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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on 04.01.2018

+ **FAO 303/2003 & C.M. APPL. 38117/2016**

POWER GRID CORPN.OF INDIA LTD. Appellant

Through: Mr. S.B. Upadhyay, Senior Advocate
with Ms. Anisha Upadhyay, Mr.
Nishant Kumar and Mr. Pawan
Upadhyay, Advocates.

Versus

KARNATAKA POWER TRANS. CORP. LTD. Respondent

Through: Ms. Swapnil Seshadri, Advocate.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. The appellant seeks review of the order dated 06.02.2003 passed in Review Petition No. 97/2002 by the Central Electricity Regulatory Commission (for short 'Commission'), which had reduced its claim of Interest During Construction ('IDC') from Rs. 129.14 crores to Rs. 117.19 crores. The reason for dismissing the petitioner's/appellant's review petition was recorded as under:

"8. We have considered the rival contentions. Without expressing any option on sufficiency or justification for the reasons placed on record in the review petition to explain the delay in execution of project, it is necessary for us to take a view whether or not there is proper justification for not filing the explanation during pendency of the petition. The petitioner, vide order 19.9.2001 in Petition No.9/1999 was asked to explain the reasons for time over run, if any, in

execution of the project. In the affidavit filed before the Commission on 8.2.2002, the petitioner took a stand that there was no time over run and the different elements of the project were energised and commissioned by 2.3.1999, though in the same affidavit it was stated that the date of commercial operation of HVDC system was 1.9.1999. In the review petition, the petitioner admits the factum of delay and has furnished the reasons in support thereof as has been noticed above and has taken a stand which is at variance with that taken earlier. The right of review is possible only on limited grounds mentioned in order 47, Rule 1 of the code of Civil Procedure (CPC). In our opinion, the grounds for review now furnished by the petitioner are covered under the statutory prescription. The Commission in its order dated 1.1.2003 in Review Petition No. 102/2002 has already taken a view that for the purpose of filing of petition for approval of tariff before the Commission, the different departments of the petitioner company cannot be considered entities separate from the petitioner. Therefore, there is no merit in the submission of the petitioner that the new evidence produced explaining the delay in execution of the project could not be produced by the petitioner after exercise of "due diligence."

2. Mr. S. B. Upadhyay, the learned Senior Counsel for the appellant contends that the Commission erred in taking a restrictive view of its power of review in the context of **Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999**, which reads as under:-

*“103. Review of the decisions, directions, and orders-
(1) The Commission may at any time, on its own motion, or on the application of any of the person or parties concerned,*

within 60 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.

(2) Any application for such review shall be filed in the same manner as a petition under Chapter II of these regulations."

3. He also contends that under the said Regulation, the Commission is not governed by the Rules of the Code of Civil Procedure, 1908 ('CPC'). Since the Electricity Regulatory Commissions Act, 1998 alongwith the eponymous Rules is a complete Code in itself, therefore, the Commission ought to have considered the documents and the grounds made out in the review petition, before arriving at a decision. He relies upon the following two judgments of the Supreme Court to contend that the expression "*pass such order as it thinks fit*" should be used to ensure complete justice. The judgments are:-

(i) **Arbind Kumar Singh vs. Nand Kishore Prasad and another** AIR 1968 Supreme Court 1227, which held:

"8. Finally, it was urged that the Minister of Transport acted illegally in taking into account evidence which was not on the record of the Regional Transport Authority, and alternatively, that the Minister violated the fundamental rules of natural justice in basing his judgment upon a document received from the Deputy Commissioner of Commercial Taxes, intimating that the transport tax was due by the appellant without bringing it to the notice of the appellant and calling for an explanation. Section 64-A of the Motor Vehicles Act, 1939, as amended by Bihar Act 17 of 1950 authorises the State Government to call for, in the course of any proceedings taken under the Chapter, from any authority

or officer subordinate to it, the records of such proceedings, and after examining such records pass such order as it thinks fit. The expression "pass such order as it thinks fit" is not restricted to the passing of orders which are final in character. If for the purposes of doing complete justice between the parties, the authority who hears the revision petition is satisfied that it is necessary to call for additional evidence, he may call for such evidence. There, is no bar in the Act or the rules against an appellate or the revising authority taking into consideration additional evidence brought on the record, if the authority requires additional evidence to be brought on the record or allows it to be brought on the record to do complete justice between the parties”.

