

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Review Petition No. 2/RP/2019

In

Petition No. 95/MP2017

Coram:

Shri P. K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S.Jha, Member

Date of Order: 11th December, 2019

In the matter of:

Petition under Section 94 of the Electricity Act, 2003 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 and Regulation 103, 111 and 114 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for review of the judgment and order dated 17.12.2018 passed in Petition No. 95/MP/2017.

And

In the matter of

Solar Energy Corporation of India Limited
1st Floor, D-3, A-Wing, District Centre,
Religare Building, Saket,
New Delhi – 110 017

.....**Petitioner**

Vs

1. Welspun Energy Private Limited
3rd Floor, PTI Building,
4, Parliament Street,
New Delhi – 110 001.

2. Maharashtra State Electricity Distribution Company Limited
Prakashgad, 6th Floor, Station Road,
Bandra (E), Mumbai – 400 051.

.....**Respondents**

The following were present:

Shri M. G. Ramachandran, Sr. Advocate, SECI

Shri Prabhas Bajaj, Advocate, SECI

Shri Shubham Arya, Advocate, SECI

Ms. Tanya Sareen, Advocate, SECI

Shri S. Das, SECI

Shri Gopal Jain, Sr. Advocate, Welspun Energy

Shri Amit Ojha, Advocate, Welspun Energy

Ms.Meha Chanrda, Advocate, Welspun Energy

Ms.Shreya Mukerjee, Advocate, Welspun Energy
Shri Ashish Bhardwaj, Advocate, Welspun Energy

ORDER

The Review Petitioner, Solar Energy Corporation of India Limited (hereinafter referred to as “ Review Petitioner” or “SECI”) has filed the present Review Petition under Section 94 of the Electricity Act, 2003 (hereinafter referred to as “the Act”) read with the Order 47 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’) and Regulations 103 (1), 111 and 114 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of the order dated 17.12.2018 in Petition No. 95/MP/2017 (hereinafter referred to as ‘ Impugned order’) alongwith the following prayers: .

- (a) Admit the Review Petition;
- (b) Call for the records of the Petition No.95/MP/2017;
- (c) Review and recall the impugned judgment and order dated 17.12.2018 and dismiss Petition No.95/MP/2017 filed by Welspun Energy Private Limited; and
- (d) Pass any further order or orders as this Hon’ble Commission may deem just and proper.

Background of the case:

2. On 4.8.2015, Ministry of New and Renewable Energy (MNRE), Government of India, issued a Scheme for setting up of 2000 MW Grid connected Solar PV Projects under Batch III of Phase II of Jawaharlal Nehru National Solar Mission (JNNSM) with Viability Gap Funding Support from National Clear Energy Fund. SECI, being nodal agency for the implementation of the aforesaid Scheme, issued Request for Selection (RfS) document for selection of Solar Power Developer (SPD) for development of 500 MW Grid connected Solar Power Projects on Build, Own and Operate (BOO) basis in the State of Maharashtra. In pursuance of the bidding process conducted by SECI, Welspun Renewables Energy Private Limited was

awarded 100 MW Project and subsequently, its parent company, Respondent No.1, Welspun Energy Private Limited executed the Power Purchase Agreement with SECI on 10.4.2016.

3. During the course of implementation of the Project, certain disputes arose between the parties leading to filing of the Petition No. 95/MP/2017 along with IA Nos. 35/2017 and 93/2017 by Welspun Energy Private Limited for resolution of disputes arising out of the said PPA executed between WEPL and SECI along with the following prayers:

- “(i) Restrain the Respondent from termination the PPA;
- (ii) Direct the Respondent to permit the assignment of the PPA to Giriraj Renewable Private Limited in terms of Articles 15 of the PPA;
- (iii) Direct the Respondent to extend the Scheduled Commissioning Date and the time-period for Condition Subsequent for the Force Majeure like period; or
- (iv) In the alternate to prayer (iii), direct the Respondent to allow extension of time to complete the Conditions Subsequent in terms of Article 3.2.2 of the PPA and consequent extension of the Scheduled Commissioning Date;
- (v) During pendency of the proceedings, grant ad-interim injunction against the Respondent from taking any action toward terminating the PPA”

4. The Petitioner No. 2, Giriraj Renewable Private Limited to Petition No. 95/MP/2017 filed IA Nos. 35/2017 and 93/2017 to implead it as party to the Petition and for substitution of Giriraj Renewable Private Limited in place of Welspun Energy Private Limited respectively.

5. The Commission after hearing the parties decided the Petition No. 95/MP/2017 along with IA Nos. 35/2017 and 93/2017 vide order dated 17.12.2018 wherein the Commission in Para 88 of the Impugned order held as under:

“88. Based on the above, the summary of our decision is as under:

(i) As regards the Conditions Subsequent Activities related to financial closure and grid connectivity, the same stand fulfilled within the extended period from 11.11.2016 to 29.11.2016.

(ii) As regards the delay in fulfillment of Conditions Subsequent activity related to clear possession and title of land, it is decided that fulfillment of this condition was beyond the control of the Petitioner, and was caused due to "Government delay akin to Force Majeure". Accordingly, the delay from 4.10.2016 to 9.6.2017 is condoned.

(iii) Delay from 5.5.2017 till date of issue of this Order is also condoned since the matter was sub-judice before this Commission. Therefore, in effect the period from 4.10.2016 till issue of this Order is treated as force majeure and is condoned.

(iv) The prayer in the IA to substitute WEPL with the Resultant Company, GRPL is allowed.

(v) 28 MW has already been installed, synchronized and commissioned. For commissioning of balance capacity of 72 MW, the SCoD is extended upto 90 days from date of issue of this Order subject to payment of penalty in terms of clause 3.2.2 of the PPA within one week from the date of issue of this order."

Submissions of the Review Petitioner

6. Aggrieved by the above Impugned order, the Review Petitioner has filed the present Review Petition seeking review of the Impugned order, mainly on the following grounds:

(a) The extension of the Scheduled Commercial Operation Date (SCoD) is contrary to the express stipulation in Articles 3.1 and 3.2.2 of the PPA to the effect that the extension of time for satisfaction of the conditions subsequent would be 'without any impact on the 'Scheduled Commissioning Date'.

