

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No. 3/RP/2018
In Petition No. 32/MP/2017**

Coram:

Shri P.K. Pujari, Chairperson

Shri A. K. Singhal, Member

Shri A. S. Bakshi, Member

Dr. M. K. Iyer, Member

Date of order: 19th of July, 2018

In the matter of

Petition under Section 94 (1) (f) of the Electricity Act, 2003 Read with Regulation 103(1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, for Review of Order dated 26.9.2017 in Petition No.32/MP/2017.

And

In the matter of

Himachal Sorang Power Pvt. Ltd. Limited
Ashirwad Building, D-7, Lane-1,
New Shimla-Shimla-171 009

...Petitioner

Vs.

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

2. Northern Regional Load Despatch Centre
18-A, Katwaria Saria, New Delhi-110 016

...Respondents

Parties Present:

Shri Sanjay Sen, Senior Advocate, HSPPL

Shri S. Venkatesh, Advocate, HSPPL

Shri Sandeep Rajpuroit, Advocate, HSPPL

Shri Vikas, Advocate, HSPPL

Ms. Swapna Seshadri, Advocate, PGCIL

Ms. Thea Luthra, Advocate, PGCIL

Ms. Parichita Chowdhery, Advocate, PGCIL



ORDER

The Review Petitioner, Himachal Sorang Power Pvt. Ltd. (hereinafter referred to as “the Review Petitioner”) has filed the present Review Petition under Section 94 of the Electricity Act, 2003 Read with Regulation 103 (1) of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 to review the order dated 26.9.2017 in Petition No. 32/MP/2017 (hereinafter referred to as ‘impugned order’).

2. The Review Petitioner has made the following prayers:

“(a) Admit the present Petition and Review the Impugned Order dated 26.9.2017 to the extent Impugned by the HSPPL in the present Petition; and

(b) Pass such order, further relief/s in the facts and circumstances of the case as this Commission may deem just and fit and equitable in favour of t he HSPPL.”

3. The Review Petitioner has sought review of the impugned order on the following grounds:

(a) The impugned order suffers from error apparent on the face of the record as the said order did not consider the Force Majeure events presently being faced by HSPPL pursuant to the accident of its penstock and consequences arising there from. The Commission while passing impugned order has failed to appreciate that the transmission charges levied by PGCIL and partly paid by the Review Petitioner subsequent to force majeure event i.e. from 18.11.2015 is not payable by the Review Petitioner in terms of clauses 13 or 14 of the BPTA. Though PGCIL was made aware about the force majeure event in November, 2015 itself when it was widely published on all newspapers and television media and again made aware of the said force



majeure event on 8.1.2016, the Review Petitioner cannot be held liable for any breach of contractual obligation.

(b) The impugned order did not consider the breach of Regulations 15A and 16B of the Connectivity Regulations by PGCIL and NRLDC. The Review Petitioner was granted 100 MW LTA by CTU which was operationalized on 1.4.2012. However, due to force majeure events, the above LTA could not be utilized even till date, the Review Petitioner did not make any request for scheduling of power under the LTA. As per Regulation 15A of the Connectivity Regulations, PGCIL had a statutory obligation to approach the Review Petitioner after expiry of one year from the commencement of the LTA for surrender of LTA. However, PGCIL has failed to act in accordance with the provisions of the Regulation 15A of the Connectivity Regulations. Further, since, the Review Petitioner was not in a position to utilize the LTA granted due to force majeure events, NRLDC was obligated to issue notice to the Review Petitioner in terms of Regulation 16B of the Connectivity Regulations and to release the unutilized LTA capacity for scheduling MTOA and STOA. Pursuant to Sixth Amendment to the Connectivity Regulations, the Commission should have sought information regarding compliance of Regulation 16B of the Connectivity Regulations from PGCIL and NRLDC. The Commission while passing the impugned order ignored the provisions of the Regulation 16B of the Connectivity Regulations which is an error apparent on the face of the record.

(c) PGCIL did not disclose the following crucial facts for adjudication of the present proceedings:



(i) Accident happened at the project site of the Review Petitioner in November, 2015 which completely halted project works of the Review Petitioner;

(ii) TSA entered into between the Review Petitioner and PGCIL is still unsigned by ISTS licensee i.e Jaypee Powergrid and in terms of Clause 3 of TSA, it only comes into effect once ISTS licensee signs the same. Therefore, recovery of transmission charges by PGCIL is still unknown; and

(iii) Jaypee Powergrid was a necessary party and was not arrayed as party by PGCIL in Petition No. 32/MP/2017.

Therefore, non-disclosure of facts by PGCIL qua the existence of TSA and the effect of Article 14.6 upon occurrence of force majeure event i.e penstock burst in the plant is material concealment of fact and is an error apparent on the face of record.

(d) The Commission in the impugned order held that HSPPL or its successor or assignees shall be liable for the payment of all outstanding dues which is an error apparent on the fact of the record.

