% of 1109 MW which is equivalent to 797.3 MW. As against the requirement of coal for 797.3 MW, the Petitioner is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW. The Petitioner in its affidavit dated 8.5.2015 before the Appellate Tribunal has admitted that the Petitioner had the coal availability for the linked capacity of 1386 MW towards the Haryana PPAs and did not dispute or refute the claims of the Respondents that the Petitioner had the coal availability upto80.64%. Therefore, there has been no shortage of domestic coal availability to the Petitioner for fulfilment of its obligations under the PPAs dated 7.8.2008 with Haryana Utilities.
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> 30. We have considered the submissions of Prayas made in its affidavit dated 13.7.2017. According to Prayas, the Petitioner requires coal for generation of 797.3 MW to meet the contractual obligations under the PPAs whereas it is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW and therefore, there is no shortage in supply of domestic coal. In our view, this is not the correct position. The Petitioner has entered into PPAs for supply of 1424 MW power at Haryana periphery and as mentioned in para 26 above, the Petitioner in order to fulfil its contractual obligations requires coal to

generate 1566 MW gross at the bus bar of the generating station based on March 2014 values of auxiliary consumption and transmission loss which may vary from month to month. Further, the requirement of coal cannot be capped at 80% availability as the Haryana Utilities have the first right of refusal for generation and supply beyond 80%. It is pertinent to mention that the Petitioner entered into PPAs dated 7.8.2008 with Haryana Utilities whereas the decision to allocate domestic coal to the extent 70% of the recommended capacity by CEA/MoP in case of coastal plant was taken subsequently in the SLC (CT) meeting dated 12.11.2008.CEA/MoP recommended 70% of the installed capacity of 1980 MW and accordingly, the Petitioner was sanctioned the coal linkage corresponding to 1386 MW being 70% of the installed capacity. Therefore, the Petitioner could not have factored in its bid that it would supply 70% of the contacted capacity by using domestic coal and 30% by using imported coal. Accordingly, the Petitioner has been granted coal to generate 70% of 1980 MW installed capacity i.e. 1386 MW. Since the Petitioner has entered into PPAs for 1424 MW (1566 MW gross approximately) which is more than the linked capacity of coal, the Petitioner is entitled to get supply of full ACQ under the FSA i.e. 64.05 lakh tonnes per annum. In fact, as per the data available on the website of MCL, the ACQ quantity and the effective ACQ quantity of coal granted to the Petitioner are the same i.e. 64.05 lakh tonnes which means that the Petitioner is entitled for the said quantity and ACQ is not required to be prorated again at 70% with reference to 1424 MW contracted capacity. Therefore, the contention of Prayas that the Petitioner is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW is not correct as the Petitioner is entitled under the FSA for assured quantity of coal to generate 1386 MW of electricity.

31Further, Prayas has referred to the Petitioner's affidavit dated 8.5.2015 filed before the Appellate Tribunal. The relevant paras of the said affidavit are extracted as under:

…….

As per the above affidavit, the Petitioner has admitted that it has been granted domestic linkage coal for 1386 MW which can be prorated corresponding to Haryana PPA which works out to 997 MW as and when long term PPA for the balance capacity of 556 MW is entered into. The Petitioner has admitted that it does not have the long term PPAs for the balance capacity and therefore, the entire actual coal received from MCL will be allocated towards the power supplied under the Haryana PPAs. Since actual supply of coal is linked to the existence of PPA and the Petitioner is having PPAs for 1424 MW only with Haryana Utilities which is more than the linkage coal for 1386 MW, MCL has made the entire ACQ quantity of coal of 64.05lakh tonnes as the effective ACQ quantity and the entire coal received from MCL as against the linkage capacity of 1386 MW is being utilized for supply of power to the Haryana Utilities."

9. The Commission has recorded and examined the detailed submissions made by the Respondents therein and came to the conclusion that the Respondent herein (Adani

Power) had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA would be considered for generation and supply of power to Haryana Utilities and any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA would be admissible under change in law in terms of the judgment of the Hon`ble Supreme Court. This being a well analysed and considered view of the Commission after considering all aspects, we do not find any error in the impugned order under the stated ground. The Review Petitioners' submission would amount to exercise its power of review by the Commission to substitute the view taken in the impugned order which is not permissible under the review jurisdiction. In this connection, reference can be made to the following judgments:

(a) In **Lily Thomas &Ors. vs. Union of India &Ors. [(2000) 6 SCC 224]** Judgment, 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…."

