ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4th & 5th Floors, Singareni Bhavan, Red Hills, Hyderabad 500 004

R.P. No.1 of 2011
in
I.A. No.8 of 2011
in
O.P. No.23 of 2005

Dated 23-04-2013

Present
Sri A.Raghotham Rao, Chairman
Sri C.R.Sekhar Reddy, Member

Between
M/s. Lanco Kondapalli Power Pvt. Ltd
Plot No. 4, Softsol Building,
Software Units Layout, Hitec City,
Madhapur, Hyderabad – 500 081. _ **PETITIONER**

AND

1. Andhra Pradesh Power Co-ordination Committee
2. Transmission Corporation of Andhra Pradesh Ltd
3. Central Power Distribution Company of Andhra Pradesh Ltd
4. Southern Power Distribution Company of Andhra Pradesh Ltd
5. Northern Power Distribution Company of Andhra Pradesh Ltd
6. Eastern Power Distribution Company of Andhra Pradesh Ltd

\- **RESPONDENTS**

This petition coming up for hearing on 27.06.2012 in the presence of Sri C.Kodandaram, Sr.Advocate for the petitioner and Sri P.Shiva Rao, Advocate for the respondents having stood over for consideration to this day, the Commission delivered the following :

ORDER

This is a petition filed by the petitioner under Regulation 49 of APERC (Conduct of Business) Regulations, 1999 r/w Section 94 (1) (f) of the Electricity Act, 2003 seeking review of the order dt. 13.06.2011 passed by the Commission in O.P. No. 23 of 2005 between the parties herein.

2. According to the petitioner, the said order dt. 13.06.2011 suffers from errors apparent on the face of the record, which in brief are as follows:

a) Undertaking the exercise of going into the merits of the case was a futile exercise when the Commission has found that the petition filed by the respondents i.e., in O.P. No.23/2005 is barred by limitation.

b) In holding that the petitioner herein has not placed letter dated 05.06.1999 in respect of invocation of force majeure, inspite of the same being placed on the record of this Commission along with the acknowledgement issued by the 1st respondent.

c) In dealing with a communication dated 30.11.2000 which is not part of the record and purported to have filed in another case.

d) In not giving a finding either on facts or in law except recording the contentions and extracting the judgments.

e) In coming to the conclusion that COD needs to be accepted by the respondents, ignoring the fact that COD needs to be declared by the petitioner and if there is any specific dispute then only the question of reference to Independent Engineer in terms of 8.2 of Schedule – F of PPA.

f) In totally misconstruing Sec. 171 of the Contract Act and law laid down by the Apex Court.

g) As Sec. 171 of the Contract Act has application only to Bankers, Factors, Wharfingers, Attorneys of a High Court and Policy Brokers and that too in the absence of a contract to the contrary, therefore as the petitioner does not fall under any of the above four categories and coupled with the fact that there exists a specific contract enabling that under no circumstances the respondents herein shall withhold the bill (Article 5.7 of PPA), the Section shall have no application to the present case and the respondents cannot withhold or adjust any amounts.

h) In giving a finding that the respondents are bankers merely on the ground that they are body corporate.

i) In holding that the petitioner herein has filed I.A. No. 1 of 2009 in the form of counterclaim, when the same is filed by the respondents herein.

j) In answering issue No.1 in favour of the respondents without first arriving at a finding whether there is a breach or not.

k) In recording that the letter dated 21.07.1997 wherein 80% fuel linkage was given was not replied to and recording so had completely omitted to refer letters dated 26.07.1997 and 26.09.1997 which are part of the record, wherein the petitioner has categorically said that fuel linkage to 80% PLF will not meet the covenants of the board stipulated in Clause 7.2 (g) of the PPA and requires quantities of fuel to generate electricity at 100%.

l) Acceptance of 80% of fuel linkage as the criteria under Article 7.2 (g) instead of 100% amounts to amendment of PPA for which parties have not consented.

m) As the order did not deal with the specific provision i.e., Article 5.7 of PPA which specifies that under no circumstances the respondents should withhold the payment of bill pending the dispute resolution.

n) As the Commission did not advert to have the law laid down by the constitutional bench in AIR 1961 SC and also 2003 (5) SCC 705 which held that compensation / damages could be awarded only when the loss is suffered because of the breach of contract.

o) In construing the claim for return of the illegally collected amount as counter claim as in as much as the consequence of holding collection being invalid and unauthorized, the amount ought to be refunded.

p) As the Commission while dealing with issue No.1 relating to the claim of liquidated damages of Rs. 95.16 crs has not adverted to

nor discussed about the plea raised by the petitioner regarding delay in achieving fuel linkage as per Article 7.2 (g) of PPA, therefore this period of delay has to be reckoned while arriving at the damages.

q) As the respondents neither in their pleadings nor in any of the correspondence have disputed or denied the occurrence of an event of *force majuere*, therefore they deemed to have admitted the same and hence the time between the occurrence of incident and date of cessation of *force majuere* event be reckoned. Further, the discussion and finding on the issue of *force majeure* is completely neither based on pleadings nor based on the record placed before this Commission.

r) The order suffers from various contradictory recordings and suffers from erroneous appreciation facts and law and ignored the relevant material placed on record, hence the same is liable to be reviewed and revised.

3. Along with the said petition, the petitioner also filed an application u/s 94 (2) of the Electricity Act, 2003 r/w Regulation 55 APERC (Conduct of Business) Regulations, 1999 seeking interim directions to suspend the letters No. Lr. Dy.CCA/APPCC/SAO(PP&S-I)/D.No. 456 dated 23.06.2011 and Lr. No. Dy.CCA/APPCC/SAO(PP&S-I)/D.No. 458 dated 24.06.2011 issued by the Dy. Chief Controller of Accounts of respondent No. 1.