4. The Review Petitioner has submitted that in terms the judgments of the Hon`ble Supreme Court in Lily Thomas and other Vs Union of India and other [AIR 2000 SC 1650] and Board of Control for Cricket in India and Another Vs. Netaji Cricket Club and others [(2005) 4 SCC 741], mistake on the part of the court is a valid ground for review and therefore, the impugned order which has been passed under mistake of facts and law needs to be reviewed.



5. Notice was issued to PGCIL to file its reply. PGCIL has filed its reply. The Petitioner has filed its rejoinder thereof.

6. PGCIL in its reply dated 16.4.2018 has taken a preliminary objection that the Review Petitioner has challenged the impugned order on the same grounds before the Appellate Tribunal for Electricity before filing the Review Petition and therefore, the review petition is not maintainable in terms of Order 47 Rule 1 of the CPC. On merit, PGCIL has submitted as under:

(a) During the proceedings of the main Petition, the Review Petitioner deliberately did not appear before the Commission despite the fact that PGCIL had served copy of the petition on the Review Petitioner thrice. Therefore, the Review Petitioner cannot take advantage of its own failure to contest the petition before the Commission.

(b) On making enquiry, PGCIL found that the project of the Petitioner had been taken over by the Greenko Group of Companies. Since, the Review Petitioner was not appearing before the Commission during the hearing of Petition No. 32/MP/2017, Learned Counsel for PGCIL brought to the notice of the Commission about its knowledge of the project of the Petitioner having been taken over by Greenko Group of Companies. The Commission after taking note of the submission of PGCIL, directed that if the company of the Review Petitioner has been taken over, then the successor company shall be liable for payment of transmission charges. This was a bonafide observation of the Commission and cannot be a ground for review.



(c) The scope of Review Petition is for review of “error apparent” only and not to review the judgment/order even if the parties are in a position to satisfy the court that order under review is an erroneous one. In fact, the Review Petitioner by way of the review petition has prayed to consider an altogether new case set up by it which is impermissible.

7. The Review Petitioner in its rejoinder dated 17.5.2018 has submitted that due to stringent financial circumstances faced by the Review Petitioner, the Review Petitioner could not contest the main petition i.e. Petition No. 32/MP/2017. The Review Petitioner has clarified that its project has neither been taken over nor absorbed by Greenko Group as alleged by PGCIL. The Review Petitioner has submitted that there is no bar on it to approach the Commission under the review jurisdiction against the ex-parte order dated 26.9.2017. The ex-parte order has not been challenged on the ground that the Review Petitioner had not been afforded a fair hearing. Therefore, the decision of N.K. Prasad Vs. Government of India and others [(2004) 6 SCC 299] has wrongly been cited by PGCIL and cannot be applicable in the present case.

Analysis and Decision:

8. We have heard Learned Senior Counsel for Review Petitioner and the Learned Counsel for PGCIL. A preliminary objection about maintainability of the Review Petition has been raised by PGCIL as the Review Petitioner has challenged the impugned order in the Appellate Tribunal for Electricity which has been registered as IA No. 105 of 2018 in DFR No. 3984 of 2017. PGCIL has submitted that the Review Petitioner has filed appeal in the Appellate Tribunal before filing the review on the very same grounds. In its rebuttal, the



Review Petitioner has submitted that Review Petition was filed on 17.11.2017 whereas the Appeal before the Appellate Tribunal for Electricity was filed on 21.11.2017, and therefore, the Review Petition is not barred by the provision of Order 47 Rule 1 (1) of the CPC. Order 47 Rule 1 (1) of the CPC provides that Review can be filed against an order if no appeal against the same order has been filed. On perusal of record, we notice that the Review Petitioner filed the present review Petition online on 17.11.2017. As per the notified procedure, online filing of the Petition shall be followed by filing a hard copy of the Petition along with the acknowledgement of the online filing. Pending such filing, no action would be taken on the Petition. In the present case, the Registry of the Commission informed the Review Petitioner vide its e-mail dated 18.11.2017 to submit hard copy of the Petition. However, the hard copy of the review petition was filed by the Review Petitioner on 21.11.2017. In the meanwhile, the Review Petitioner filed the Appeal on 21.11.2017. Since the Review Petitioner did not file the hard copy of the Petition before filing of the Appeal, the process of filing of the Review Petition was not completed as on the date of filing of the Appeal. It is further noticed that Review Petitioner has taken following grounds in the Appeal:

- “(a) The Impugned order suffers from gross irregularities as it did not consider the ‘Force Majeure events presently being faced by HSPPL pursuant to the accident and consequences arising there from;
- (b) Impugned order does not consider the breach of the Connectivity Regulations, 2009 by PGCIL and Respondent No. 2, NRLDC; and
- (c) PGCIL has not disclose crucial facts which were relevant to the adjudication of the present proceedings.”

