CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Review Petition No.1/RP/2022
in
Petition No.156/MP/2014

Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member

Date of order: 13th March, 2022

In the matter of

Review Petition under Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 seeking review of order dated 24.10.2021 passed by this Commission in Petition No. 156/MP/2014 on remand from the Appellate Tribunal's judgment dated 7.6.2021.

And
In the matter of

Adani Power (Mundra) Limited,
Adani Corporate House,
Near Vaishnodevi Circle, Shantigram,
Ahmedabad – 382 421 **...Review Petitioner**

Vs.

1. **Uttar Haryana Bijli Vitran Nigam Limited,**
Shakti Bhawan, Sector 6,
Panchkula,
Haryana – 134 109.

2. **Dakshin Haryana Bijli Vitran Nigam Limited,**
Vidyut Sadan, Vidyut Nagar,
Hisar, Haryana – 120 005. **...Respondents**

Parties Present:

Shri Amit Kapur, Advocate, APMuL
Shri Akshat Jain, Advocate, APMuL
Shri Raghav Malhotra, Advocate, APMuL
Shri M. G. Ramachandran, Sr. Advocate, Haryana Discoms
Shri Shubham Arya, Advocate, Haryana Discoms
Ms. Poorva Saigal, Advocate, Haryana Discoms

ORDER

The Review Petitioner, Adani Power (Mundra) Limited ('APMuL'), has filed the present Petition seeking review of the Commission's order dated 24.10.2021 in Petition No. 156/MP/2014 ('Impugned Order') under Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (hereinafter referred to as 'the Conduct of Business Regulations').

Background

2. APMuL had filed Petition No.156/MP/2014 before the Commission under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Article 13 of the Power Purchase Agreements ('PPAs') dated 7.8.2008 seeking direction to the Respondent 1 and Respondent 2 (collectively referred to as 'the Haryana Discoms') to pay compensation on account of occurrence of Change in Law events affecting APMuL during construction period and operating period and for restoration of APMuL to the same economic position as if these Change in Law events had not occurred. After considering the submissions of the parties, the Commission vide its order dated 6.2.2017 disposed of the said Petition. However, being aggrieved by the said order, AMPuL filed Appeal No.158 of 2017 before the Appellate Tribunal for Electricity ('APTEL') challenging the order to the extent the Commission disallowed APMuL's Change in Law claims viz. (i) increase in Busy Season Surcharge ('BSS') and Development Charge ('DC') on transportation of coal, (ii) increase in Surface Transportation and Sizing Charges of coal, (iii) change in pricing of coal from UHV (useful heat value) to GCV (gross calorific value), (iv) levy of Minimum Alternate Tax on power plants situated in SEZ (Special Economic Zone), and (v) carrying cost. The Respondents, Haryana Discoms had also filed cross-appeal before APTEL bearing Appeal No. 316 of 2017, challenging the order dated

6.2.2017 to the extent the Commission allowed the Change in Law claim of levy of Custom Duty.

3. Both the aforesaid appeals came to be decided by APTEL by judgment dated 7.6.2021. Vide the said judgment dated 7.6.2021, APTEL dismissed the Appeal No. 316 of 2017 filed by the Haryana Discoms. However, APTEL allowed APMuL's claims regarding levy of BSS and DC on transportation of coal and carrying cost. APTEL further directed the Commission to make computation of compensation in respect of the Change in Law events and carrying cost.

4. Pursuant to the aforesaid direction of APTEL, remand proceedings were held and the parties made their respective submissions and furnished the computation in respect of the Change in Law compensation. In the said proceedings, an issue arose with regard to treatment of BSS and DC w.e.f. 15.1.2018. The Haryana Discoms contended that BSS and DC had been abolished w.e.f. 15.1.2018 by the Ministry of Railways and consequently, BSS @ 5% and DC @ 2% factored in the bid by APMuL became nil, resulting into savings to APMuL which must be passed onto the Haryana Discoms under Article 13 (Change in Law) of the PPAs. On the other hand, APMuL contended that BSS and DC which were being levied separately till 14.1.2018 had been subsumed in the basic freight rate w.e.f. 15.1.2018 and, consequently, there had been no change in the cost incurred by APMuL w.e.f. 15.1.2018. Therefore, according to APMuL, the question of refund of such charges does not arise.