Further, In the case of **Union of India Vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}**, the Hon'ble Supreme Court held as under:

> "23. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In Parsion Devi & Others Vs. Sumitri Devi & Others, this Court held as under:

> "9. Under Order 47 Rule 1 of CPC, a judgement may be open to review inter alia if there is a mistake or an error apparent on the face of the record. 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 Rule1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has limited purpose and cannot be allowed to be "an appeal in disguise."

(iii) 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"

Thus, the legal position is that the power of review can be exercised for an apparent mistake and not to substitute a view. Since the Review Petitioners are in effect seeking substitution of the view taken earlier taken by the Commission in the impugned order which is not an apparent mistake, this ground for review cannot be sustained.

10. The Review Petitioners have relied on the judgment of the Hon'ble Supreme Court in Board of Control for Cricket, India and Anr Vs. Natejji Cricket Club & others [(2005) 4 SCC 741], stating that court can rectify its own mistake through review. Relevant portion of the said judgment is extracted as under:

> "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.

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 neminemgravabit".”

11. As per the above judgment, there has to be misconception of the fact or law by the court or by an Advocate to constitute sufficient reason for review. In this case, there is no misconception of fact or law by this Commission while deciding the issue under consideration in the impugned order. In fact, the submissions of both the Respondent and Review Petitioners have been analysed and detailed reasons have been recorded for the decision in the impugned order whose review has been sought. Therefore, the judgment relied upon by the Review Petitioners is not applicable in the present case.

12. In the light of the above discussion, we are of the view that the contention of the Review Petitioners that the Commission has preceded on the wrong assumption with regard to use of domestic coal cannot be accepted as a valid ground for review and hence, the issue raised by the Review Petitioners on this count is rejected.

(B) The compensation can only be for shortfall of coal for upto 65%, 65%, and 67% and 75% of LoA/FSA in last 4 years of 12th plan.

13. The Review Petitioners have submitted that the decision of the Commission in Paragraph Nos. 32 to 34 of the impugned order 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 record. Learned counsel of the Review Petitioners argued that change in law was 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 and the actual supply of coal lower than these percentages is not covered under Change in Law but is in nature of a commercial issue under the FSA for which the Respondent needs to seek compensation from Mahanadi Coalfield Limited and the Procurers should not be burdened with any extra cost for procurement of coal from alternate sources or through import.

14. The Respondent has submitted that the Commission has already dealt with the issue through a reasoned order and there is no error apparent for which the review jurisdiction of the Commission can be invoked.

15. We have considered the submissions of the parties. Paras 32, 33 and 34 of the impugned order pertaining to shortage of coal supply as per the NCDP, 2013 are extracted as under:

> "32. Next we consider the quantum of shortage of domestic coal under change in law in order to implement the directions of the Hon'ble Supreme Court. The envisaged normative shortfall in supply of coal for the last four years of the 12th Plan i.e. 2013-14 to 2016-17 works out as under:

S. No.	Particulars	2013-14	2014-15	2015-16	2016-17
1.	Contracted coal quantity as per FSA (in million tonne)	64.05	64.05	64.05	64.05
2.	Coal quantity as per NCDP 2007 (in percentage)	100	100	100	100
3.	Coal quantity as per NCDP 2013 (in percentage)	65	65	67	75
4.	Coal shortage due to change in law (in percentage)	35	35	33	25

5.	Coal shortage due to change in law (in tonnage) (in lakh tonne)	22.4175	22.4175	21.1365	16.0125

33. According to Prayas, 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 and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%,65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. In this connection, Article 13.2 of the PPAs dated 7.8.2008 provides for the following principles of computing change in law:

> "13.2 Application and Principles for computing impact of Change in Law While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred."

Further, the relevant observations of the Hon'ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:

> "53……This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred."

The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the

provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.

34. Hon'ble Supreme Court has in this particular matter declared that the Tariff Policy being issued under Section 3 of the Act has the force of law. Para 6.1 of the Tariff Policy reads as under:

> "Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January,2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy. Clause 6.1 states:
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> 6.1 Procurement of Power
>
> As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.
>
> However, some of the competitively bid projects as per the guidelines dated19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."

As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes. "

16. It is clear from the impugned order as quoted above that the Commission after considering the Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case decided that the Respondent was

entitled to compensation for the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA, and not upto the threshold limits prescribed in NCDP, 2013.