4. The respondents also filed a common reply in the main review petition, stating that

a) The review petition cannot be heard by two member bench as the impugned order was passed by three member bench (subsequent to passing the impugned order, third member demitted office on 15.06.2011).

b) The recovery of Rs. 62.69 cr is subsequent to the impugned order and the same cannot be considered in this review petition and it

constitutes a separate cause of action. Review is only reconsideration of earlier issue, but not in respect of acts of parties that took place subsequent to the impugned order dt. 13.06.2011.

c) The scope of review is circumscribed in Order 47 Rule 1 of C.P.C. The petitioner has not produced any new important matter or evidence which was not within its knowledge or could not produce when the impugned order was passed. Therefore, this ground is not available to the petitioner. The other ground of mistake or error apparent on the face of record raised by the petitioner is misconceived with plausible different opinion on certain issues as that of mistake or error on the face of record.

d) The contention that the findings and the conclusions of the Commission are not based on the material available of record is baseless and unwarranted. The Commission analysed different issues that have arisen upon claims of rival parties in the main O.P. No. 23 of 2005 and came to conclusion against each issue, viz., delay in completion of the project; *force majeure* due to ship wreckage; adjustment of monthly bill; limitation and counter claim.

e) Therefore, it is prayed that the Commission may dismiss the R.P. No.1 of 2011 and I.A. No.8 of 2011 with costs.

5. The Interlocutory Application filed by the petitioner herein mentioned at Para-3 supra is taken on file of the Commission as I.A. No. 8 of 2011. On behalf of all the respondents, a common reply was filed on 08.07.2011. Upon hearing the counsel for the respective parties, the Commission disposed of the above mentioned Interlocutory Application by its order dated 12.07.2011 in favour of the petitioner herein. While suspending the two letters dt. 23.06.2011 and 24.06.2011 referred to above, the Commission directed the respondents not to recover / adjust the amount of Rs.28,06,82,885/- in the June monthly bill or future monthly bills, pending disposal of the main review petition and further held that

the request for refund of the amount already adjusted will be considered at the time of hearing of the main review petition.

6. Against the said order dt. 12.07.2011 of the Commission, respondents herein filed W.P.No. 20872 of 2011 before the Hon'ble High Court of A.P., to declare the action of the Commission in entertaining the R.P.No. 1 of 2001 and passing orders in I.A.No. 8 of 2011 therein on 12.07.2011 as illegal, arbitrary and one without jurisdiction. The respondents sought stay of all further proceedings including hearing of R.P.No. 1 of 2011 in O.P.No. 23 of 2005 till the 3rd Member is appointed, pending the main writ petition. By an order dt. 25.07.2011 in W.P.M.P.No. 25365, the Hon'ble High Court was pleased to grant interim stay as prayed for by the respondents herein. However, by its order dt. 24.11.2011, the Hon'ble High Court of A.P., was pleased to dismiss the writ petition without going into the merits of the case and with liberty to the petitioners (respondents herein) to pursue the objection raised by them before the Commission on the maintainability of the review petition in the absence of full strength. As a sequel to the dismissal of the writ petition, interim order dt.25.07.2011 shall stand vacated and W.P.M.P.No. 25365 of 2011 and W.V.M.P.No. 3057 of 2011 are disposed of as infructuous.

7. On 19.04.2012, 'Rejoinder' is filed by the petitioner by narrating the following grounds:

a) Two member bench is fully empowered to entertain the review petition and decide the same on merits. This Commission in its order dated 16.03.2012 in R.P. No. 4 of 2011 and batch, in similar circumstances has held that a bench consisting of two members can review the order passed by a bench consisting of three members.

b) As per Regulation 49 (1), this Commission can review its orders and pass such appropriate orders as it thinks fit. Therefore, the scope and powers of this Commission to review its orders are wide.

c) The assertion that the petitioner has to file a separate original petition against the act of respondents in respect of recovery of Rs. 62.69 crs from the monthly bill dated 13.06.2011 is misleading. The present review petition is filed to review the orders of this Commission by considering all the material placed on the record. As per Order 47 Rule 1 (ii)., an order can be reviewed if the same suffers, on account of some mistake apparent on the face of record as in the case of present review petition.

d) The contention that the petitioner has not produced any new material on evidence is not correct. The material relating to adjustment of monthly bill of the petitioner relying on the impugned order can be looked into by the Commission for just decision of the case.

e) It is not correct to state that errors apparent on the face of record are necessarily relates to correction of arithmetical figures. Ignoring important material documents on record and drawing conclusions holding that such material is not placed on record, inspite of the fact that the said material is very much part of the record are errors apparent on the face of record which can be reviewed, revised and rectified.

f) It is submitted that the Commission has mistakenly held that certain material is not filed by the petitioner inspite the same was placed on record.

g) The Commission has clearly held that the claim for alleged damages is barred by limitation. Therefore, the respondents can not adjust any amount of the petitioner subsequent to such declaration.

8. The learned advocate for the petitioner submitted his written arguments and also addressed his oral arguments reiterating the same grounds. The following are the main points argued by the counsel for the petitioner:

(i) The matter was reserved for orders on 30.06.2009 and the order was pronounced on 13.06.2006 and there was delay of nearly 2 years in delivering the judgment and it would obliterate / lost sight of the relevant aspects of the main grounds in the arguments; and that itself is sufficient to review its own order.