5. The Commission, after considering the submissions of the parties, in the impugned order dated 24.10.2021 observed that while the Petitioner requires to be compensated by the Haryana Discoms for Change in Law (i.e. increase in BSS and DC) from the cut-off date (19.11.2008) up to 14.1.2018, it would need to reimburse to

the Haryana Discoms for the same Change in Law (i.e. decrease in BSS and DC) from 5% and 2% respectively to nil. Relevant portion of the said order dated 24.10.2021 is extracted under:

> *"**(i) Treatment of BSS and DC w.e.f. 15.1.2018***
>
> *19. The Haryana Discoms have contended that BSS and DC have been abolished with effect from 15.1.2018 by the Railways. Consequently, BSS at the rate of 5% and DC at the rate of 2% factored in the bid by the Petitioner became NIL. It has been contended that the same has resulted into savings to the Petitioner which must be passed on the Haryana Discoms as change in law under Article 13 of the PPA. The Haryana Discoms have also argued that increase in freight is a commercial decision of the Railways which is not admissible under change in law in terms of the orders of the Commission and judgment of the APTEL.*
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> *20. Per Contra, the Petitioner has contended that BSS and DC have been subsumed in the basic freight with effect from 15.1.2018. Accordingly, the Petitioner has not raised any claim with regards to these charges w.e.f. from 15.1.2018. However, since these charges have been subsumed in the basic freight, there has been no change in the cost incurred by the Petitioner since 15.1.2018. The Petitioner has also submitted that though the question of refund does not arise, however, if it is assumed that Haryana Discoms are entitled to refund w.e.f. 15.1.2018, such refund has to be corresponding to linkage coal supplied by subsidiaries of Coal India Limited.*
>
> *21. Thus, the controversy in the present dispute is whether abolishing/ subsuming of BSS and DC in the basic freight of Railways constitutes change in law in favour of the Haryana Discoms.*
>
> *22. Relevant provisions of Article 13 (dealing with Change in Law) of the PPAs between the Petitioner and the Haryana Discoms is extracted as under:*
>
> *……..*
>
> *24. Therefore, increase as well as decrease in revenues/cost to the seller constitute change in law in terms of the PPAs. Cut-off date i.e. the date, which is seven (7) days prior to the Bid Deadline was 19.11.2008 in case of the PPAs entered into between the Petitioner and the Haryana Discoms. The APTEL has, in Appeal No. 158 of 2017 vide judgment dated 7.6.2021, already held that BSS and DC are events of change in law and that the Petitioner needs to be compensated since BSS and DC have been levied/ increased subsequent to the cut-off date. ……..…….*
>
> *25. Though the Petitioner has not admitted that reduction of BSS and DC to nil constitute change in law, it has also not categorically denied that subsuming/ abolishing of BSS and DC are not change in law events. We note that the Petitioner has submitted that if it is required to refund on this account, such refund to the Haryana Discoms has to be corresponding to linkage coal supplied by subsidiaries of Coal India Limited.*
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> *26. It is the admitted position of the parties that as on cut-off date, BSS was levied @5% and DC was levied @2%. BSS and DC were applied at varying rates up to 14.1.2018 when it was became nil with effect from 15.1.2018. While the Petitioner has contended that BSS and DC have been subsumed in the basic freight and, therefore, it is not required to refund any amount, the Haryana Discoms, on the other hand have contended that BSS and DC have been abolished and that such abolishment is a*

change in law event in the same manner as their introduction/ increase are change in law events.