17. The Review Petitioners have contended that in Paragraph 66 of the Judgment of in the matter of Nabha Power Limited v. Punjab State Power Corporation Limited and Anr, the Hon'ble Supreme Court has observed that the burden of short supply under FSA cannot be passed on to the procurers of electricity and relief has to be restricted only to the extent provided in the PPA. Para 66 of the judgment in Nabha Power Limited case is extracted as under:

> "66. Now turning to the other aspect of the GCV of the coal. If the issue is one of SECL billing for higher Calorific Value while actually supplying a low Calorific Value of Coal that would be a matter between the appellant and the SECL and the first respondent cannot be blamed for the same. That does not take away from the application of the formula for energy charge which provides for PCV as the weighted average Gross Calorific Value delivered to the project. This Calorific Value of coal would have to be, thus, on the same parameter determined at the project site."

The above observation of the Hon`ble Supreme Court was with regard to grade slippage of coal supplied by the coal companies to the generators and in that context, Hon`ble Supreme Court has observed that it was between the generating company and the coal supplier and the impact of such grade slippage cannot be passed on to the distribution licensee. On the other hand, CIL was mandated under NCDP, 2013 to supply particular percentage of coal to the distribution companies under the FSA in the last 4 years of the 12th Plan and the shortfall between the quantum assured and the percentage of coal to be supplied by CIL to be generators to be through alternate

sources of coal was admissible under change in law. The NCDP, 2013 was on a premise of assured supply of coal @ 65%, 65%, 67% and 75% of the ACQ during last four years of the 12th Plan by CIL. However, on account of short supply of coal by CIL below the threshold limit, the generators were required to meet the shortfall from alternative sources. Keeping in view the provisions of the PPA and the Hon`ble Supreme Court's observation that while determining the consequence of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore the affected party to the same economic position as if such change in law has not occurred, the Commission took a conscious view that the Respondent would be entitled for any shortfall in supply of coal by CIL vis-à-vis the quantity included in the LOI/FSA. Therefore, there is no infirmity in the decision which requires review. The Review Petitioners are seeking to revisit decision on merit which is a subject matter of appeal and falls outside the purview of review. We have already referred the Judgments of Hon'ble Supreme Court in the matters of (i) Lily Thomas & Ors. vs. Union of India & Ors. {(2000) 6 SCC 224}; and (ii) Union of India Vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}; and (iii)M/S Goel Ganga Developers India Pvt. Ltd. vs. Union of India 2018 [SCC Online SC 930] at Paragraph 9 above which lays down the principle that the review cannot be an appeal in disguise. Our decision in the impugned order being a considered one in light of the facts on record and mandate of the Hon'ble Supreme Court in Energy Watchdog case, we do not find that this ground meets the requirement of review and accordingly, the review on this ground is rejected.

(C) No compensation can be allowed for the period 1.4.2013 to 31.7.2013

18. The Review Petitioners have contended that there cannot be any compensation for the period 1.4.2013 to 31.7.2013. In support, Review Petitioners have argued that the change in law occurred only in July 2013 and the same is for the remaining four years which means July, 2013 to 31.3.2017. The Review Petitioners have further argued that the relief as granted by the Commission applies the law retrospectively, which is not permissible. According to the Review Petitioners, the phrase "remaining four year period of the 12th Plan" does not mean full 4 years and the compensation cannot be granted more than what has been specified in the NCDP, 2013 and MoP letter dated 31.7.2013.

19. The Respondent has submitted that the Commission's decision under the para 35 of the impugned order is a considered view and the Review Petitioners have failed to show any sufficient cause or new facts warranting the rectification of the impugned order. Learned counsel for the Respondent submitted during the hearing that Article 13.2 of the PPA provides that the effective date is to be decided by the Commission which has been done in the instant case and therefore, there is no error or infirmity in the impugned order.

20. We have considered the submissions made by the Review Petitioners and the Respondent. Perusal of impugned order makes it clear that the Review Petitioners have already raised these issues and the Commission has analysed and considered them on merits and taken the view that the Respondent would be entitled for relief from 1.4.2013

in light of the MoP letter dated 31.7.2013 read with Article 13.2 of the PPA and Tariff Policy 2016. The relevant portion of the impugned order is extracted as under:

> "As per the above provisions, the Petitioner is entitled to compensation for the remaining four years of the 12thPlan. If the date of 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 MoP letter dated 31.7.2013 and the Tariff Policy, 2016. In our view, "the remaining four year period of the 12th Plan" shall cover the period 1.4.2013 to 31.3.2017 as per the MoP letter dated 31.7.2013 read with Tariff Policy, 2016."

21. In light of the above discussion, it is clear that the Review Petitioners are essentially seeking re-examination of the issue on merit which is beyond the scope of review as held by the Hon'ble Supreme Court in catena of the Judgments as referred at para 9 above. In our view, the review on this ground fails and is accordingly rejected.