(b) Article 3.1 of the PPA does not contemplate any extension of time for fulfillment of the conditions subsequent on account of "force majeure like" events. It is not permissible to grant extension of SCoD on grounds of 'force majeure like event' or 'Government delay akin to force majeure'. There was no warrant to import such concepts of "force majeure like" events when the term "force majeure" is a defined term in Article 1 and scope and application is expressly dealt with in Article 11 of the PPA. In absence of applicability of force majeure provisions as per Article 11, there cannot be any extension of SCoD in terms of Article 4.5 of the PPA. SCoD cannot be extended on grounds of delay being described as "force majeure like" events.

(c) In terms of Article 11.5 of the PPA, it is impermissible to claim any relief on the basis of “force majeure” without serving notice of force majeure event. SECI had specifically raised the said aspect but the same has not been considered at all in the Impugned order dated 17.12.2018.

(d) In terms of Article 4.5.6 read with Article 4.6.2 of the PPA, the SCoD cannot be extended beyond 10.5.2018 being 25 months from the Effective Date of the PPA i.e. 10.4.2016. This would also include non-achievement of SCoD even on account of force majeure or force majeure like events. This express prohibition in the PPA has not been considered by the Commission.

(e) In terms of Article 4.1.1 (f) of the PPA read with Clause 1.3.7(iv) and Clause 3.20(v) of the RfS document, WEPL was obligated to maintain the controlling shareholding in the Company as was at the time of signing of PPA for a period of one year after the date of Commercial Operation. Further, in terms of Article 15.1 of the PPA, there cannot be any assignment of the agreement except by mutual consent between the parties to be evidenced in writing. Article 17.3 of the PPA provides that the consent of any party under the PPA has to be in writing. In terms of the express provisions of the PPA requiring the consent in writing, it was incorrect to assume that by silence on part of SECI, the assignment through de-merger has been accepted.

(f) The demerger sanctioned by National Company Law Tribunal (NCLT) under the provisions of the Companies Act, 2013 was a voluntary transfer and cannot override the specific contractual provision contained in the PPA prohibiting the assignment of the PPA.

(g) In para 87 of the Impugned order, the Commission has treated 28 MW capacity of the Petitioners’ plant as having been ‘commissioned’ which is contrary to Article 5 of the PPA which lays down the specific procedure for commissioning of the project that WEPL has not yet undertaken. Clause 3.17 of the RfS provides that part commissioning is permissible only for minimum 50% of the contracted capacity.

(h) SECI vide its communication dated 8.5.2017, had intimated Respondent No.1, *inter-alia*, on account of the non-compliance of the

Conditions Subsequent by WEPL, the PPA executed by the parties stood terminated. The said termination letter has not been challenged till date.

(i) SECI, on the aspect of the sanctity of contract entered into between the Parties, has relied upon the judgments of the Hon'ble Supreme Court in the cases of (a) Gujarat Urja Vikas Nigam Limited v. EMCO Limited and Anr., [(2016) 11 SCC 182], (b) Gujarat Urja Vikas Nigam Limited v. ACME Solar Technologies (Gujarat) Pvt. Ltd., [(2017) 16 SCC 498], (c) Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Co. (India) Pvt. Ltd. [(2017) 16 SCC 498]. With regard to NCLT order on demerger, the Review Petitioner has relied upon the judgments of Hon'ble Supreme Court in the case of (a) Gujarat Bottling Company Limited v. Coco Cola Company Limited [(1995) 5 SCC 545] and (b) Singer India Limited v. Chander Mohan Chadha & Ors. [(2004) 7 SCC 1].

7. The Review Petitioner has submitted that on the basis of the PPA it had entered into PSA with Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (MSEDCL), on back-to-back basis. However, after passing of the Impugned order dated 17.12.2018 but during the pendency of the time period for completion of the project granted by the Commission, Respondent No. 2, MSEDCL vide its letter dated 18.1.2019 has cancelled the PSA. Therefore, this subsequent event also necessitates the Commission to rectify and/or clarify the Impugned order dated 17.12.2018.

8. The Review Petitioner, vide its rejoinder dated 12.4.2019, has reiterated the submissions made in the Petition. The Review Petitioner has also submitted that in view of the sustained delay on the part of the SPD, the PPA has been terminated by the Review Petitioner, including by letter dated 11.4.2019.

9. The Review Petition was admitted on 7.3.2019 and notices were issued to the Respondents to file their replies. Respondents, WEPL and MSEDCL, filed their replies vide affidavits dated 29.3.2019 and 26.3.2019 respectively. Review Petitioner filed its rejoinder to reply filed by Respondent No. 1 vide affidavit dated 12.4.2019. After the conclusion of the hearing, Review Petitioner and Respondent No.1 have also filed their respective written submissions.

Submissions of Respondent No.1

10. Respondent No. 1, Welspun Energy Private Limited/ Giriraj Renewables Private Limited (now known as, Avaada Energy Private Limited), vide its reply has submitted that the Review Petitioner by way of instant Review Petition is seeking re-hearing or re-agitating the issues which have been already heard and adjudicated upon by the Commission, which is not permissible in review jurisdiction. None of the grounds raised in the pleadings show any error apparent on the face of record within the meaning of Order 47 Rule 1 of the CPC. Respondent No. 1 further submits that it is well settled principle of law that the power of review can be exercised only for a limited purpose of correction of a mistake and not to substitute a view. Therefore it cannot be allowed to be 'an appeal in disguise'. In support of its contentions, Respondent No.1 has relied upon the judgment of the Hon'ble Supreme Court in the case of (i) Parison Devi and Ors. v. Sumitra Devi and Ors. [(1997) 8 SCC 715], (ii) Thungabhadra Industries Limited v. Government of Andhra Pradesh [(1964) 5 SCR 174], (iii) Sow Chandra Kante and Anr. v. Sheikh Habib, [(1975) 1 SCC 674], (iv) Kerala State Electricity Board v. Hitech Electrothermic & Hydropower Ltd. & Ors. [(2005) 6 SCC 651], (v) Kamlesh Verma v. Mayawati and Ors., [(2013) 8 SCC 320] and the judgment of Hon'ble Delhi High Court in the case of H. K. Kapoor v. Union of India and Ors., [122 (2005) DLT 455] and the judgment of Hon'ble High Court of

Allahabad in Satya Prakash Pandey and Ors. v. Dev Brat Mishra, [2011 (85) ALR 818].