27. In our view, there is no need to get into technicalities of whether BSS and DC have been abolished (as claimed by the Respondents) or have been subsumed in the basic freight (as claimed by the Petitioner), as the only point required to be considered is whether such levy/ increase/ decrease is covered under Article 13 of the PPAs. In the instant issue, we note that BSS and DC have become nil with effect from 15.1.2018. The relevant extract from the Rates Circular No.1 of 2018 issued vide No. TCR/1078/2015/07 of Indian Railways dated 9.1.2018 is as follows:

> *"1.0 In supersession to Board's Corrigenda to Rates Circular under reference regarding rationalization of Coal and Coke Tariff Structure, the competent authority has decided to rationalize the Coal and Coke Tariff Structure for transportation of Coal and Coke by rail.*
>
> *2.0 The revised Freight Rate Tables for transportation of Coal and Coke by rail are attached herewith.*
>
> *2.1 These Freight Rate Tables for transportation of Coal and Coke by rail shall be applicable throughout the year.*
> *2.2 No Busy Season Surcharge and Development Charge shall be leviable on transportation of Coal and Coke by rail.*
>
> *3.0 These instructions shall come into force with effect from 15.01.2018.*
>
> *4.0 This issues in consultation with Traffic Transportation Directorate and with the concurrence of Finance Directorate of Ministry of Railways.*"

28. From the above-quoted extract of Rates Circular of the Railway Board, it is clear that BSS and DC have not been levied w.e.f. 15.1.2018. It is also noted that vide the same circular, the revised Freight Rate Tables for transportation of Coal and Coke by rail have been issued. Any increase or decrease in the basic freight rate vide that circular or any subsequent circular is captured in the escalation indices notified by the Commission. The Petitioner, if it has quoted escalable component of tariff in its bid, would be getting corresponding increase/ decrease in this component of tariff in terms of the escalation indices.

29. Since BSS and DC were levied @5% and @2% as on cut-off date, they got reduced by 5% and 2% respectively w.e.f. 15.1.2018 (when these became nil) vis-à-vis the rate that prevailed as on cut-off date. In terms of the Article 13 of the PPAs, increase as well as decrease in revenue/ cost constitutes change in law. Therefore, while the Petitioner requires to be compensated by the Haryana Discoms for change in law (i.e. increase in BSS and DC) from cut-off date (19.11.2008) up to 14.1.2018, it would need to reimburse to the Haryana Discoms for the same change in law (i.e. decrease in BSS and DC) from 5% and 2% respectively to nil."

6. Being aggrieved by the aforesaid findings of the Commission requiring APMuL to reimburse the Haryana Discoms for decrease in BSS and DC from 5% and 2% respectively prevailing on the cut-off date to nil, APMuL has filed the present Review Petition.

Submissions of APMuL

7. In support of its plea for review of the Impugned Order, APMuL has mainly submitted the following:

(a) (i) The Impugned Order fails to consider the issue of BSS and DC being subsumed in the basic freight w.e.f. 15.1.2018, which has been conclusively settled by APTEL in judgment dated 6.8.2021 in Appeal Nos. 432 of 2019 and 173 of 2021.

(ii) The Impugned Order fails to consider the submissions of APMuL as recorded at paragraph 15(a) and paragraph 20, wherein it had stated that APMuL has not claimed the impact of BSS and DC w.e.f. 15.1.2018 since these have been subsumed in the basic freight from 15.1.2018.

(iii) The findings at paragraph 27 to paragraph 29 of the Impugned Order constitute an error apparent on the face of record.

(b) APMuL has admittedly not claimed BSS and DC w.e.f. 15.1.2018 and, hence, there cannot be any occasion for direction of refund of these charges. This was the very same issue raised before the APTEL in judgment dated 6.8.2021 wherein the APTEL had dismissed the said contention on behalf of the Bihar Discoms. Since the impact of BSS and DC from 15.1.2018 is not decreased – it is only subsumed in the basic freight, there is no change in income or expenditure warranting invocation of Change in Law.

