

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Review Petition No.44/RP/2018
in Petition No.235/MP/2015**

Subject : Petition for review and modification of order dated 17.9.2018 in Petition No. 235/MP/2015.

Date of hearing : 17.12.2019

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

Petitioner : Gujarat Urja Vikas Nigam Limited (GUVNL)

Respondents : Adani Power (Mundra) Limited (AP(M)L) and Ors.

Parties present : Ms. Swapna Seshadri, Advocate, GUVNL
Shri Anand. K. Ganeshan, Advocate, GUVNL
Shri Saunak Rajguru, Advocate, AP(M)L
Shri Kumar Gaurav, AP(M)L

Record of Proceedings

Learned counsel for the Review Petitioner submitted that the present Review Petition has been filed seeking review of the order dated 17.9.2018 in Petition No. 235/MP/2015 passed pursuant to the remand of the matter by the Appellate Tribunal for Electricity (APTEL) in Appeal No. 210 of 2017. Learned counsel for the Review Petitioner, mainly submitted as under:

- (a) The Commission in its order dated 17.9.2018, while considering the claims of Adani Power on the issue of Customs Duty on imported coal, has held that the duty shall be considered on actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the Tariff Regulations or actual, whichever is lower. The aforesaid observation of the Commission deviate from the earlier decision of the Commission dated 4.5.2017 on the operating parameters to be adopted for computation of Change in Law is an error apparent on the face of record.
- (b) The Commission in its earlier order dated 4.5.2017 had adopted the same operating parameters including SHR as approved by the Gujarat Electricity Regulatory Commission (GERC) in Petition No. 1080 of 2011 under PPA dated 6.2.2007) and in Petition No. 1210 of 2012 (under PPA dated 2.2.2007) for the purpose of allowing the Change in Law claims of Adani Power. The above order was challenged by Adani Power before the APTEL in Appeal No. 210 of 2017, *inter-alia*, on the ground that the Commission has erroneously adopted the SHR as was previously applied by the GERC. APTEL in its judgment dated 13.4.2018 rejected the said contention of the Adani Power holding that the SHR as per the previous decision of the GERC and accepted by Adani Power would apply.
- (c) However, vide order dated 17.9.2018, in the remand proceedings, the Commission has changed the methodology. Operating parameters to be applied for calculating the impact on account of Change in Law for Adani Power is an error apparent on the face of the record.

(d) The proceedings in remand were not for the purpose of amending the principles to be adopted, particularly when the very same principles were challenged by Adani Power and were rejected by the APTEL and appeal in this regard filed by Adani Power is pending before the Hon'ble Supreme Court.

2. Learned counsel for the Respondent, Adani Power (Mundra) Limited, handed over copy of note on arguments and mainly submitted as under:

(a) The Review Petitioner has failed to establish that the order dated 17.9.2018 suffers from any error apparent on the face of record. Under the garb of the present Review Petition, GUVNL is trying to re-open and re-argue the case on merits, which is not permissible under the review jurisdiction. In support of his contentions, learned counsel relied upon the judgments of Hon'ble Supreme Court in the cases of (i) Kamlesh Verma v. Mayawati [(2013) 8 SCC 320], (ii) Lily Thomas v. Union of India, [(2000) 6 SCC 224], and (iii) Kerala State Electricity Board v. Hitech Electrothermics and Hydropower Ltd. [(2005) 6SCC 651].

(b) Consideration of the actual GCV of the imported coal and the operating parameters for calculating the actual coal consumed by the Commission in the said order is in accordance with the principles adopted by the APTEL in its judgment dated 12.9.2014 in the case of Wardha Power Limited v. Reliance Infrastructure & Ors. (Wardha Power Judgment) in Appeal No. 288 of 2013. APTEL has also confirmed the findings of Wardha Power judgment in the subsequent judgments in (i) Appeal No. 202 of 2018 in the case of Jaipur Vidyut Vitran Nigam Limited v. RERC and Ors. And (ii) Appeal No. 77 of 2016 in the case of Sasan Power Limited v. CERC and Ors.

(c) In the remand proceedings, the Commission is empowered to consider the matter afresh and decide on the basis of the peculiar circumstance brought on record. Further, in absence of any particular mechanism to grant the Basic Customs duty specified by the APTEL, the Commission has taken a considered view in line with mechanism prescribed by it in other cases and the principles laid down by the APTEL in Wardha Power Judgment. In support of his contentions, learned counsel relied upon the Order XLI Rule 23 A of the Code of Civil Procedure, 1908 and judgment of Hon'ble Supreme Court in the case of Remco Industrial Workers House Building Coop, Society v. Lakshmeesha M. [(2003) 11 SCC 666].

(d) Findings of the APTEL in the judgment dated 13.4.2018 on the issues of SHR and Auxiliary Energy Consumption (AEC) cannot be replicated and applied to the issue of GCV of coal. The Review Petitioner has sought to confuse the issue of GCV of coal by submitting that an appeal is preferred by the Respondent on SHR and AEC. The findings on these parameters are independent and findings on GCV are clearly not bound by the findings of the APTEL on the issue of SHR and AEC. Further, unlike the SHR and AEC, GCV is not an operational parameter.

3. After hearing the learned counsel for the Review Petitioner and Respondent, the Commission reserved order in the Review Petition.

By order of the Commission

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