(ii) When there is a delay of more than 6 months, in delivering the judgment, it would rehear the arguments afresh and it was not done in this case. The non-application of principle of law is apparently error on the face of it as the Commission treated the company as "Banker" and that itself is a mistake committed by the Commission and it is an error apparent on the face of it.

(iii) The Commission framed the issues behind the back of the parties and it is against to the principles of law as parties have to be heard on the issues before settlement of the issues.

(iv) The Commission has framed issues, though they are irrelevant and they are not born out from the pleadings. The framing of issues completely altered the colour of the case.

(v) There is no denial in the pleadings on the event of 'Force Majeure' but the Commission has framed the issue on that aspect and answered against to the petitioner herein and it is an error apparent on the face of the record.

(vi) No plea is raised in the counter denying the ground of Force Majeure, but the Commission has framed the issue on the event of Force Majeure.

(vii) They have given 80% PLF and the Commission has considered it as sufficient and fixed COD and it is against to the agreement as it agreed to provide 100% PLF and the COD has to be computed from 17.11.1998 and it is a factual error apparent on the face of it.

(viii) The determination of COD is a glaring and apparent error on the face of it and it requires review of the order.

(ix) The Commission has misapplied the principle of “Banker” as it has a different connotation and the transaction of respondents would not come under the definition of a Banker’s debt.

(x) The corporation cannot be a “Banker” and S.171 of the Contract Act has a limited role.

(xi) It is duty of the petitioner in the main petition (OP 23/2005) to prove their claim including the delay as claimed.

(xii) Notification of accident is sufficient compliance and the finding given on the event of Force Majeure is totally incorrect position of law.

(xiii) Para 32 of the order is to be eschewed as it is totally incorrect calculation.

(xiv) Fuel allocation is there. There is a letter to that effect but the Commission has observed that no letter is there and it is a mistake apparent on the face of it.

(xv) If fuel linkage is taken as 100%, the date of COD would be changed and it is apparently a mistake committed in calculating the date of 100% fuel linkage and it requires to review the order passed by the Commission.

(xvi) In Para 28 of the judgment, the date is typed by mistake as 05.06.1999 instead of 03.06.1999 and the same has to be corrected.

(xvii) The above aspects are sufficient to hold that the order passed by the Commission on 13.06.2011 in OP 23/2005 is liable to be reviewed.

9. The respondents have also submitted their written arguments and addressed oral arguments reiterating the same grounds. The following are the main grounds projected by the counsel for the respondent:

(i) No material is brought before the Commission to review its own order.

(ii) Good number of orders are pending and they have to be delivered according to the convenience of the Commission and that the delay caused in delivering the order is not a ground to review the order and the petitioner ought to have filed a petition to reopen and insist upon rehearing of the matter soon after expiry of 6 months as argued by the counsel for the petitioner.

(iii) If the Commission feels necessity of rehearing, it would reopen and rehear the matter once again. So the point urged by the counsel for the petitioner on that aspect is not tenable.

(iv) No proviso is there to frame issues after hearing both sides in the Act or Regulation, since it is a petition filed under section 86(1)(f) of EAct and it is a quasi-judicial proceeding. So framing of issues by the Commission is for convenience sake and to answer the same in an appropriate manner and that itself is not a ground to reject the order passed by the Commission.

(v) Review of its own order is with a limited scope and it cannot be exercised even on an erroneous view of law.

(vi) Incorrect application of law cannot be corrected under order 47 Rule 1 of CPC.

(vii) The delay of 736 days is the point to be urged before the Appellate Authority but not before this Commission, by filing review petition to review its own order.

(viii) All the points which are now urged before the Commission were also urged at the time of hearing of main petition and the counsel for the petitioner is estopped from raising the same aspects.

(ix) The fuel linkage is not addressed to HPCL but not to these respondents, whose job is to assist the supply of fuel linkage and the Commission has felt it that the petitioner is satisfied with 80% PLF.

(x) There is no mistake apparent on the face of it and there is no need to review its own order.

(xi) It is incorrect to say that no objection is raised by the respondent on the aspect of Force Majeure. Infact, the same was denied specifically by the respondents in para 3 of rejoinder filed by the respondents.

(xii) No review can be entertained since the appeal filed by the respondents is dismissed by Hon'ble APTEL.

(xiii) The order which is the subject matter of review petition was delivered by 3 members of the bench and now 2 members cannot sit and decide the issue and the remedy left open is to approach the Appellate Authority but not before the Commission. Infact the appeal filed by the appellant is dismissed and the review can not be entertained.

(xiv) Hence, the petition is liable to be dismissed with exemplary costs.

10. Now, the points for consideration are:

(i) Whether review can be made by two members i.e., Chairman & Member?

(ii) Whether the petitioner is entitled to a review of the order dated 13.06.2011 passed by the Commission in OP No.23/2005?

Point No.1:

Whether review can be made by two members i.e., Chairman & Member?

11. The learned advocate for the respondents vehemently argued that the bench consisting of 2 members cannot deal with the order pronounced by 3 members. He projected that u/s 9 clause (4) proviso to the effect that for a meeting of the Commission to review any previous decision taken, the quorum shall be that all members shall be present.

He has relied upon a ruling reported in 1993 INSC 357 (State of Rajasthan vs. Gopal singh). In this it was held that

"the delinquent filed a review application which was heard by one of the judges, constituting the Division Bench, presumably because the second learned judge was not available. In such a situation under Rule 64 of the Rules of the High Court of Judicature of Rajasthan, 1952, the proper

procedure to be followed was to lay the application before the leaned Chief Justice, who with due regard to the provisions of Rule 5 of Order 47 of the Code will constitute a Bench for hearing and disposal of such application."