(c) APMuL relies on the order dated 15.11.2018 passed by the Commission in Petition No.88/MP/2018 to contend that there is no change in the cost to be incurred by APMuL w.e.f. 15.1.2018 since BSS and DC have been subsumed in the basic freight. APMuL's submissions to this effect are recorded in paragraph 15(a) of the Impugned Order. However, the issue i.e. whether BSS and DC were subsumed/ abolished, was not considered by the Commission which proceeded to qualify the alleged decrease in BSS and DC w.e.f. 15.1.2018 as Change in Law event in terms of Article 13 of the PPAs. Since the Commission in the Impugned Order has not considered the submissions/ arguments advanced by APMuL, seeking review of the Impugned Order on account of non-consideration of its submissions/ arguments is the appropriate

course of action. In this regard, reliance is placed on Daman Singh v. State of Punjab, [(1985) 2 SCC 670].

(d) The findings at paragraph 27 of the Impugned Order that there was no need to get into technicalities of whether BSS and DC have been abolished (as claimed by Haryana Discoms) or have been subsumed in basic freight (as claimed by APMuL) w.e.f. 15.1.2018 as the only point required to be considered is whether such levy/ increase/ decrease is covered under Article 13 of the PPAs constitute an error apparent inasmuch as had the Commission considered the APMuL's argument that BSS and DC have been subsumed in basic freight w.e.f. 15.1.2018 as conclusively settled by APTEL vide judgment dated 6.8.2021, it would have become evident that there is no change in the expenditure to be incurred by APMuL and consequently, the question of refund does not arise.

(e) Paragraph 28 of the Impugned Order erroneously holds that APMuL, if it has quoted escalable component of tariff in its bid, would be getting corresponding increase/ decrease in this component of tariff in terms of escalation indices as admittedly, the Haryana Discoms had elected to procure the quantum of power through non-escalable tariff stream since the same provided certainty of tariff for next 25 years which the escalable tariff would not have provided. Thus, having exercised its option to select the bid based on non-escalable tariff, Haryana Discoms cannot claim contrary to the disadvantage of APMuL.

(f) The findings at paragraph 29 of the Impugned Order that since BSS and DC were levied @ 5% and @ 2% on cut-off date and that they got reduced by 5% and 2% respectively w.e.f. 15.1.2018 (when these became nil) vis-à-vis the rate that prevailed as on cut-off date, APMuL needs to reimburse to Haryana Discoms for the same Change in Law (i.e. decrease in BSS and DC) from 5% and 2% respectively to nil is also erroneous as BSS and DC which was being levied separately, has now been subsumed in the basic freight w.e.f. 15.1.2018 and, therefore, insofar as the cost to be incurred by APMuL is concerned, there has been no change w.e.f. 15.1.2018. The impact of BSS and DC from 15.1.2018 has not decreased – it has only been subsumed in the

basic freight and there is no change in income or expenditure warranting invocation of Change in Law.

8. The matter was heard 'on admission' through virtual hearing on 24.2.2022. During the course of hearing, learned counsel for AMPuL reiterated the grounds made in the Review Petition. Learned counsel argued that the Impugned Order failed to consider the submissions of APMuL that it has not claimed the impact of BSS and DC w.e.f. 15.1.2018 since these have been subsumed in the basic freight rate from 15.1.2018. Learned counsel placed emphasis on the judgment of the APTEL dated 6.8.2021 in the Appeal Nos. 423 of 2019 and 173 of 2021 and submitted that issue regarding BSS and DC being subsumed in basic freight w.e.f. 15.1.2018 has been conclusively settled in the said judgment and, hence, there cannot be any occasion for direction of refund of these charges as there is no change in income or expenditure warranting invocation of Change in Law.