11. On the specific grounds raised by the Review Petitioner for review of the Impugned order, Respondent No.1 has submitted as under:

(a) The Impugned order recognizes that the Project of the Respondent No. 1 was delayed on account of the reasons beyond its control and accordingly, the extension of SCoD was allowed by the Commission after considering the provisions of the PPA and the peculiar facts of this case in detail. The Impugned order has been passed after taking into account the principles laid down by the Hon'ble Supreme Court in M.P. Power Management Company Ltd. v. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 157], wherein the Hon'ble Supreme Court had disallowed the termination of PPA when the project was affected due to delay by Government. The Hon'ble Supreme Court in the said judgment had observed that the delay, even though not caused by a force majeure event, was due to unavoidable circumstances and permitted the project to be completed by the developer, subject to levy of penalty charges. The present case is squarely covered by this judgment.

(b) The issue regarding "force majeure like events" and the power of the Commission to issue appropriate directions in such cases was duly considered by the Commission in the Impugned order. The Commission also took into account the impact of Article 3.2.2 of the PPA and has duly considered the issues raised and then balanced the interests of both parties by granting the time extension against penalty payable to SECI, which is reasonable, fair and wholly justified in the facts and circumstances.

(c) Since, the project is situated in the State of Maharashtra, the same was required to be registered in the State. As per letter dated 31.12.2016 issued by the Office of Tehsildar, Dahiwadi, Satara, alongwith Circular No.3118-3142/2016 dated 4.10.2016 issued by Office of District Collector, Satara, registration process at Sub-Registrar Dahiwadi, Satara Circle was on hold due to digitalization. In the meanwhile, the land deals all over the country were delayed due to the scheme of demonetization which was implemented by the Central Government on 8.11.2016 and subsequent shortage of funds thereafter. Due to delay caused by demonetization, the extension for the period from 8.11.2016 till 31.1.2017 had been given to developers by SECI. As the situation could not be avoided by the Respondent No.1, even if it had exercised reasonable care or complied with Prudent Utility Practices, the Commission held it to be a Force Majeure like event. The Impugned order recognizes that the project was affected due to Government delay which was not under the control of the Respondent No.1 and the same has been acknowledged by the State Government itself. Accordingly, the question of notice does not arise in the present case. Since the issue is fully addressed in the Impugned order the Review Petitioner cannot belatedly raise such grounds.

(d) With regard to SECI's contention that Article 4.6.2 of the PPA prohibits any extension of SCOD beyond 10.5.2018, the Respondent No. 1 has submitted that the Impugned order has condoned the time period spent in pursuing the litigation. The project was delayed due to conduct of SECI which prevented the commissioning of the project even though 28 MW out of 100 MW was synchronised with the grid on 16.08.2018 in the presence of official of

Respondent No.2. The Respondent No.1 was constrained to challenge/ initiate action against SECI's conduct before this Commission. As the matter was sub-judice, 25 months' time period does not remain sacrosanct. Moreover, this argument was available to the Review Petitioner before the Commission in Petition No. 95/MP/2017, but was never raised by the Review Petitioner at that stage. The order in Petition No. 95/MP/2017 was reserved on 13.9.2018, however no reference / objection was made based on the Article 4.6.2 of the PPA. It is apparent from the order of the Commission that detailed observations have been made on each and every point of fact and law and on the basis of the same this Commission has been passed the final order.

(e) All the contentions raised on the de-merger aspect by SECI in the instant Review Petition have already been dealt with by the Commission in the Impugned order and do not warrant the exercise of review jurisdiction. It is a settled principle of law that the power of review can be exercised only for a limited purpose of correction of a mistake and not to substitute a view already taken with a new one. A Review Petition cannot be allowed to be "an appeal in disguise".

(f) Out of total 100 MW capacity, 28 MW was installed, synchronized and commissioned. In the Impugned order, the Commission has clearly held that the 'commissioning' shall be as per the PPA. Hence, no fault can be found with the Impugned order on this account as the direction is for commissioning in terms of the PPA.

(g) Termination letter dated 8.5.2017 was issued by SECI during the pendency of the original Petition when the parties were already before the Commission. All the issues raised in the letter dated 8.5.2017 have been fully considered and addressed by the Commission in the Impugned order dated 17.12.2018 and the Respondent No.1 was directed to complete the project. The termination letter dated 8.5.2017 therefore ceases to have any effect.

(h) Respondent No. 1, in terms of the Impugned order, has made substantial payment which has been duly accepted by SECI without any objection. Therefore, SECI's belated attempt to circumvent the Impugned order dated 17.12.2018 is wholly unjustified.

(i) The letter of Respondent No.2, MSEDCL dated 18.1.2019 terminating the Power Supply Agreement, is an event subsequent to the date of Impugned order and it is well settled principle that 'any subsequent event' cannot be brought within the scope of review. In this regard, the Respondent No. 1 has relied upon the judgment of Hon'ble Supreme Court in the case of State of West Bengal v. Kamal Sengupta, [2008 (8) SCC 612]. The conduct of the Respondent No.2 of terminating the PSA vide letter dated 18.1.2019 despite being party to original proceedings, is an attempt to circumvent the order of the Commission and is in the teeth of the Impugned order dated 17.12.2018 wherein the Commission had duly held that the delay is fulfillment of Condition Subsequent and implementation of project was not attributable to the Respondent No. 1.

12. The Respondent No.2, MSEDCL vide its reply has contended that it was following up with the SECI to comply with material obligations of PSA and to provide complete 500 MW power immediately as per the provisions of the PSA. Vide letter

dated 21.2.2018, MSEDCL issued first notice to SECI to comply with material obligations as per PSA. Due to failure of SECI to commission 100 MW capacity under Phase II, Batch III as per PSA, MSEDCL vide letter dated 18.1.2019 cancelled the 100 MW quantum out of 500 MW from the PSA and directed quantum under the PSA to be modified accordingly. Since MSEDCL is the Buying Utility and has already suffered heavy losses, SECI should indemnify MSEDCL as per the provisions of the PSA not only for the damages suffered but also the reduction in the tariff.