He has also relied upon another ruling reported in 1998 3 CALLT 348 HC Ratanlal Nahata vs. Nandita Bose. In this it was held that

"As laid down by Order 47 rule 5 CPC as far as possible the same two leaned judges or more judges who decided the original proceedings have to hear the review petition arising from their own judgment."

He has also relied upon another ruling reported in 1999 SCC (L&S) 786 State of M.P. v. Ghanshyam. In this it was held that

"Order passed by a Division Bench reviewed by a Single Member (Chairman) on the ground that only he was available for review while appointment of the other Member had been quashed – On facts found that there was no urgency to hear the review petition without waiting for another Member to come – the question whether Single Member was competent in law to hear and dispose of review petition not gone into but held, propriety demanded that arrival of another Member should have been awaited."

These three decisions along with some other decisions relied upon by the counsel for the respondents were already considered by the Commission in IA 8/2011 with 2 members. Against that order, the respondents herein filed a WP No. 20872/2011 before the Hon'ble High Court questioning the entertainment of the petition by 2 members of the bench. The Hon'ble High Court delivered its judgment on 24.11.2011 holding

"*In the premises as above, the writ petition is dismissed without going into the merits of the case with liberty to the petitioners to pursue the objection raised by them before respondent No.1 on the maintainability of the review petition in the absence of full strength. If the petitioners feel aggrieved by the order passed in IA No. 8 of 2011, they shall be free to avail the remedy of appeal before the appellate authority under the provisions of the Act.*

As a sequel to dismissal of the writ petition, interim order, dated 25.07.2011, shall stand vacated and WPMP No.25365 of 2011 and WVMP No. 3057 of 2011 are disposed of as infructuous."

In view of the above said finding, the Commission has to decide whether the petition can be entertained by the 2 members of the Commission passed by 3 members.

12. After delivering the order dated 13.06.2011, one of the members demitted the office on 15.06.2011. After that, the Commission with Chairman and Member passed the order in I.A. 8 of 2011. The matter went to the Hon'ble High Court and the Hon'ble High Court passed the above order directing the Commission to decide the issue.

14. The Commission had an opportunity to deal with above said issue in RP 4 to 9 in OP 2 of 2011 on 16.03.2012 arriving at a conclusion that 2 members including Chairman is a valid Commission. It can also entertain review petitions in other legal proceedings. Here, in this case, Chairman and 1 Member heard the matter though 2members were there and 2 members were compelled to hear i.e, Chairman & 1 Member as the other Member worked as Chief Engineer (Commercial) in the office of respondent no.1 and dealt with matter in that capacity of CE(Commercial) of the 1st respondent.

The proviso to clause 4 of the S.9 of APER Act, 1998 reads as follows:

"*provided that for a meeting of the Commission to review any previous decision taken by the Commission, the quorum shall be that all members shall be present".*

13. The above said section is replaced by S.92 and S.93 of the Electricity Act 2003, by dealing with the entire subject. So a separate procedure is contemplated. So far as the proceedings, power and functions of the Commission are concerned a clear cut distinction is made in S.9 of APER Act, 1998 and S.92 of the EAct 2003. Under S.92, it is confined to the decisions in the meetings only but not casting vote on the decisions as envisaged under S.9 of the APER Act. So, it is to be construed that S.9 is indirectly repealed by enacting S.92 and 93 of the Act. Even otherwise the said provision is inconsistent with S.92 of the Act. As per S.185, the provisions of Reform Act can be relied if they are not inconsistent with the Electricity Act, 2003.

14. As per S.82 clause 4, the State Commission shall consist of not more than 3 members including Chairperson. Even if S.9 is treated as not inconsistent with S.92, it does not specify that all the three members have to sit and decide the matter. What it says that the quorum with all members shall be present that means all the members available in the Commission. It does not specify that all the 3 members have to decide the matter.

15. Whereas in this case the other Member is prevented from hearing arguments, it indirectly speaks that the Commission even with 2 members is a full-fledged Commission as on that particular date of transaction and it cannot be questioned in any manner that the review petition cannot be entertained by 2 members on the decisions taken by the 3 members then available. In the above said case, there is a possibility to fill the vacancy of Demitted member, but that possibility is also not available in this case, since the vacancy filled and member is unable to participate in the hearings owing to post held by him prior to the appointment of Member. There is no possibility for appointment of another Member and no procedure is contemplated to hear the matter by appointing another Member to hear this matter, substituting the Member who is prevented to participate in the proceedings.

16. The Commission has already passed an order with 2 members in IA 8 of 2011 in this matter to hear the case by Chairperson and a member. Against that order, they filed the above said writ petition. They did not file any appeal against that order. In the light of the above said circumstances, the above said decisions are not applicable to the facts of this case.

17. As per S.82 clause (4), the State Commission shall consist of not more than 3 members including Chairperson. It does not mean that the optimum strength has to sit and decide the issues. There is no bar as such that the orders cannot be entertained by 2 members available at that time.

18. Moreover, the respondents in the above said matter have not preferred any appeal against the order passed in RP Nos. 4 to 9 of 2011 and in IA Nos. 12 to 17 of 2011. The decision of the Commission has become final and therefore 2 members ie., Chairman & 1 member can hear and decide review petition. Hence, this point is answered accordingly.

Point No.2:
Whether the petitioner is entitled to a review of the order dated 13.06.2011 passed by the Commission in OP No.23/2005?