9. *Per contra,* learned senior counsel for the Respondents, Haryana Discoms objected to the admissibility of the Review Petition and submitted that APMuL's reliance on the judgment of APTEL dated 6.8.2021 is misplaced in the present case as in the said judgment, the APTEL has categorically recorded that the generator therein had been passing on the benefits of stoppage of levy of BSS and DC with effect from 15.1.2018 at paragraph 154 and paragraph 156 of the said judgment. Hence, the said judgment is not applicable to the present case. Learned senior counsel further submitted that distinction between the basic freight of Railways and charges to be paid on account of Change in Law events has already been recognized by the Commission and APTEL in various decisions. If any event leading to increase/ decrease in costs falls under the Change in Law, the impact thereof has to be considered and passed on under Change in Law provisions. However, the

increase/decrease in basic freight rate of railways has been held to be outside the purview of Change in Law. Learned senior counsel added that BSS and DC have been abolished w.e.f. 15.1.2018 by the Railways and consequently, BSS @ 5% and DC @ 2% prevailing as on the bid cut-off date and factored in the bid by APMuL became nil, resulting into savings to APMuL, which has rightly been passed onto the Haryana Discoms vide Impugned Order as the Change in Law under Article 13 of the PPAs. Accordingly, the present Review Petition deserves to be rejected.

10. *In rebuttal*, learned counsel for APMuL submitted that at paragraph 154 of the APTEL judgment dated 6.8.2021, it has been observed that no amount had been claimed by the generator therein w.e.f. 15.1.2018. Similar statement has also been made by APMuL that it has not been claiming any amount under BSS and DC w.e.f. 15.1.2018. Learned counsel further emphasised that the Haryana Discoms, on their own volition, had elected to procure the quantum of power through non-escalable tariff stream and, thus, the escalation indices notified by the Commission are not applicable to AMPuL which would otherwise cover the increase in basic freight rate. Therefore, insofar as the cost to be incurred by APMuL is concerned, there has been no change w.e.f. 15.1.2018, which would warrant the invocation of Change in Law.

Analysis and Decision

11. We have considered the submissions made by learned counsel for the Review Petitioner, APMuL and learned senior counsel for the Respondents, Haryana Discoms. Accordingly, we proceed to consider whether any case for review has been made out by APMuL in terms of Order 47 Rule 1 of the Code of Civil Procedure, 1908 ('CPC') read with Regulation 103 of the Conduct of Business Regulations.

Under 47 Rule 1 of the CPC, a person aggrieved by order of a Court can file for review on the following grounds, if no appeal against the said order has been filed:

(a) Discovery of new and important matter of 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.

(b) On account of some mistake or error apparent on the face of record; and

(c) For any other sufficient reason.

In light of the above provisions, we proceed to consider the grounds raised in the Review Petition for review of the impugned order dated 24.10.2021 in Petition No. 156/MP/2014.

12. The Review Petitioner, APMuL has contended that the Impugned Order deserves to the reviewed as it does not consider the submissions made by APMuL that BSS and DC have been subsumed in the basic freight rate w.e.f. 15.1.2018 and that there is no change in the cost to be incurred by APMuL. It has been submitted by the Review Petitioner that had the Commission considered the aforesaid submissions/ arguments advanced by APMuL, it would have become evident that there is no change in expenditure to be incurred by APMuL w.e.f. 15.1.2018 warranting invocation of Change in Law. APMuL has also placed emphasis on the judgment of APTEL dated 6.8.2021 in Appeal No. 423 of 2019 and Appeal No. 173 of 2021 to contend that issue regarding BSS and DC being subsumed in the basic freight w.e.f. 15.1.2018 has been conclusively settled by APTEL in the said judgment.

13. We have considered the submissions made by APMuL. At the outset, we observe that the contention of APMuL that the submissions/ arguments advanced by

it had not been considered by the Commission in the Impugned Order is entirely misplaced. In the analysis part of the Impugned Order at paragraph 20 as already quoted above, all the contentions of APMuL - that BSS and DC have been subsumed in the basic freight w.e.f. 15.1.2018; that it had not raised any claims with regard to these charges thereof; that there has been no change in the cost incurred by it since 15.1.2018 and, therefore, the question of refund does not arise, etc. have been taken note of. It is only after considering the submissions made by both the parties and examining the provisions of Article 13 of the PPAs that the Commission observed in Impugned Order that there is no need to get into technicalities of whether BSS and DC have been abolished (as claimed by Haryana Discoms) or have been subsumed in the basic freight rate (as claimed by APMuL) and that the only point required to be considered was whether such levy/ increase/ decrease is covered under Article 13 of the PPAs.