Analysis and Decision

13. We have considered the submissions made by the parties in their respective pleadings as well as during the hearings and perused the documents on record. Prior to dealing with the submissions of the parties, it is pertinent to note that Impugned order was passed by two-member Bench of the Commission. While the instant Review Petition filed by SECI was pending for adjudication before the Commission, Respondent No.1 filed Petition No. 125/MP/2019 along with IA No. 63/2019 seeking extension of time for commissioning of balance capacity of 72 MW (out of 100 MW) Solar PV Project in terms of order dated 17.12.2018, which was listed before three-member Bench of the Commission. Since the learned senior counsels for the Parties during the course of proceeding on 16.9.2019 consented to list the Review Petition for hearing before three-member Bench, the instant Review Petition was heard along with Petition No. 125/MP/2019 and IA No. 63/2019 by three-member Bench.

14. Before examining as to whether the contentions of SECI satisfy the grounds for review, it would be pertinent to refer to the legal aspects in this regard.

15. The Commission has the power to review its decision, direction and orders under Section 94(1)(f) of the Electricity Act, 2003, which extracted below:

“Section 94 (Powers of the Appropriate Commission):

(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:-

....

(f) reviewing its decisions, direction and orders; ...”

16. Order 47 Rule 1 of the Civil Procedure Code, 1908, provides for filing of an application for review, which is extracted below:

“94.Application for review of judgment

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”

17. As per under Order 47 Rule 1 of the CPC, an application for review would be maintainable upon the discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of record or for any other sufficient reason.

18. It is noted that parties have placed their reliance on the catena of judgments of the Hon'ble Supreme Courts and various High Courts in support of their contentions on the maintainability of the Review Petition.

19. SECI has relied upon the following judgments of Hon'ble Supreme Court and High Courts in the cases of : (i) Moran Mar Basselios Catholicos and Anr. v. The Most Rev. Mar Poulouse Athanasius and Ors.; [(1995) 1 SCR 520.], (ii) Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, [(1964) 5 SCR 174], (iii) CST v. Pine Chemical Limited, [(1995) 1 SCC 58], (iv) AmarjitKaur v. Harbhajan Singh, [(2003) 10 SCC 288], (v) Board of Control for Cricket in India v. Netaji Cricket Club, [(2005) 4 SCC 741], (vi) Green View Tea and Industries v. Collector, Golaghat, Assam and Anr. [(2004) 4 SCC 122], (vii) Rajender Singh v. Lt. Governor, Andaman and Nicobar Islands and Ors., [(2005) 13 SCC 289] and (viii) Dhanani Shoes Ltd. v. State of Assam and Ors., [2008] 16 VST 228 (Gau)].

20. The Respondent No. 1 has relied upon the following judgments of the Hon'ble Supreme Court and various High Courts in the cases: (i) Parison Devi and Ors. v. Sumitra Devi and Ors., [(1997) 8 SCC 715], (ii) Thungabhadra Industries Limited v. Government of Andhra Pradesh [(1964) 5 SCR 174], (iii) Sow Chandra Kante and Anr. v. Sheikh Habib, [(1975) 1 SCC 674], (iv) Kerala State Electricity Board v. Hitech Electrothermic & Hydropower Ltd. &Ors. [(2005) 6 SCC 651], (v) Kamlesh Verma v. Mayawati and Ors., [(2013) 8 SCC 320], (vi) H. K. Kapoor v. Union of India and Ors., [122 (2005) DLT455], (vii) Satya Prakash Pandey and Ors. v. Dev Brat Mishra, [2011 (85) ALR 818] and (viii) Rajkumar Ramavtar Chourasia v. Mathew Charian Christian, [AIR 1986 Bom 458]; (ix) Lily Thomas v. Union of India [(2000) 6 SCC 224].

21. We have gone through all the judgments relied upon the by the parties with regard to maintainability of the Review Petition. The Hon'ble Supreme Court laid

down the conditions on which a Review Petition can be entertained in the case of Kamlesh Verma v. Mayawati and Ors. [(2013) 8 SCC 320] as under:

“20.1. When the review will be maintainable:

- (i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
- (ii) Mistake or error apparent on the face of the record;*
- (iii) Any other sufficient reason.*

The words “any other sufficient reason” have been interpreted in Chhajju Ram v. Neki[(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2 When the review will not be maintainable:

- (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
- (ii) Minor mistakes of inconsequential import.*
- (iii) Review proceedings cannot be equated with the original hearing of the case.*
- (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
- (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*
- (vi) The mere possibility of two views on the subject cannot be a ground for review.*
- (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.*
- (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
- (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negative.”*

In Lily Thomas v. Union of India [(2000) 6 SCC 224], 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 same subject is not a ground for review.”

In *M/S Goel Ganga Developers India Pvt. Ltd. v. 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 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 review is manifestly distorted, is 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. ”

22. We have also gone through the other judgments cited by the parties where similar principles have been reiterated. Thus, the settled position of law is that the scope of enquiry in a Review Petition is limited and a review is not “an appeal in disguise”. In a review, the court cannot substitute a view already taken by the Commission which is not an apparent mistake with a new one merely because two views on a subject are possible.

23. In the instant Review Petition, the grounds raised by the Review Petitioner for the review of the Impugned order can be broadly categorized under the following heads, namely:

- (a) Non-recognition of “force majeure like events” in Power Purchase Agreement and consequent extension of SCoD.
- (b) Recognition of part-commissioning (28 MW) for capacity less than 50% of the total capacity is contrary to the PPA, RfS and the Guidelines.

- (c) Change in Shareholding Pattern and substitution of Welspun Energy Private Limited with Giriraj Renewable Private Limited.
- (d) Effect of termination letter dated 8.5.2017 issued by SECI ; and
- (e) Subsequent developments

These issues have been dealt with in the succeeding paragraphs.

(a) Non-recognition of “force majeure like events” in Power Purchase Agreement and consequent extension of SCoD.