19. APTRANSCO & 5 others filed the above said OP No. 23/2005 claiming liquidated damages for 834 days during the year 2000. The Commission passed the order on 13.06.2011 and held that Lanco is liable to pay Rs.74.86crores instead of Rs.95.16crs and also held that adjustment of Rs.48,06,55,963/- which is payable to the respondent towards bills they raised is valid though held that claim is barred by limitation, on the ground that recovery still subsists. It is the petitioner herein respondent in the main OP filed the above said OP to review the order dated 13.06.2011, under section 94(2) of EA 2003, the Commission is empowered to review its own orders. So far as the scope of review is concerned, it is not born out in the EA 2003, but the same is guided by the provisions of CPC. Under order 47 Rule 1 of CPC the court has got power to review its own orders. The provision is to be applied to consider the request made by the petitioner. Order 47 Rule1 reads as follows:

"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, 6r 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.

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. "

20. So, it is the duty of the petitioner to establish at least to one of the 3 main grounds mentioned in the above said provision of order 47 Rule 1 of CPC. Under order 47 Rule 1 of CPC, the petitioner has to establish

(1) the discovery of new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced at the time of hearing of the main case.

(2) On account of some mistake or error apparent on the face of record.

(3) For any other sufficient reason. The petitioner is mainly harping upon the 2nd ground arguing vehemently that the order passed by the Commission is nothing but a mistake and that it is an error apparent on the face of record.

21. The learned advocate for the petitioner relied upon a ruling reported in (2000) 6 SCC 224 *Lily Thomas and others v Union of India and others.* . In this it was held that

> "*The words "any other sufficient reason appearing in Order 47 Rule 1 CPC" must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram v. Neki and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius. Error apparent on the face of the proceedings is an error which is based on clear ignorance or disregard of the provisions of law. In T.C.Basappa v. T.Nagappa this Court held that such error is an error which is a patent error and not a mere wrong decision. In Hari Vishnu Kamath v. Ahmad Ishaque it was held that:*

"[I]t is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut by which the boundary between the two classes of errors should be demarcated."

He has also relied upon another ruling reported in (2005) 4 SCC 741 *Board of Control for Cricket in India v Netaji Cricket Club*. In this it was held that

"*"Mistake", held, covered mistake on the part of the court regarding the nature of undertaking given by the counsel of a party – what constitutes "sufficient reason", held, would depend on the facts and circumstances of the case – words "sufficient reason" covered even a misconception of fact or law by the court or even an advocate – moreover, the doctrine of "actus curiae meminem gravabit." Also may necessitate a review"*

He has also relied upon another ruling reported in (2006) 4 SCC 78 *Haridas Das v. Usha Rani Banik (Smt) and others.* In this it was held that

"Section 114 CPC does note even adumbrate the ambit of interference expected of the court. The parameters are prescribed in Order 47 CPC which permit a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. That is amply evident from the Explanation to Order 47 Rule 1."

In addition to the above said rulings, the counsel for the petitioner relied on a ruling reported in AIR 2009 SC 1103 *Bachhaj Nahar v. Nilima Mandal and Anr.* . In this it was held that

"*when there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."*

He has also relied upon another ruling reported in Anil Rai v. State of Bihar JT2001 (6) SC 515. In this it was held that

"*if the judgment, for any reason, is not pronounced within a period of six months, any of the parties of the said lis shall be entitled to move an application before the Chief Justice of the High Court with a prayer to withdraw the said case and to make it over to any other Bench for fresh arguments. It is open to the Chief Justice to grant the said prayer or to pass any other order as deems fit in the circumstances.*"

He has also relied upon another ruling reported in (2009) 11 SCR 252 Inderchand Jain (D) through L.Rs. v. Motilal (D) through L.Rs. In this it was held that

"*The law on the subject – exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarized as hereunder:*

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on the points where there may be conceivable be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an Advocate.

(v) An application for review may be necessitated by way of invoking the doctrine 'actus curiae neminem gravabit'."

22. On the other hand, the learned advocate for the respondents relied upon a ruling Ajit Kumar Rath v. State of Orissa & ors delivered on 02.11.1999. In this it was held that

"*The power of the review available to the Tribunal is the same as has been given to a court under section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within this knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which states in the face without any elaborate argument being needed for*

establishing it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.

Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."

He has also relied upon a ruling reported in 2011 (12) SCC 166 *Commissioner of Central Excise, Belapur Mumbai v. RDC concrete (India) Private Limited.*

"Practice and Procedure – Review – Rectification of mistake – power of rectification, when exercisable – reiterated, power to rectify mistake should be exercised when mistake is patent and quite obvious – said mistake cannot be such that can be ascertained by long-drawn process of reasoning- an erroneous view of law or debatable point cannot be decided while rectifying mistake – further, incorrect application of law cannot be corrected under this jurisdiction."

It was also held in *T.S.Balaram v. Volkart Bros. (1971) 2 SCC 526* that a

"mistake apparent from the record cannot be something which can be established by along-drawn process of reasoning on points on which there may conceivably be two opinions. It has been also held that a decision on a debatable point of law cannot be a mistake apparent from the record. If one looks at the subsequent order passed by CESTAT in pursuance of the rectification application, it is very clear that CESTAT reappreciated the evidence and came to a different conclusion than the earlier one."