14. The Commission in the Impugned Order had also examined the Rate Circular No.1 of 2018 of India Railways dated 9.1.2018 and observed that BSS and DC have not been levied w.e.f. 15.1.2018. Further, it has also been observed in the Impugned Order that revision in the freight rate table for transportation of coal and coke by the Railways vide said circular gets captured by the escalation indices notified by the Commission and that if APMuL had quoted the escalable component of tariff in its bid, it would be getting the corresponding increase/ decrease in this component of tariff in terms of escalation indices.

15. In view of the above, the Commission in the Impugned Order observed that BSS and DC which were levied @5% and @2% respectively as on the cut-off date and, subsequently, got reduced by 5% and 2% respectively w.e.f. 15.1.2018 vis-à-vis

the rate prevailing as on cut-off date. Accordingly, it was held that decrease in costs on account of reduction of BSS and DC would also constitute an event of Change in Law in terms of Article 13 of PPAs and APMuL would need to be reimbursed to the Haryana Discoms for Change in Law i.e. decrease increase in BSS and DC from 5% and 2% respectively to nil. The Commission having not acceded to the submissions/ arguments advanced by APMuL therein cannot be construed as non-consideration of its submissions and thereby constituting a 'sufficient cause' i.e. ground for review of the Impugned Order.

16. APMuL has further referred to the judgment of APTEL dated 6.8.2021 in the Appeal No. 423 of 2019 and Appeal No. 173 of 2021 to contend that issue regarding BSS and DC being subsumed in the basic freight w.e.f. 15.1.2018 has been conclusively settled by APTEL and that the similar contentions raised by the Bihar Discoms therein has been dismissed by the APTEL. *Per contra*, the Haryana Discoms have contended that the reliance on the aforesaid judgment is misplaced as, in the said judgment, it has been observed that the generator therein had been passing on the benefits of stoppage of levy of BSS and DC with effect from 15.1.2018.

17. We have considered the submissions made by the parties. At the outset, we observe that the aforesaid judgment dated 6.8.2021 of the APTEL had neither been relied upon nor referred to by APMuL during the remand proceedings including during the course of hearing on 27.9.2021. Reliance has been placed for first time only in the present review proceedings. Further, the ground which APMuL intends to press upon on the basis of the said judgment i.e. issue regarding BSS and DC being

subsumed in the basic freight w.e.f. 15.1.2018, has already been considered and appropriately dealt with by the Commission in the Impugned Order.