(D) Change in law compensation can be for the difference between landed cost of domestic linkage coal and landed cost of alternate coal

22. The Review Petitioners have submitted that the Commission in Para 46 of impugned order has computed the compensation for change in law as the difference between the actual cost of generation using alternative coal and energy charges revenue under the PPA. The Review Petitioners have submitted that change in law is for procurement of alternate coal to make up for shortfall in domestic coal and therefore, the compensation is for the difference between landed cost of domestic linkage coal and landed cost of alternate coal. The Review Petitioners have submitted that landed cost of domestic linkage coal is available for the quantum of coal actually being supplied by CIL/subsidiaries and the same should be the basis. However, in the present case, the cost of domestic coal was higher than the energy charges quoted by the

Respondent (Adani Power). Therefore, the basis for calculation of impact of change in law can only be the difference between the cost of procurement of alternate coal and domestic linkage coal price at which it would have been available but for the shortfall. The quoted energy charge therefore has no relevance in such computation.

23. Learned counsel for the Respondent during the hearing submitted that the Commission has taken a conscious decision to work out the relief under change in law and therefore, the legality of the formula cannot be questioned in review.

24. Learned counsel for the Review Petitioners during the hearing submitted that in view of the preceding three grounds raised, the formulation for computation of relief due to shortage of domestic coal at Para 46 of the impugned order would require substantial consideration. Learned counsel further submitted he has no objection to adoption of methodology in GMR Kamalanga case (order dated 3.2.2016 in Petition No. 79/MP/2013) except for the changes to be made on account of the three issues raised as above.

25. We have considered the submissions of the Review Petitioners. In the impugned order, the Commission had considered the submissions of the Respondent (Adani Power) and Prayas with regard to the methodology to be adopted for allowing the relief . The relevant paras are extracted as under:

> "39. The Petitioner has submitted that the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 *(*GMR- Kamalanga Vs. Haryana Power Purchase Centre) approved the methodology for relief on account of shortfall in domestic coal due to change in law subsequent to the issue of NCDP, 2013. The said

methodology provides for pass through of higher cost of imported/market based e-auction coal in accordance with the NCDP, 2013 and MoP letter dated 31.7.2013. Accordingly, the Petitioner has proposed a similar methodology in the present case.

42. Prayas has submitted that, the formula in GMR case may not be applied in toto in the case of the Petitioner due to three reasons, such as, (a) the generating station of the Petitioner is based on a mix of domestic and imported coal; (b) the quantum of linkage coal is higher as compared to the contracted capacity; and (c) the Petitioner has the commitment to use the entire linkage coal qua contracted capacity under the Haryana PPA. Prayas has further contended that the operational parameters such as GSHR and Auxiliary Consumption should not exceed the bid assumed parameters and in the event, bid assumed parameters are not available, then the OEM specified parameters or parameters specified in the Tariff Regulations of the Commission whichever is lower should be considered.

43. We have considered the submissions of the Petitioner, the Respondents and Prayas. We have already come to the conclusion that the Petitioner had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA shall be considered for generation and supply of power to Haryana Utilities. Therefore, any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA dated 9.6.2012 shall be admissible in relief under change in law in terms of the judgement of the Hon`ble Supreme Court. Accordingly, the formula given in GMR case has been modified to meet this requirement, and the same is given in para 46 of this Order."

It is apparent from the above that the Commission, after due consideration of the submissions of the Adani Power and Prayas had consciously decided on the methodology for computation of relief due to shortage of domestic coal under change in law for the period from 1.4.2013 to 31.3.2017 in Para 46 of the impugned order. The Review Petitioners had not suggested any methodology of calculation of the relief due to shortage of domestic coal. On the other hand, the Review Petitioners in their reply dated 28.7.2017 in the Petition No. 97/MP/2017 had stated that 'the reliance to the decision of GMR is wholly in appropriate". The Review Petitioners are now suggesting

an alternative formula for computation of the relief under change in law. As already reiterated in the earlier part of the order, the review cannot be used for substitution of a view already taken with a new view. Therefore, the review on the ground is not maintainable.

(E) Substitution of Adani Power Mundra Limited in place of Adani Power Limited was allowed without any application and merely on the basis of affidavit

26. In the petition filed, the Review Petitioners have sought review on the issue of substitution of Adani Power (Mundra) Limited in place of Adani Power Limited. However, the learned counsel for the Review Petitioners submitted during the hearing that he was not pressing the issue. We are, therefore, not dealing with this issue in this order as issue was not argued.

27. In view of the above, Review Petition No. 24/RP/2018 is disposed of in terms of the observations/decision made in this order.

Sd/-	sd/-
(Dr. M.K.Iyer)	**(P.K.Pujari)**
Member	**Chairperson**