24. SECI has contended that the PPA specifically gives an exhaustive definition of the term ‘force majeure’ and does not recognize any “force majeure like” event or ‘force majeure akin’ event. According to SECI, it is not permissible to treat any event as force majeure event unless it is covered by the contractual definition and provisions dealing with force majeure. In absence of any force majeure in terms of Article 11.3 of the PPA, it was not permissible to grant extension in SCoD on the grounds of ‘force majeure like event’ or ‘government delay akin to force majeure’. SECI has placed reliance upon the judgment of Hon’ble High Court of Delhi in the case of NTPC Vidyut Vyapar Nigam Limited v. Precision Technik Private Limited, [(2018) SCC Online Delhi 13102] and has contended that force majeure clauses are to be narrowly construed and further the court has no general power to absolve a party from the performance of its part of the contract.

25. SECI has further submitted that for claiming a relief of force majeure event, notice in terms of Article 11.5.2 is mandatory and pre-condition which was not given in the present case. SECI submitted that implication of no such notice being given has not been considered in the Impugned order.

26. SECI has also placed reliance on the judgment of the APTEL in Taxus Infrastructure & Power Project Pvt. Ltd. v. Gujarat Electricity Regulatory Commission

and Ors. and has submitted that to contend that matter being sub-judice is not force majeure event and a ground for extension of SCoD. Further, in terms of Article 4.5.6 and 4.6.2 of the PPA, SCoD could not have been extended beyond 10.5.2018 i.e. 25 months from the effective date even on account of the force majeure events. Accordingly, SECI has submitted that vide the Impugned order, the Commission could not have granted reliefs contrary to specific contractual provisions in the PPA, RfS and Guidelines and has relied upon catena judgments in support of its contentions

27. The Respondent No.1 on the other hand, has submitted that the aforesaid contentions have been duly considered and addressed in the Impugned order and cannot be re-agitated in review. Even if SECI is aggrieved by the decision of the Commission, the view taken in the Impugned order is final and cannot be substituted with a different view. The Respondent No.1 has further submitted that the Impugned order relies on the judgment of the Hon'ble Supreme Court in the case of M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 157], wherein the Hon'ble Supreme Court observed that the delay, even though not caused by a force majeure event, was due to unavoidable circumstances and permitted the project to be completed by the developer, subject to levy of penalty charges. The Respondent No. 1 has submitted that APTEL in its judgment in Appeal No. 115 of 2011 [Reliance Infrastructure vs. MERC &Anr.] has observed that contracts are entered into by the parties to be executed in good faith and for mutual benefits and not for terminating them on one ground or another. The Respondent No.1 has also contended that law cannot be divorced from business realities and has to make business sense to business dealings.

28. We observe that the contentions raised by SECI have already been considered and dealt with by the Commission while passing the Impugned order. In the Impugned order, the Commission had observed and directed as under:

“80. We have examined the matter. Article 3.2.4 and 3.2.5 of the PPA provide as under:

.....

As per the above provision, in case the SPD is not able to fulfill any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent, shall be extended for the period of such Force Majeure event. The Respondent has made detailed submissions in this proceeding to the effect that the PPA stood terminated from 11.11.2016 or at the latest on 1.3.2017, whereas the Petitioner has been seeking permission to continue and comply with the PPA for implementing the Project. The Petitioner has based its claims on delay caused due to digitization of land records stating that the event is akin to force majeure. On the other hand, the Respondent has stated that the Petitioner has not complied with Condition Subsequent activities in stipulated time and that the PPA has been terminated with efflux of time.

81. We have already decided that the Petitioner has, during extended time up to 29.11.2016, complied with two (financial closure and grid connectivity) of the three Conditions Subsequent activities. As regards the third Condition Subsequent activity i.e. clear possession and title of land, we have held that due to events akin to force majeure (government delay), the Petitioner has not been able to fulfill this Condition Subsequent activity.

82. According to the Petitioner, when it is willing and is committed towards execution of the Project and that the delay caused is beyond its control, the Respondent should not be permitted to back out of its contractual obligations by raising capricious grounds. The Petitioner has submitted that the Appellate Tribunal for Electricity in Appeal No. 115 of 2011(Reliance Infrastructure vs. MERC &Anr.) has observed that contracts are entered into by the parties to be executed in good faith and for mutual benefits and not for terminating them on one ground or the other. The Petitioner has further submitted that its case is squarely covered by the judgment of Hon'ble Supreme Court in the case of M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 151] in which the Hon'ble Supreme court held that the termination of the contract is “not fair”. The Petitioner has also placed its reliance on the order dated 11.06.2018 passed by the Maharashtra Electricity Regulatory Commission in Case No. 185 of 2017, wherein in somewhat similar circumstances, the Respondent had initially proceeded to take precipitative action against a solar power developer on account of delay in completing the solar power project. The SPD approached the MERC by filing a petition, which was contested by SECI. Subsequently, the Respondent amicably resolved the dispute/ issue with the SPD by entering into a settlement agreement. The Petitioner has also placed reliance on the judgment given by the Bombay High Court in Mumbai Metropolitan Region Development Authority vs. Unity Infra project Ltd., in which it was observed that law is not divorced from business realities nor can the vision of the Judge who interprets the law be disjointed from the modern necessities to make business sense to business dealings. The Petitioner has submitted that the Commission may allow the present petition and grant additional time of 3 months to commission the balance capacity of the Project.

83. *The Petitioner has relied on judgment of Hon'ble Supreme Court in the case of M.P. Power Management Company Ltd. vs. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 151], The Respondent argued that this judgment of Hon'ble Supreme Court is not squarely applicable in the present case and differentiated the two cases as stated at paragraph 12(f) of this Order. The relevant portion of the judgment is as under:*

"...These circumstances, though not a Force Majeure event, time taken by respondent No.1 in change of location and construction of the plant have to be kept in view for counting the delay. Having invested huge amount in purchasing the land and development of the project at Ashok Nagar district and when the project is in the final stage of commissioning, the termination of the contract is not fair....."