The grounds are the same as in the Review Petition. Having filed the Appeal before the Appellate Tribunal, it is not open to the Review Petitioner to file a Review Petition before the



Commission. We are of the view that the Review Petition of the Review Petitioner is barred by Order 47 Rule 1 (1) of the CPC and hence, is not maintainable.

9. The Review Petitioner has argued that the impugned order suffers from error apparent on the face of the record and the Commission did not consider the force majeure event faced by the Review Petitioner on account of burst of penstock, non-compliance of the Regulation 15A of the Connectivity Regulations by PGCIL and Regulation 16B of the Connectivity Regulations by NRLDC. It is pertinent to mention that PGCIL filed Petition No. 32/MP/2017 for direction for recovery of transmission charges from the Review Petitioner. PGCIL has served copy of the Petition on the Review Petitioner which has not been denied by the Review Petitioner. The Review Petitioner neither filed any reply nor appeared before the Commission. In the rejoinder, the Review Petitioner has pleaded that due to stringent financial circumstances, it could not contest the Petition No. 32/MP/2017. Therefore, the Review Petitioner has not consciously contested the Petition No. 32/MP/2017 which led to passing of the ex-parte order. Para 10 of the impugned order is extracted as under:

“ 10. None was present on behalf of HSPL despite repeated notices. We express our displeasure at the conduct of the HSPL to ignore our notices. The Petitioner, vide Record of Proceedings for hearing dated 25.4.2017, was directed to confirm whether HSPL is generating and supplying power under any form of access. The Petitioner has submitted that as per the information received from NRLDC, HSPL has injected infirm power into the regional grid upto 18.11.2015 and there is no injection by HSPL thereafter. As per Regulation 12 of the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010, CTU is empowered to enforce regulation of power supply against defaulting DICs for non-payment non-payment of transmission charges and non-compliance of LC. Therefore, a statutory mechanism is available to the Petitioner to invoke the regulation of power supply in case of non-payment of transmission charges and non-opening of LC. Since, the generating station of HSPL is not generating the power, the Petitioner cannot invoke provisions of regulations of power supply against HSPL. As HSPL has been granted LTA and the said LTA has been operationalised from April 2012 onwards, the liability of transmission charges shall accrue to HSPL. The Petitioner shall continue to raise the bills for the LTA on HSPL. If HSPL has been taken over by another company as informed during the hearing, the said company shall be liable to pay the transmission charges as per the terms of the BPTA dated 24.10.2009 which provides that HSPL includes its successors and assignees. Accordingly, it is directed that HSPL or its

successor or assignee shall be liable for the payment of all outstanding dues towards transmission charges along with surcharge and to open the LC. Since, the payments are overdue, it is directed that HSPL or its successor or assignee shall be permitted to inject power under LTA/MTOA/STOA only after they make the payment of outstanding transmission charges.”

10. The grounds taken by the Review Petitioner are being raised by it for the first time in the Review Petition since it chose not to file any reply to the main petition. The Review Petitioner has sought to re-argue the matter on merit which is not permissible at the stage of review.

11. In the case of Union of India Vs. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}, the Hon’ble Supreme Court has explained the scope of review 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 Rule 1 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.”

In the light of the above legal position, the Review Petitioner cannot be permitted to take pleas which it failed to take during the proceeding of the main petition and seek re-hearing of the matter. The Review Petition cannot be used as an appeal in disguise.

12. The Review Petitioner has submitted that its project has not been taken over by Greenko Group of Companies and therefore, the observation regarding liability of the successor company to pay the transmission charges is an error apparent on the face of record. It is clarified that the Learned Counsel for the PGCIL pointed out during the hearing



that the project has been taken over by the Greenko Group of Companies and after taking note of the said statement, the Commission observed that “if HSPL has been taken over by another company as informed during the hearing, the said company shall be liable to pay the transmission charges as per the terms of the BPTA dated 24.10.2009 which provides that HSPL includes its successors or assignees.” The observation of the Commission in the said para was conditional subject to confirmation that HSPL had been taken over by another company. If that eventuality did not happen, then the liability rests with HSPL i.e. the Review Petitioner herein. In our view, there is no error apparent in the order on this account.

13. The Review Petitioner has relied upon the judgments of the Hon’ble Supreme Court in Board of Control for Cricket in India Vs. Netaji Cricket Club [(2005) 4 SCC 741]. In BCCI case supra, the Hon’ble Supreme Court has held in those cases that the mistake on the part of the Court which would include the mistake in the nature of the undertaking may also call for review of the order. In the present case, there is no mistake on the part of the Commission with regard to appreciation of any facts or question of law in the impugned order and therefore, the judgment in BCCI case is not applicable. The Review Petitioner has also cited some more judgments which are not relevant to the present Review Petition.

14. The Petition No. 3/RP/2018 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/-
(P.K. Pujari)
Chairperson