18. The relevant extract of the said judgment of the APTEL relied upon by APMuL is reproduced as under:

> "*150. Appellant in this Appeal – Bihar Holding Company's contention seems to be that since increase in the Busy Season Surcharge and also Development Surcharge is a change law, equally it should be treated as change in law whenever said Busy Season Surcharge and Development Surcharge are decreased. In this context, learned senior counsel Mr. M. G. Ramachandran submits that in the Remand Judgment, this Tribunal considered the increase for the period between 01.09.2014 to 14.01.2018, but has not considered the decrease and even to zero, since with effect from 15.01.2018 no such Busy Season Surcharge and Development Surcharge discontinued since they were made as part of the Dynamic Pricing Policy of the Railways. Except for certain period, these two surcharges were discontinued. Therefore, there has to be a specific direction i.e., Busy Season Surcharge and Development Surcharge when they are discontinued, the said benefit policy amounts to change law and must be extended to the Appellant Bihar Holding Company.*
>
> *151. The Appellant Bihar Holding Company further contends that the Central Commission while considering the matter after remand, though allowed compensation for the increase in the Busy Season Surcharge and Development Surcharge for the period effective from 01.09.2014, but with effect from 15.01.2018, the CERC opined that there is no levy of Busy Season Surcharge and Development Surcharge. Therefore, the claim for increase is only until 14.01.2018.*
>
> *152. According to Bihar Holding Company, it was not justified on the part of the Commission not to consider that the consequence of abolition/reduction from 15.01.2018 as a change in law benefit to the Bihar Holding Company. They placed reliance on Article 10.1.1 of PPA to point out that change in law means occurrence of any of the events referred to therein. Therefore, according to the Appellant, even the decrease/abolition/ reduction of such surcharge ought to have been considered. This Tribunal in the Remand Judgment at Para 36 specifically opined that it amounts to change in law whenever there is escalation of price leading to increase in base price, since it does not cover increase in taxes and duties. Therefore, according to Appellant, if GMR is getting benefit of escalation for increase in any railway freight, the Appellant Bihar Holding Company is entitled to get adjustment of decrease in Busy Season Surcharge and Development Surcharge. Therefore, they seek intervention of this Tribunal so far as the opinion of CERC on this aspect.*
>
> *153. As against these arguments of Bihar Holding Company, the Respondent GKEL contends that the opinion of Central Commission on this issue that such surcharges would be liable as change in law events, question of any additional benefit falling to the GKEL would not arise even otherwise. They further contend that these charges were subsumed in the basic freight of Railways and the same gets accounted for through Escalation Indices which is effective from 15.01.2018. Therefore, according to GKEL, these charges cannot be claimed as change in law any more from 15.01.2018. Therefore, according to them, there is no justification in the claim of the Appellant Bihar Holding Company.*
>
> *154. Without prejudice to their rights, GKEL further contends that it has been passing on the benefit of stoppage of levy of the above two surcharges with effect from*

15.01.2018. In other words, no amount was claimed under these Heads. This is in consonance with the impugned order, since the Commission said that GKEL is entitled for such charges up to 14.01.2018. Therefore, GKEL contends that this argument of the Appellant Holding Company deserves to be rejected.

155. On perusal of the impugned order and so also the Remand Judgment, we note the following:

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156. From reading of the above relevant paragraphs of Remand Judgment and also the impugned order pertaining to these issues, what we notice is that in Appeal No. 193 of 2017, the Appellant claimed these two surcharges when they became change in law events, since they were not part of the basic price on cut-off date. Even otherwise we note that from 15.01.2018, these charges are specifically held not to be collected. It is not the case of the Appellant Bihar Holding Company that in spite of this direction, the GKEL is raising invoices claiming these amounts. On the other hand, GKEL specifically contends that from 15.01.2018 i.e., subsequent to reduction/abolition of these charges, the benefit is passed on to Bihar Discoms. They have explained how said benefit is passed on, as under:

"Benefit passed to Bihar under the head	*For period Jan'18 to Dec' 19 (in Rs. Crores)*	*For period Jan' 20 to Dec'20 (in Rs. Crores)*
BSS	*(2.74)*	*(1.51)*
DS	*(1.15)*	*(0.75)*
Total	*(3.89)*	*(2.26)*

157. In light of the above discussion, we are of the opinion that so far as opinion of the CERC in respect of Busy Season Surcharge and Development Surcharge, the Appellant Bihar Holding Company's arguments cannot be sustained."

19. Perusal of the aforesaid judgment reveals that the generator i.e. GKEL has been passing the benefits to the Procurer therein w.e.f. 15.1.2018 subsequent to reduction/ abolition of BSS and DC. Therefore, as rightly pointed out by the Respondents, the Haryana Discoms, the said judgment does come to any aid of APMuL. If the benefits of reduction of BSS and DC had not been passed on to the Procurer(s) by GKEL, it would have amounted to taking double benefits inasmuch as BSS and DC prevailing as on cut-off date would have continued to be factored into non-escalable component of energy charges while at the same time it would have also been recovered through the escalable component of energy charges on account of increase/ revision in the basic freight rate w.e.f. 15.1.2018.