(ii) ***Babulal Nagar and others vs. Shree Synthetics Ltd. and others*** AIR 1984 Supreme Court 1164, which held:

“16-17 Section 66(1) of the Act provides that the Industrial Court, omitting the portion not relevant for the present purpose, may call for and examine the record of such case and pass order in reference thereto as it thinks fit. If the Industrial Court has the jurisdiction to pass any order in reference to a case called for by it as it thinks fit, obviously it can come to a conclusion on the same set of facts different from the one to which the Labour Court had arrived. It was however urged that this jurisdiction of wide amplitude has been cut down by the proviso which provides that the Industrial Court shall not vary or reverse any order of the Labour Court under Sec. 66(1) unless-(i) it is satisfied that the Labour Court has-(a) exercised jurisdiction not vested in it by law; or (b) failed to exercise a jurisdiction so vested; or (c) acted in exercise of its jurisdiction illegally or with material irregularity. It was urged that these clauses so circumscribe and cut down the jurisdiction of the Industrial

Court under Sec. 66 as to be on par with Sec. 115 of the Code of Civil Procedure. The main part of Sec. 61 clearly spells out the jurisdiction of the Industrial Court to pass any order in reference to the case brought before it as it thinks fit. The expression 'as it thinks fit' confers a very wide jurisdiction enabling it to take an entirely different view on the same set of facts. The expression 'as it thinks fit' has the same connotation as unless context otherwise indicates, 'as he deems fit' and the latter expression was interpreted by this Court in Raja Ram Mahadev Paranjyape v. Aba Maruti Mali, 1962 Supp (1) SCR 739 : (AIR 1962 SC 753)) to mean to make an order in terms of the statute, an order which would give effect to a right which the Act has elsewhere conferred. Is this jurisdiction so circumscribed as to bring it on par with Sec. 115 of the, Code of Civil Procedure? Proviso does cut down the ambit of the main provision but it cannot be interpreted to denude the main provision of any efficacy and reduce it to a paper provision. Both must be so interpreted as to permit interference which if not undertaken there would be miscarriage of justice. Sub-clause (c) of the first proviso to Sec. 66(1) will permit the Industrial Court to interfere with the order made by the Labour Court, if the Labour Court has acted with material irregularity in disposal of the dispute before it. If the finding recorded by the Labour court is such to which no reasonable man can arrive, obviously, the Industrial Court in exercise of its revisional jurisdiction would be entitled to interfere with the same even if patent jurisdictional error is not pointed out.”

4. The learned Senior Counsel further submits that although the appellant had claimed an amount of Rs.129.14 crores in the original petition for fixation of tariff, it could always adduce relevant material in support of its case. He submits that the reason why some relevant documents could not

be adduced with the original petition was that they were not readily available with the petitioner at an earlier stage. Therefore, even if these documents are brought on record at the review stage, they should be considered, especially since they relate to a relief sought in the original petition. He further contends that if the IDC is allowed, it would not cause any adverse financial effect to the respondent because ultimately the money would be recovered by the latter through the tariff charges that may be fixed.

5. Refuting the aforesaid contentions, the learned counsel for the respondent contends that it is not a question of recovery of the IDC or other amounts, but of the justification of its grant in the first case. She submits that a review would be permissible only under section 12 of the Electricity Regulatory Commissions Act, 1998, which reads as under:-

“12. The Central Commission, shall, for the purposes of any inquiry or proceedings under this Act have the powers as are vested in a civil court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:-

- (a) the summoning and enforcing the attendance of any witness and examining him on oath;*
- (b) the discovery and production of any document or other material object producible as evidence;*
- (c) the reception of evidence on affidavits;*
- (d) the requisition of any public record;*
- (e) the issue of commission for examination of witnesses;*
- (f) review its decisions, directions and orders;*
- (g) any other matter which may be prescribed.”*

6. The aforesaid statutory provision limits the review petition in terms of the CPC i.e. Order 47 Rule 1 which reads as under:-

“1. 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 which 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

[441] [Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.]”

7. According to the learned counsel for the respondent, the IDC could be claimed only when there was “time over-run” or a delay in commission of the project due to extraneous reasons, but a case for “time over-run” was never made out, hence there was no cause for grant of the claim of IDC. She refers to para 8 of the original petition for fixation of tariff filed by the appellant, which reads as under:-

“8. As per the investment approval, Jeypore– Gazuwaka HVDC system was to be commissioned within 48 months from the date of investment approval. As the investment approval was accorded on 21st February, 1995, the project was to be completed by 21st February 1999. One circuit of Jeypore-Gazuwaka line was test charged on 18.6.1998 and the 400 KV bus at Gazuwaka 400 KV substation was energized by passing the HVDC system through ERS. Hence the system was available for transfer of power well within the project completion schedule. The other key dates in the project completion are as below.