He has also relied upon another ruling reported in (1997)8 SCC 715 Parsion Devi & Ors. v. Sumitri Devi & Ors. In this it was held that

"In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

He has also relied upon another ruling reported in (1964) 5 SCR 174 *Thungabhadra Industries v. Govt. of A.P*. In this it was held that

"*Order XLVII R. 1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order from which an appeal is allowed but from which no appeal has been preferred". In the present case, it would be seen, on thedate when the application for review ws filed the appellant had not filed an appeal to this Court and therefore the terms of O.XLVII R. 1(1) did not stand in the way of the petition for review being entertained. Learned Counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting*

the petition for review on that ground. The crucial date for determining whether or not the terms of O. XL.VII R.1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end."

He has also relied upon another ruling reported in (2005) 3 ALD 817 *Ramji patel v. Irukulla Narender.*. In this it was held that

"The crucial date for determining whether or not the terms of O. XL.VII R.1(1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end."

He has also relied upon another ruling reported in (1996) 3 SCC 463 *State of Maharashtra & Anr. V. Prabhakar Bhikaji Ingle*. In this it was held that

"Having regard to the terms of the Section and the cases referred to above, we are of opinion that the Court has power, and in fact is bound, to proceed with the application for review, notwithstanding the fact that an appeal has been subsequently filed in the case. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded with."

He has also relied upon another ruling reported in (2002) 3 SCC 496 *Haryana Financial Corporation v. Jagdamba Oil Mills*. In this it was held that

"Under Section 171 of the Indian Contract Act, bankers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; and we agreed with the learned judge that the official assignee in this case has failed to show any contract to the contrary."

No doubt the court can correct the clerical mistake or arithmetical mistake crept in judgment. At the same time, Order 47 Rule 1 CPC envisages that the court can review the order if there is any mistake error apparent on the face of the record or for any other sufficient reason. The essence of the above said rulings is that the mistake can be corrected when the error is apparent on the

face of it. As per Order 47 Rule 1 of CPC it is for the petitioner to establish three ingredients to review the earlier order passed by the Commission. Mainly,

(i) discovery of new and important matter which was not within his knowledge even after exercise of due diligence or could not produce at the time of hearing of the main case.

(ii) on account of some mistake or error apparently on the face of record

(iii) for any other sufficient reason.

23. The counsel for the petitioner is mainly harping upon the second ground by raising mainly three aspects on which the Commission has committed errors which he claimed were apparent on the face of the record and requested to review the earlier order dated 13.06.2011. The three aspects raised by him are

(a) **80% PLF**
According to the petitioner the Commission has erroneously calculated instead of 100%.

(b) **Force Majeure event**
The petitioner claims that it is an error committed by the Commission in its earlier order by rejecting the claim made by the petitioner on the Force Majeure event and

(c) **The applicability of banking provisions**
The said provisions enables unilaterally adjudication of amounts due towards electricity supply charges exfacie appears to be beyond the correction of arithmetical or typographical errors they appear to be items apparently erroneous on the face of the record and it is a subject matter of review jurisdiction. Hence, the Commission is of the view that there is a need to critically look into the position of the facts and law in the context of the above three aspects whether they can be considered as the aspects for review or any one of them is sufficient to review the order. Hence, this point is answered accordingly.

24. The following are the aspects which are to be critically looked into for consideration of review of the earlier order:

(a) **80% PLF**

The counsel for the petitioner herein raised that the determination of COD is glaring and apparent error on the face of it and it requires review of the order dated 13.06.2011. The main contention on this aspect is that the petitioner has given 80% PLF and the Commission has considered it as sufficient and it is against to the agreement and ought to have taken COD as 17.11.1998 on which date the HPCL agreed to supply 100% PLF and it is a factual error on the face of it.

25. As per Art.7.2(g) reasonable efforts have to be made to assist the company to obtain the issuance of the fuel linkage i.e., the required permits from the GOAP and the GOI allocating to the project the right to obtain and use quantities of Naphtha to generate electricity at a PLF of 100%. The respondents are not the authorities to sanction the PLF and it has to assist only to see the supply of fuel linkage. The calculation was made by the GOI with liquid fuel requirement as 80% PLF. Had it been replied to the concerned departments by marking copies to the respondents, it would have been addressed properly by the respondents and more efforts have been made by the officials of the respondents. When there is no proper response to the letter dated 21.07.1997, the Commission construed that it was sufficient. This itself cannot be treated as an error apparent on the face of it.

26. (b) **Force Majeure event**

So far as the Force Majeure is concerned, it is dealt with Article 10.1 and 10.2 of PPA. Article 10.1 reads as follows:

"Force Majeure Events

10.1 For the purposes of this Agreement, Force Majeure means any act, event or circumstance, or combination of acts, events or circumstances, which materially and adversely affects Party's performance of its obligations pursuant to the terms of this Agreement , but only if and to the extent that such acts, events or circumstances are not within the affected Party's reasonable control, were not reasonably foreseeable and could not have been prevented or overcome by the affected Party through the exercise of reasonable skill or care. Any act, event or circumstance or combination thereof meeting the description of Force Majeure that has the same effect upon the performance of any Contractor, which directly, materially and adversely affects the performance by the company or the

Board respectively of their obligations in whole or in part under this Agreement shall constitute Force Majeure with respect to the company or the Board respectively. Where such performance is affected in part, after applying any damages or compensation from the parties involved or insurance to remedy the effect of such event, the affected party shall not be relieved of the performance of that part which is not so materially and adversely affected. Force Majeure shall comprise the following acts, events and circumstances to the extent that they or their consequences satisfy the above requirements.