84. *We are of the view that the two basic grounds of this judgment of the Hon'ble Supreme Court are applicable in the present case i.e. a) huge investment has been made in the project and b) it is at an advanced stage of commissioning.*

85. *We have already decided that the period of 249 days i.e. from 4.10.2016 to 9.6.2017 is the delay due to "Government delay akin to Force Majeure" and has been condoned for purposes of complying with Conditions Subsequent activities. We also note that the parties have been before this Commission since 5.5.2017 in order to adjudicate upon the status of the PPA. In the circumstances, the Commission deems it appropriate to direct that the benefit of period when the issue was pending before this Commission should also be extended to the Petitioner to fulfill the Conditions Subsequent requirements."*

29. It is clear from the above that the Impugned order was passed after considering the detailed submissions made by the parties and in the backdrop of the facts and circumstances in the instant case. The Commission in the Impugned order has also taken note of the principles enunciated by the Hon'ble Supreme Court in the case of M.P. Power Management Company Ltd. v. Renew Clean Energy Pvt. Ltd. [(2018) 6 SCC 157] and accordingly, noted that the two basic tenets of this judgment, i.e., (i) huge investment has been made in the project, and (ii) the project is at an advanced stage of commissioning, were squarely applicable in the present case as well. The Impugned order has also recognized the fact that the delay in completion of the project was primarily due to unavoidable circumstances beyond the control of the Respondent No.1, even though they may not strictly fall within the definition of force majeure in terms of the PPA.

30. Based on these factors, the Commission was of the view that the principles laid down by the Hon'ble Supreme Court and in the other judgments as referred above are squarely applicable and termination of the PPA would neither be fair to Respondent No. 1 nor would it be in the interests of the project or the larger national interest. It is on this basis that in the Impugned order, the Commission held that the delay in the present case was beyond the control of the Respondent No. 1 and was caused due to "Government Delay akin to Force Majeure". The Commission resultantly extended the time period for satisfaction of the Conditions Subsequent and for SCoD.

31. The Review Petitioner has placed its reliance on the judgment of the Hon'ble High Court in the case of NTPC Vidyut Vyapar Nigam Ltd. v. Precision Technik Pvt. Ltd. [2018 SCC Online Delhi 13102] and has contended that force majeure clauses are to be narrowly construed and the court has no general power to absolve a party from the performance of its part of the contract is also misplaced. In that case, the Hon'ble Delhi High Court had rejected relief taking into account that the Respondent therein had itself delayed initiating the Route Survey and applying for permission to construct the approach road and did not act with reasonable care. In the present case, the Commission has observed that the delay was beyond the control of the Respondent No. 1 and was not caused on account of lack of care on part of the Respondent No. 1. Accordingly, in the Impugned order, relief was granted on the basis of the principles laid down by the Hon'ble Supreme Court in M.P. Power Management and in consideration of the fact that the delay was occasioned due to Government Delay as evidenced by the letter dated 3.2.2018 issued by Under Secretary, Industry, Energy and Labour Department, Government of Maharashtra wherein the State government has categorically acknowledged the delay caused in

land registration process was caused by ongoing digitization process and also has recommended the extension of the SCoD of the Project by twelve months to MNRE. In view of the same, the Commission had extended the time period for satisfaction of the Conditions Subsequent subject to payment of penalty and further extended the SCoD to enable completion of the project.

32. In this regard, SECI has relied upon the decision of the APTEL in Appeal No. 131 of 2015 in *Taxus Infrastructure & Power v. Gujarat Electricity Regulatory Commission &Ors.* SECI has submitted that matter being sub-judice is not a force majeure event and a ground for extension of SCoD. SECI has further submitted that in terms of Article 4.5.6 read with Article 4.6.2 of the PPA, SCoD could not have been extended beyond 10.5.2018 i.e. being 25 months from the Effective Date of the PPA. In the Impugned order, the Commission took note of the fact that in the Review Petitioner, SECI had itself contended that PPA between the parties stood terminated from 11.11.2016 or latest on 1.3.2017 in terms of notices issued by SECI. Thus, after observing that parties had been before the Commission contesting the status of the PPA since 5.5.2017 and considering the ratio laid down by the Hon'ble Supreme Court in *M.P. Power Management Company Ltd. v. Renew Clean Energy Pvt. Ltd.* [(2018) 6 SCC 157] and readiness of the part capacity (28 MW), the Commission deemed it appropriate to direct that the benefit of period when the issue regarding validity of SECI's termination of the PPA was pending before this Commission should also be extended to Respondent No.1. Accordingly, the Commission extended the time for the period during which the proceedings were pending before this Commission as Respondent No.1 could not be expected to perform the PPA in a situation where SECI's stand was that the PPA stood terminated. SECI's reliance on the decision of the APTEL in Appeal No. 131 of 2015

in *Taxus Infrastructure & Power v. Gujarat Electricity Regulatory Commission &Ors.* is not applicable to this case. In the above case, the issue did not involve the question of termination or validity of PPA and in fact, the procurer therein had already granted the Appellant an extension of the “commissioning date”. Moreover, the litigation period sought to be excluded in that case did not arise out of a purported termination of the PPA, as it does in the present case. However, in the present case, in view of the fact that in the original proceedings, the dispute arising out of SECI’s purported termination of the PPA was pending before this Commission, the benefit of exclusion of the litigation period was given to Respondent No.1 in the Impugned order.

33. In view of the above, we find that the aforesaid contentions raised by SECI in the instant Petition have already been given due consideration in the Impugned order and SECI is seeking to re-agitation the very same issues, which is not permissible in review jurisdiction. It is well settled that in Review Petition it is not permissible to substitute a view already taken with a different view. We do not find any error apparent on the face of the record in the extension of time granted in the impugned order. The decision to extend time was taken after duly considering the provisions of the PPA, the submissions made by the parties and the applicable legal principles.

34. In view of the above, we are unable to agree with the Review Petitioner that there is an error apparent on the face of record. We do not find any manifest error or infirmity in the Impugned order to warrant a review on this ground. Accordingly, review on this aspect is rejected.

(b) Recognition of part-commissioning (28 MW) for capacity less than 50% of the total capacity is contrary to the PPA, RfS and the Guidelines.

35. SECI has submitted that in terms of Article 5 of the PPA, Clause 3.17 of the RfS and guidelines issued by MNRE, even part commissioning is permissible only for minimum 50% of the contracted capacity, whereas the Impugned order directs 28 MW [only 28% of the contracted capacity] as part commissioning of the project. SECI has submitted that this relief has been granted even when no such prayer had been made by the Respondent No.1 at any stage and has paved a way for Respondent No. 1 to claim further extension on the ground that SECI has not recognized the commissioning of 28 MW and issued a certificate to the Bank.