20. However, APMuL has contended that the terms and conditions of the bid called out by Haryana Discoms were such that Haryana Discoms could select any tariff stream - escalable or non-escalable - for procurement of power. And the Haryana Discoms admittedly selected to procure power through non-escalable tariff stream and, thus, having exercised the option to procure power through non-escalable tariff stream, the Haryana Discoms cannot now use the same to the disadvantage of APMuL. APMuL has contended that the selected tariff stream being non-escalable, the escalation indices notified by the Commission are not applicable to take into account the revision in the basic freight rate. Therefore, in so far as the cost to be incurred by APMuL is concerned, there has been no change w.e.f. 15.1.2018 as the impact of BSS and DC from 15.1.2018 has been subsumed in the basic fright rate and APMuL not being compensated for increased basic freight rate through the escalation indices notified by the Commission is put in an adverse economic position.

21. We have considered the submissions made by APMuL. In our view, APMuL was fully aware of the terms and conditions of the bid documents and it chose to submit its bid based on the non-escalable tariff. Thus, it is the Review Petitioner which took the risk by quoting non-escalable tariff. Therefore, having quoted and having been selected as the successful bidder on the basis of non-escalable tariff, it is now not open to APMuL to raise the issue with regard to escalation indices being not applicable. Admittedly, increase or decrease in the basic freight rate is outside the purview of Change in Law under the PPA. Further, any increase in cost on account of increase in freight rate cannot be passed on to the procurers, if the bid is premised on non-escalable tariff. Therefore, any increase in basic freight rate vide Railway Circular dated 9.1.2018 remains outside the purview of Change in Law

under the PPA and also cannot be claimed as bid was based on the non-escalable tariff. At the same time, as has been observed in the Impugned Order, the impact of reduction of BSS and DC needs to be reimbursed to the procurers under Change in Law (Article 13) provisions of the PPA. Therefore, the ground for review of the Impugned Order that there has been no reduction in the cost to be incurred by APMuL since BSS and DC have been subsumed in the basic freight rate and that the escalation indices notified by the Commission are not applicable deserve to be rejected.

22. We also note that Article 13.2 of the PPA provides as under:

> ***"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.*
> ---
> *b)* ***Operation Period***
> *As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law."*

23. The Review Petitioner has also submitted that it had only claimed impact of change in law up to 14.1.2018 and that there was no occasion for the Commission to decide the same with effect from 15.1.2018. We note that the clause of PPA (quoted in paragraph 22 above) related to change in law provides that "*the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission"*. Therefore, the Commission is required to determine the compensation as well as the effective date for such compensation. It is not open to the Review Petitioner to claim compensation for the period when there is increase in cost and not to pass on the benefit to the

Respondents when there is decrease in cost. We, therefore, reject this contention of the Review Petitioner.

24. It is a well settled that a review petition has a limited purpose and cannot be allowed to be an appeal in disguise. An error which is not self-evident and has to be detected by process of reasoning can hardly be said to be error apparent on the face of record for the Court to exercise its power to review under Order 47 Rule 1 of CPC. In exercise of the jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for erroneous decision to be reheard and corrected. It is also well settled that the power of review cannot be exercised to substitute a view. Relevant extracts of some of the judgments of the Hon`ble Supreme Court in this regard are as under:

(a) In **Lily Thomas & Ors. v. Union of India & Ors. [(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 subject is not a ground for review…."*

(b) In **Union of India v. Sandur Manganese and Iron Ores Limited & others {(2013) 8 SCC 337}**, the Hon'ble Supreme Court has 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 judgment 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."*

25. In view of the foregoing observations, we are of the view that no grounds for review have been made out by the Review Petitioner, APMuL for reviewing the

Impugned Order dated 24.10.2021 in Petition No. 156/MP/2014 and therefore, the present Review Petition deserves to be rejected.

26. The Review Petition No. 1/RP/2022 is disposed of in terms of the above.

Sd/-	sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S. Jha)**	**(P.K. Pujari)**
Member	**Member**	**Member**	**Chairperson**