- (a) Energization of HVDC converter transformers on SR Side : 02.01.1999*
- (b) Test charging of other circuit of Jeypore - Gazuwaka Line. : 02.03.1999*
- (c) Energization of HVDC converter transformers on the Eastern region side. : 02.03.1999*
- (d) Date of commercial operation of the HVDC system. : 01.09.1999*

It may be seen from the above that both the circuits of Jeypore-Gazuwaka Line and HVDC converter transformers on southern and eastern region side were energized and commissioned by 02.03.1999. As such there is no time overrun.”

8. Keeping this in mind, the tariff was fixed vide order dated 03.06.2002 for the following reason:-

“10. We have considered the submissions made on behalf of the parties. The amount reflected in the techno-economic clearance given by CEA on 26.9.1989 is at constant prices. The construction on the project had commenced after investment approval during February 1995. During the period from techno-economic clearance given by CEA and the

investment approval by Ministry of Power, there has been general inflation which needs to be considered. None of the respondents have come out with any specific items of excess cost and the observations made on their behalf are of general nature. Therefore, the estimated completion cost of Rs.642.66 crores, including an IDC of Rs 129.14 crores shall be considered for the purpose of calculation of tariff. However, for the present petition, expenditure of Rs.641.63 crores incurred upto 31.3.2001 that is the end of present tariff period shall be considered on the question of delay in execution of the project. We are satisfied that the petitioner has not been able to explain the delay of five months that is upto 1.8.1999. In view of this, we direct that pro rata reduction in IDC from the expenditure incurred upto 31.3.2001 shall be made. The reduction works out to Rs. 11.95 crores. Which shall be distributed on pro rata basis towards reduction in the equity and loan availed to keep debt-equity ratio uncharged. The reduction works out to Rs. 11.95 crores, which shall be distributed on pro rata basis towards reduction in the equity and loan availed to keep debt-equity ratio uncharged. In regard to the issues raised by respondent No.7 (WBSEB) suffice it to state that these issues are extraneous to the present proceedings since the matters raised are matters of policy. Whereas in the present proceedings we are concerned with determination of tariff based on terms and conditions notified by Ministry of Power. The Respondent has not pointed out anything to show that the petitioner's claim is outside the norms notified by Ministry of Power. We now specifically deal with the issue of financing pattern raised on behalf of TNEB. As provided in Ministry of Power notification dated 16.12.1997, the capital expenditure of the transmission system shall be financed as per the approved financial package set out in the techno-economic clearance has been placed on

record by the petitioner. The manner of financing of the project cost has not been incorporated in the techni-conomic clearance. Therefore, for the purpose of tariff we allow the actual debt and equity employed by the petitioner for financing the project.”

9. From the aforesaid narration, what emanates is that, the appellant in the first instance was sanguine that there was no time over-run as otherwise, without justifiable delay, it ran the risk of some liability to the respondent as well as the loss of goodwill. But simultaneously, it sought to maximise its returns from the project including what it perceived as interest charges for the delay. However, since the claim was not supported by documents or other evidence, the claim for Rs.11.95 crores towards IDC was logically disallowed. In the review petition, an entirely new case has been set up contrary to the original petition wherein no such delay was admitted or suggested by the appellant/petitioner. The process of review is a re-look at what existed, so as to remove any anomalies in the decision as a result of having missed out on some of the material that existed on the record. It cannot be an exercise of reassessing the case on the basis of new material, which entirely changes the earlier stance. It would tantamount to a new proceeding, which is not permissible under law. The documents adduced with the review petition were always within the reach and knowledge of the appellant. They chose not to gather and adduce them to the original petition. Resultantly, their claim being unsubstantiated was disallowed. The sanguinity of their position about meeting timelines, led to the obvious lack of diligence.

10. The law on review is well settled. The appellant has not shown any error apparent on the face of the record, nor has it shown how it was prevented from procuring and bringing on record, the documents adduced in the review petition. Therefore, the impugned order justly concluded what it did.

11. The Court is of the view that the reasons for dismissal cannot be faulted with since the appellant itself had repeatedly said that there was no time over run, which is also reiterated in the additional affidavit dated 08.02.2002, filed on its behalf.

12. In the aforesaid circumstance, the Court finds no reason to interfere with the impugned order. Accordingly, the appeal alongwith the application is dismissed.

NAJMI WAZIRI, J.

JANUARY 04, 2018

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