(i) **Political Force Majeure Events, which shall comprise the following acts, events and circumstances.**

(1) xxxxxxx
(2) xxxxxxx
(3) xxxxxxx
(4) xxxxxxx
(5) xxxxxxx

(ii) Non-Political Force Majeure events comprising the following acts, events and circumstances;

(1) Flood, cyclone, lightning, earthquake, drought, storm or any other extreme effect of the natural elements:
(2) Epidemic or plague;
(3) Fire or explosion;
(4) Strikes, lockouts or other labour difficulties not included in Article 10.1(i) (3); (excluding such events which are site specific and attributable to the Company);
(5) Catastrophic failure of major components or equipment excluding however, normal wear and tear or inherent defects or flaws in materials or equipment;
(6) *Air crash, shipwreck or train wreck or loss of or damage to any major component of the Project arising in the course of marine transit, other than due to the fault of the transporting party;*
(7) Any act, event or circumstance of a nature analogous to the foregoing.

Provided however, that for the avoidance of doubt, lack of funds shall not be construed as an event of Force Majeure

10.2 Notification Obligations, etc.

(a) Any Party claiming a Force Majeure event shall formally notify in writing in the manner specified in (b) below and seek to satisfy the other party of the existence of such a Force Majeure event and shall use its reasonable endeavour to resume performing its normal obligations as soon as possible after the cessation of such a Force Majeure event.

(b) The party claiming Force Majeure shall give notice to the other party of any event of Force Majeure as soon as reasonably practical after becoming aware of its existence, but not later than (5) five days after the date on which such part knew or should reasonably have known of the

commencement of the event of Force Majeure. Notwithstanding the above, if the event of Force Majeure results in a breakdown of communications rendering it not reasonably practicable to give notice within the applicable time limit specified herein, then the party claiming Force Majeure shall give such notice as soon as reasonably practicable after the reinstatement of communications, but not later than seven (7)days after such reinstatement.

(c) The party claiming Force Majeure shall give notice to the other party of:

(i) the cessation of the relevant Force Majeure act, event or circumstance; and

(ii) the cessation of the effects of such Force Majeure events on the enjoyment by such party of its rights or the performance by it of its obligations under this Agreement;

as soon as practicable after becoming aware thereof.

27. Article 10.2 of the PPA refers to Notification obligations, etc. It says any party claiming a Force Majeure event shall formally notify in writing in the manner specified by giving notice to the other party of any event of Force Majeure as soon as practicable after becoming aware of its existence, but not later than five days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure.

28. But clause 10.1 refers to the nature of Force Majeures and efforts to be taken by the parties claiming the benefit. Therefore, it cannot be said that there is no need to answer letter dated 23.06.1999. In the said letter, the respondents asked some information on the event of Force Majeure. The petitioner has neither replied nor a compliance report is made to the said letter.

29. A fax message copy was faxed on 03.06.1999 issued by Project Director to the petitioner and the same was sent to the respondent. On that a reply was sent on 23.06.1999 for compliance of the said Force Majeure. The Commission has considered that a letter was addressed by the Project Director, Korea Heavy Industries & Constructions Co. Ltd on 22.01.2000 in that they have clearly mentioned about letter address and on 05.06.1999 and this date was mentioned in the impugned order by the Commission. The said Korea Heavy Industries &

Constructions Co. Ltd alleged to have addressed a letter dated 05.06.1999 invoking the Force Majeure on account of loss of gas turbine, but the said letter dated 05.06.1999 was not filed before the Commission to ascertain the actual event of Force Majeure. The Commission did not say that letter dated 05.06.1999 addressed by the petitioner was not placed before the Commission. It is mostly based on the facts and the Commission fixed the burden to prove the Force Majeure on the petitioner and held it is not discharged and the petitioner is not entitled to the said benefit. Hence, it cannot be said that it's an error apparent on the face of it which requires review of the entire order dated 13.06.2011.

30. (c) **Applicability of Banking provisions:**

The counsel for the petitioner urged that the observation of the Commission that the body corporate comes within the definition of Bankers as defined u/s 171 of the Contract Act is incorrect and it is a mistake committed by the Commission and it is an error apparent on the face of it.

S.171 of the Indian Contract Act reads as follows:

> *"Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain , as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain,, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."*

31. The Commission observed in its earlier order dated 13.06.2011 at page 31 that **"the first part of the S.171 of the Contract Act identifies the five categories of persons who have been general lien and the case billed by them. The general balance of the account has to be on the amount legally due to bankers, factors, wharfingers and policy brokers. The petitioner herein comes within the definition of banker which in turn a corporate body under Companies Act as in the case of other Banking Companies. A Banker's lien can attach to money, so long as it remains an earmarked sum of money, but money paid into a bank to be credited to the current account of the person making the payment does not constitute a bailment, so that there is no question of lien. The term lien cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds of**

which, are the property of the bank itself. The term set-off should be applied in such cases. When a creditor has a lien over goods by way of security for a loan, he can enforce the lien for obtaining satisfaction of the debt even though an action thereon would be time barred."

32. The Commission has also observed in the impugned order that **"the lien may arise from a contract or from a mercantile usage or by operation of law. But practical effect of lien and set-off is the same. This principle is laid down in Punjab National Bank Vs.Arunamal 1964 (1) Madras 1012. So it is evident that the lien may arise from a contract. Here in this case, the damages are claimed basing on the terms and conditions of a contract. Therefore, damages which the petitioner claims on the basis of a contract are recoverable; though barred by time, the liability still subsists."**

33. The counsel for the petitioner submits that the very observation made by the Commission is a mistake and it failed to differentiate between the banking company and the body corporate on the erroneous assumption that the APTRANSCO is a banker specific statute rights are confined on the banker u/s 171 of Indian Contract Act and the same was erroneously extended in favour of APTRANSCO which is patently illegal which is required to be reviewed and he also relied upon a case reported in (2009) 11 SCR 252 Inderchand Jain (D) through L.Rs. v. Motilal (D) through LRs.