36. *Per contra*, the Respondent No. 1 has argued that out of total 100 MW capacity, 28 MW was installed, synchronized and commissioned w.e.f. 16.4.2018 and power is flowing into the grid of Respondent No.2. It has been further argued that on 9.1.2019, Respondent No. 1 *inter-alia* requested SECI to issue confirmation and commissioning certificate for 28 MW. According to the Respondent No.1, there is no infirmity in the Impugned order and no interference is warranted.

37. We have considered the submissions of the Review Petitioner and the Respondent No. 1. The Commission in the para 86 and 87 of the Impugned order had observed and directed as under:

“86. It is an admitted fact that 28 MW capacity of the Project has been synchronized with the grid w.e.f. 16.4.2018 while balance 72 MW is yet to be commissioned. In fact, w.e.f. 16.4.2018 and till the date when Order in this petition has been reserved, the situation of injecting 28 MW into the grid remained unaltered. Having already commissioned 28 MW, we are satisfied that the Petitioner intends to continue with installation of the balance 72 MW.

87.....Since 28 MW of capacity has been commissioned during pendency of this petition and that we have condoned delay period up to date of issue of this Order, the SCOD for this capacity of 28 MW shall be as per provisions of the PPA assuming that the total period of delay in commissioning is condoned.”

38. The Commission in the above paras merely took note of the admitted facts i.e. 28 MW capacity of the Project has been synchronized with the grid w.e.f. 16.4.2018 and till the date when the order was reserved, the said position of injecting 28 MW into the grid remained unaltered. This fact has not been contested or controverted even during the course of the present review proceedings. On this basis, the Commission had in the Impugned order observed that “*the SCOD for this capacity of 28 MW shall be as per provisions of the PPA assuming that the total period of delay in commissioning is condoned.*” The Impugned order clearly holds that ‘commissioning’ of 28 MW part capacity shall be as per the PPA. In our view, contention of SECI on this account is based on a misconstrued reading of paras 86 to 88 of the Impugned order.

39. In light of the above, there is no error apparent on the face of the record and review of the Impugned order on this ground does not survive.

(c) Change in Shareholding Pattern and substitution of Welspun Energy Private Limited with Giriraj Renewable Private Limited.

40. SECI has submitted that in the Impugned order the Commission has proceeded on the basis that the change in shareholding pattern or assignment of undertaking have taken place by virtue of demerger sanction by NCLT under the Companies Act, 2013. However, the proceedings before the NCLT are voluntary action of Respondent No. 1 and cannot be taken to override the specific contractual provisions of the PPA, RfS and the Guidelines issued by MNRE. In support, SECI has relied upon the judgments of Hon'ble Supreme Court in the cases of (i) General Ratio & Appliances Co. Limited and Ors. v. M A Khader (Dead) by Lrs. [(1986) 2 SCC 656], (ii) Gujarat Bottling Company Limited v. Coco Cola Company Limited, [(1995) 5 SCC 545], (iii) Singer India Limited v. Chander Mohan Chadha&Ors.,

[(2004) 7 SCC 1] and judgment of Hon'ble Delhi High Court in Delhi Towers Ltd. v. G.N.C.T of Delhi, [(2009) 165 DLT 418].

41. Per contra, the Respondent No.1 has submitted that SECI's contentions regarding change in shareholding pattern have been considered and dealt with in detail inter alia in Para Nos. 52 & 53 of Impugned. The Respondent No. 1 has submitted that SECI cannot re-agitate the same issue that has already been considered and dealt with by the Commission. The Review Petition seeking to re-argue the issue amounts to an abuse of process and should not be permitted.

42. We have considered the submissions of the Review Petitioner and the Respondent No. 1. We are in agreement with the submissions of the Respondent No.1 and notice that all the contentions raised by SECI for review of the Impugned order on this ground had already been raised and dealt with by the Commission in para 52 and 53 of the Impugned order. In the Impugned order, the Commission had observed and directed that:

52. From the records, we find that the Petitioner intimated the Respondent of the demerger vide various letters dated 29.11.2016, 28.2.2017, 2.3.2017, 6.3.2017, 24.3.2017 and 15.4.2017. Thus, the Petitioner has not approached the NCLT secretly and has kept the Respondents informed. Except for letter dated 1.3.2017 where the Respondent sought further information and documents, we have not come across any documents where upon being intimated, the Respondent has raised any dispute or raised any objection before the NCLT.

53. The Petitioner has not sought any relief as regards change in shareholding pattern and rather it is the Respondent that has raised this issue. Infact, the issue regarding change of shareholding pattern has been raised by the Respondent for the first time, on 19.5.2017, in the reply to the present petition. The Petitioner has stated that due to internal re-arrangement/ re-structuring of shareholding of the shareholders there is consolidation of shareholding from nine (9) to seven (7) and thereafter to two (2). In view of the fact that a) the process of demerger has been approved through a judicial process by NCLT; b) the Petitioner has informed the Respondent through various correspondences; c) the erstwhile company that signed the PPA i.e. WEPL is not in existence after demerger; d) this change in shareholding resulted from re-organization/ reconstitution of shares and not through transfer of shares; and e) the Resultant Entity i.e. GRPL has been performing functions of erstwhile company subsequent to demerger approved by NCLT and has presently

installed 28 MW, we are not convinced with arguments of the Respondent. More so because of the fact that it has not raised this issue before approaching this Commission nor has opposed the matter in NCLT despite being aware of the matter. We decide accordingly.

66. Per Contra, the Respondent has submitted that the Petitioner voluntarily filed the Demerger Application before NCLT praying for transfer of its business to a third party, viz. M/s GRPL. The Respondent has argued that demerger process is not any automatic process or any "change in law" event which is beyond the control of the Petitioner. It is the Petitioner which has voluntarily opted to file the demerger application despite being aware that such an action would result in breach of its obligations. The Respondent has also placed reliance on the provisions of the Companies Act, 2013, including Section 232 thereof which provides for the application to be filed by any company for "transfer" of its business to another company, by way of the demerger process. For the purpose of ready reference, the relevant extract of Section 232(1) of the Companies Act, 2013 is reproduced as under:-

....