34. As per the Supreme Court decision reported in Ajit Kumar Rath v. State of Orissa dated 02.11.1999 a review can be exercised only for correction of a patent error of law or fact which states in the face without any elaborate argument needed for establishing it. Similarly, in the rulings reported in 2011 (12) SCC 166 *Commissioner of Central Excise, Belapur Mumbai v. RDC concrete (India) Private Limited* and *(1971) 2 SCC 526 T.S.Balaram v. Volkart Bros.* a mistake cannot be such that can be ascertained by long-drawn process of reasoning. As per the (1997) 8 SCC 715 *Parsion Devi & Ors. V. Sumitri Devi & Ors* under Order 47 Rule 1 CPC it is not permissible for an erroneous decision

to be reheard and corrected. So, the essence of the above said rulings is that the mistake can be corrected when it is apparent on the face of it.

35. By the date of filing of this petition, no appeal is filed but subsequently they filed appeal no. 119/2011 and placed before the Hon'ble APTEL about the filing of the review petition before the Commission and the Hon'ble APTEL passed its order on 30.08.2011 and copy of the order of the is filed. In the said order, the APTEL held that

> *"under these circumstances, we do not incline to entertain this Appeal. Accordingly, the appeal is dismissed.*
> *However, it is open to the appellant to file the appeal before this tribunal against the impugned order subject to the outcome of the review petition".*

36. The Commission has discussed at length by looking into the ingredients of S.171 and its scope and arrived at a conclusion that the respondents -company is a 'Banker' and rightly considered that the very adjustment of the amounts in their custody is valid and it is not an error apparent on the face of it. The Commission is not expected to pass an order by holding that it is a mistake by treating it as a long drawn process and giving different reasons is unknown to law. Since, the petitioner has filed an appeal before the Hon'ble ATE and the Appellate Tribunal has given liberty to approach the appellate authority by filing an appeal subject to the result of the review petition filed before the Commission. In view of the above said discussion, the grounds as narrated for review the earlier order of the Commission are not the errors apparent on the face of the record invoking Order 47 Rule 1 of CPC. The petitioner is at liberty to canvass his claim before the Hon'ble ATE.

37. Hence, this point is answered against to the petitioner and in favour of the respondents.

I.A. 8 of 2011

38. The petitioner had filed an I.A 8/2011 along with R.P. No. 1/2011 u/s 94(2) of EA 2003 read with Regulation 55 of APERC (Conduct of Business) Regulations, 1999, questioning the letter dated 23.06.2011, when they made an

attempt to adjust the bill amount payable to the petitioner. The petitioner requested this authority to pass an interim order not to adjust the said amount, on the ground that the notice itself is illegal and unlawful. After hearing both sides, the Commission passed the following order dated 12.07.2011 as here under:

> ***"In the result, this petition is allowed in part, by suspending the two letters dated 23.06.2011 and 24.06.2011 and also directing the respondents not to recover / adjust the amount of Rs. 28,06,82,885/- in the june monthly bill or future monthly bills, pending disposal of the main review petition. The request for refund of the amount already adjusted will be considered at the time of hearing of main review petition."***

39. Against that order, the respondent filed WP No. 20872/2011 and also obtained stay of order on 25.07.2011. Ultimately, the Hon'ble High Court dismissed the stay petition and vacated interim order passed on 25.07.2011. So a duty is cast upon the Commission to pass an order in the above said petition irrespective of the result of the review petition.

40. A 'lien' postulates property of the debtor in the possession or control of the creditor. It does not mean that the amounts accrued from the subsequent bills. The very notice is issued with a greedy attitude by the respondents to adjust the amounts together with interest from out of the amounts accrued from the subsequent bills submitted towards value of the power supplied to the respondents. It is not an amount in the custody of the respondents at the time of passing the order or prior to the order. It is not in the custody of the respondents by that time. The money paid into current account, the payment does not constitute the bailment, so that there is no such lien. The amount is not in deposit. It is an amount accrued from month to month towards value of the power supplied as per the terms of PPA. The adjustment of the amount from the current account by issuing a letter dated 23.06.2011 on the ground of lien is not postulated u/s 171 of the Contract Act. The very letter issued for adjustment of the amount is against to the ingredients of S.171 of the Contract Act. Hence, the very notice for adjustment issued on 23.06.2011 and any other amount for adjustment from out of the subsequent bills is not sustainable. The outcome is

not in the deposit of the respondents to exercise the lien. The very approach made by the respondents in the process of issuing notice is not only against to law but also against to the principles of natural justice. The request made by the petitioner is sustainable and the petition is to be allowed restraining the respondents from adjusting the amounts covered by the letter dated 23.06.2011 or any amount subsequent to that date.

41. In the result, this petition I.A.8/2011 is allowed restraining the respondents from adjusting the amounts covered by the letter dated 23.06.2011 or any amount subsequent to that date which are accrued from time to time towards the bills raised by the petitioner.

42. In the result, the review petition 1/2011 is hereby dismissed. No order as to costs.

This order is corrected and signed on this 23rd day of April, 2013.

Sd/-	Sd/-
(C.R.Sekhar Reddy)	**(A.Raghotham Rao)**
Member	Chairman