67. The Respondent has submitted that the demerger process requires the meeting of the creditors and members of the company which admittedly did not include the Respondent. By opting to voluntarily transfer its business to third party company with different shareholders, the Petitioner has voluntarily and willfully breached a fundamental obligation under the contract(s) of maintaining its shareholding pattern for a period of atleast 1 year from the COD, including under Clause 3.20(v) of the RfS. Further, even in the case of a Change in Law which is beyond the control of the parties, the PPA stipulates that the parties shall approach this Commission for seeking approval of the Change in Law.

...

71. It is noted that the Petitioner has requested the Respondent to approve the assignment of the PPA in favour of M/s GRPL, However, no decision in this regard has been communicated by the Respondent to the Petitioner and thus a prayer has been sought in the present petition in this regard. The Commission also observes that under the PPA, particularly Article 15.1, the PPA can be assigned subject to mutual agreement between the parties. In the present case, pursuant to the demerger scheme sanctioned by NCLT, the Petitioner has already gone out of existence and M/s GRPL has done substantial work to bring the project to an advanced stage of completion.

72. The Commission is of the view the PPA can be assigned under Article 15.1 taking into account relevant factors, including that the renewable business of the Petitioner has been transferred to M/s GRPL by virtue of operation of law through the demerger sanctioned by NCLT. WEPL has ceased to be in existence qua its renewable business and charge of the Project has been vested in M/s GRPL pursuant NCLT orders. Pursuant to demerger, the entire Project land and consents from the concerned authorities are in the name of M/s GRPL; substantial investment has already been made by M/s GRPL; and the Project is at the advance stage of completion and 28 MW of the project is synchronized with the state Grid through the ultimate beneficiary i.e. MSEDCL."

43. The Commission finds that SECI is only re-agitating the issues that have already been decided by the Commission in the Impugned order after detailed consideration. We are therefore not in agreement with the contention of the Review Petitioner. We find that there is no error apparent on the face of the Impugned order on this ground.

(d) Effect of termination letter dated 8.5.2017 issued by SECI during the course of the original proceedings

44. SECI has submitted that on 8.5.2017, SECI informed the Respondent No.1 regarding, *inter alia*, the non-compliance of the Conditions Subsequent by Respondent No. 1, the PPA executed by the parties has stood terminated. It is relevant to note that the said termination letter dated 8.5.2017 has not been challenged by Respondent No.1 till date. SECI has submitted that the SPD chose not to challenge the said termination letter dated 8.5.2017. Consequently, the SPD cannot be permitted to seek enforcement of the PPA which already stands terminated.

45. *Per contra*, Respondent No.1 has submitted that the letter dated 8.5.2017 whereunder the PPA purportedly stood terminated by efflux of time was issued during the pendency of the original Petition before this Commission. The Respondent No.1 has contended that the Impugned order was passed by the Commission after taking note of SECI's letter dated 8.5.2017.

46. We have considered the submissions of the Review Petitioner and the Respondent No. 1. We do not find any merit in the contentions raised by SECI. The Commission passed the Impugned order after taking into consideration the letter dated 8.5.2017 and the grounds for termination mentioned therein. The Impugned

order deals with the grounds for termination raised in the letter dated 8.5.2017. We are unable to agree with the Review Petitioner that there is an error apparent on the face of the Impugned order. Accordingly, review on this count is rejected.

(e) Subsequent developments

47. In addition to the aforementioned grounds, SECI has also referred to subsequent developments after the date of Impugned order, viz. (i) termination of PSA by MSEDCL vide letter dated 1.2.2019, and (ii) non-completion of the project even within 90 days' extension granted by the Commission in the Impugned order and consequent termination of PPA by SECI on 11.4.2019 for seeking rectification/ review of the Impugned order.

48. *Per contra*, Respondent No.1 has submitted that the subsequent developments cannot be brought within the scope of the Review Petition and has relied upon the judgment of Hon'ble Supreme Court in State of West Bengal v. Kamal Sengupta [2008 (8) SCC 612]. The Respondent No.1 has further submitted that Respondent No. 2's letter dated 18.1.2019 and SECI's letter dated 11.4.2019 are under challenge in Petition No. 125/MP/2019 along with I.A. No. 63/2019 wherein extension of time-period for commissioning of balance capacity has also been sought.

49. We have considered the submissions of the parties. We note that the Hon'ble Supreme Court in State of West Bengal v. Kamal Sen gupta [2008 (8) SCC 612] has held that while considering an application for review, the Court is required to confine its adjudication with reference to material which was available at the time of initial decision. The Hon'ble Supreme Court laid down the following principles regarding the scope of the power of a court or tribunal to review its decisions:

“35. The principles which can be culled out from the above noted judgments are:

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.”

50. In terms of Order 47 Rule 1 of CPC, the only additional evidence that may be considered is material existing at the time of the original proceedings which after the exercise of due diligence was not within knowledge or could not be produced at that time. Therefore, in the present review Petition, the Commission cannot be concerned with or take cognizance of any subsequent developments.

51. The Review Petitioner has relied on the judgments in Board of Control for Cricket in India v. Netaji Cricket Club (2005) 4 SCC 741] and Dhanani Shoes Ltd. v. State of Assam [2008] 16 VST 228 (Gau)] and has submitted that the Court/ Tribunal can take into account any subsequent event when the court/ tribunal finds in light of

the subsequent event that it had committed a mistake in understanding the nature and purport of an undertaking or submissions given by a counsel appearing on behalf of a party. In our view, this principle is not attracted in the present case since we do not find any mistake or error in understanding of the fact or law in the Impugned order.

52. The general rule is that in exercise of review jurisdiction, the occurrence of some subsequent event or development cannot be taken note of for declaring the initial decision as vitiated by an error apparent. We find that none of the exceptions to this rule are made out in the present case. In view of the above, we find no reason to review the Impugned order based on the subsequent events mentioned by the Review Petitioner.

53. The Review Petition No. 2/RP/2019 is disposed of in terms of the above.

Sd/-
(I. S. Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson