

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION
BHOPAL**

Sub: In the matter of petition for review of the order dated 18.11.2021 passed by the Commission in Petition No. 10 of 2021, under section 94 of the Electricity Act, 2003 and under order 47 rule 1 and 2 of the code of civil procedure, 1908 read along with the order dated 01.08.2022 passed in M.P. No. 564/2022 by the Hon'ble High Court of M.P. and read along with regulation 40 of the MPERC (Conduct of business) Regulations, 2016.

Petition No. 53 of 2022

ORDER

(Date of Order: 11th October' 2022)

M.P. Power Management Co. Ltd.
Block No. 11, Shakti Bhawan,
Rampur, Jabalpur (M.P.) – 482008

- **Petitioner**

Versus

M/s. Jhabua Power Limited
303 & 307, 3rd Floor, ABW Tower
M.G. Road Gurugram – 122002,

- **Respondent**

Shri Aashish Barnard, Advocate and Shri Nitin Kumar Khatri appeared on behalf of Petitioner.
Ms. Swapna Seshadri, Advocate and Ms. Roopam Bansal appeared on behalf of Respondent.

M.P. Power Management Co. Ltd, has filed this petition for review of the order dated 18.11.2021 passed by the Commission in petition No. 10 of 2021. The subject petition is filed under section 94 of the Electricity Act, 2003 and under order 47 rule 1 and 2 of the Code of Civil Procedure, 1908 read along with the order dated 01.08.2022 passed in MP No. 564/2022 by the Hon'ble High Court of M.P. and read along with regulation 40 of the MPERC (Conduct of business) Regulations, 2016.

2. The Petitioner M.P. Power Management Company Ltd. is a holding company of the distribution licensees in Madhya Pradesh. The Respondent M/s Jhabua Power Limited is a generating company having 1x 600 MW coal-based Power Project at Barela-Gorakhpur, Dist. Seoni in MP. This generating unit achieved Commercial Operation (CoD) on 3rd May' 2016. The petitioner and Respondent entered into a Power Purchase Agreement (PPA) on 05.01.2011.
3. Earlier, the Respondent M/s Jhabua Power Ltd. had filed Petition No. 10 of 2021 regarding adjudication of dispute due to non-payment of Capacity Charges / Fixed Charges by MPPMCL to M/s Jhabua Power Ltd. for the period from 24.03.2020 to 31.05.2020 by invoking 'Change in Law' provision under Power Purchase Agreement due to Covid-19 pandemic.

4. Vide order dated 18.11.2021, the Commission had allowed the prayer made in the aforesaid petition and disposed of the same with the direction to MPPMCL to pay the Capacity Charges / Fixed Charges for the period of 24.03.2020 to 31.05.2020 along with late payment surcharge in accordance to the provisions under the MPERC Tariff Regulations, 2020 and the PPA executed between the parties.
5. Aggrieved with the aforesaid order dated 18.11.2021 issued by the Commission in petition No. 10 of 2021, the petitioner filed a writ petition No. MP 564/2022 before Hon'ble High Court, Jabalpur. Vide Order dated 1st August' 2022, Hon'ble High Court has disposed of the petition with following observations and directions:

“Heard on the question of admission and interim relief.

This petition under Article 227 of the Constitution of India has been filed being aggrieved by the order dated 18.11.2021 passed by the respondent No.1/Commission.

*Initially, this Court had entertained the writ petition and vide order dated 04.03.2022 had issued notice to the respondents and in the meanwhile had stayed the effect and operation of the orders dated 18.11.2021 and 18.12.2021 till the next date of hearing. After notice, **the respondents have filed preliminary objection with regard to maintainability of the writ petition on the ground that the petitioners have an alternative efficacious statutory remedy under Section 111 of the Electricity Act, 2003. As such, this petition is not maintainable and the same is liable to be dismissed on this ground alone.***

Learned senior counsel appearing for respondent No.2 submitted that the objection is squarely covered by the decisions rendered in the cases of Jai Prakash Associate Limited vs. M.P. Electricity Regulatory Commission (2016) (3) MPLJ 349, H.P. Electricity Regulatory Commission vs. H.P. State Electricity Board (2006) 9 SCC 233, Adani Power Limited vs. Central Electricity Regulatory Commission and others (2015) 12 SCC 2016, Gujrat Urja Vikas Nigam Ltd. vs. Essar Power Ltd. (2008) 4 SCC 755 and in the case of Grasim Industries Limited vs. Madhya Pradesh Electricity Regulatory Commission, (2016) SCC Online MP 1359.

Learned senior counsel appearing for the petitioner however disputed that the issue involved in the writ petition is not covered by the aforesaid decisions and also submitted that he has a remedy to file a review under Section 94 (1)(f) of the Act. In the impugned order, there is perversity, therefore he would like to file review petition under Section 94 of the Act.

Learned senior counsel for the respondent No.2 has no objection, in case the petitioner avails the remedy of review under Section 94 of the Act within a period of three weeks from today.

In view of the aforesaid, this Court is not inclined to entertain the writ petition but relegates the petitioner to avail remedy of review under Section 94 of the Act by filing the same within a period of three weeks from today along with the application for interim relief. If such review petition is filed, the reviewing authority shall consider the application for interim relief and pass such appropriate orders in accordance with law after hearing both the sides. The interim order granted by this Court on 04.03.2022 shall continue till the date of first hearing by the Commission.

*With the aforesaid liberty, this petition is **disposed of**.*

It is made clear that the question of delay will not come in the way of the petitioner in case the review petition is filed within the aforesaid period.

6. In the aforesaid judgment, on the request of MPPMCL, Hon'ble High Court has allowed the petitioner to approach the Commission to avail remedy of review under Section 94 of the Act by filing the same within a period of three weeks from date of order along with the application for interim relief. In the aforesaid order of Hon'ble High Court, it is further mentioned that the reviewing authority shall consider the application for interim relief and pass such appropriate orders in accordance with law after hearing both the sides. Regarding the stay, it was mentioned that the interim order for stay granted by the Court on 04.03.2022 shall continue till the date of first hearing before the Commission.
7. The Petitioner has broadly submitted the following in this review petition:
 - i. *The petitioner entered into a Power Purchase Agreement on 05/01/2011 for purchase of power from the 1X600 Coal based power plant of the respondent at Barela-Gorakhpur, District Seoni (M.P). The Said Power Plant started its Commercial Operations on the 3rd May 2016. The Aforesaid power purchase agreement sets out the obligation of the petitioner in clause 4.2 and also expressly provides for force majeure in the PPA in clause 11.*
 - ii. *The Government of India, vide its notification dated 24/03/2020 issued directions/guideline directing complete lock down in the country, thereby affecting the industrial operations, which are the major consumers of electricity, procured by the petitioner through generators like the respondent no 2. It is pertinent to mention that although the Generation, Transmission and Distribution was kept away from the purview of the lockdown, being essential services, but there was admittedly a drastic reduction in demand as shops, industries etc. were closed all of a sudden and same was a force majeure event hampering the operations of the Petitioner and the very*

intention of the planned power purchases in the state thereby putting the petitioner in a force majeure situation (Beyond its Control) of having existing PPAs but no substantial consumption of power.

- iii. The petitioner herein evaluated the situation and looking to the drastic situation invoked the 'Force majeure Clause 11' of the PPA vide its letter dated 30/03/2020 and 31/03/2020 and enumerated the following hardships on the part of the petitioner in procuring the power as per Capacity of the respondent:*
 - a. Demand of state sharply decreasing due to closure of industries, shops and other major establishments due to the lockdown, forcing MPPMCL not to schedule or partly schedule power from some of the generators;*
 - b. Massive disruption in the economic activity, which is likely to affect a significant proportion of consumers' capacity to pay electricity bills on time and therefore pending payments shall be delayed; and*
 - c. Discoms being affected most by cash crunch being faced by public and communities.*
- iv. It is pertinent to mention herein that the Covid19 pandemic is a once in a century pandemic seen never before in the lifetime of the officials of the Petitioner company and therefore, looking to the urgent and immediate and overnight shutdown of industries and commercial establishment the Petitioner invoked the force majeure clause of the PPA. It is also mentioned that the Respondent did not shut down its plant as it is supplying electricity to other states also such as West Bengal and Kerala and therefore the Respondent no.1 for its own commercial reasons kept its power plant operational for supplying power to the other states who had not invoke force majeure on the Respondent.*
- v. The Respondent approached the Commission challenging the Non-Payment of Capacity (Fixed) Charges Rs 37.74 Crores along with 1.25% interest as payable under the Tariff regulations issued by the Hon'ble MPERC for the period 24/03/2020 to 31/05/2020, but surprisingly the Learned MPERC passed the Impugned Order dated 18/11/2021 in petition no 10/2021 holding that the lockdown imposed and the closure of shops and industries and establishment does not fall in the category of natural force majeure as mentioned in the PPA. Force Majeure has been clearly defined in the PPA as any event which wholly or partly prevents or delays the performance of the obligations of a party and covid-19 imposed lockdown was and admittedly is a force majeure event and therefore, a natural force majeure event under the PPA and the Commission committed a grave error on the face of the record. It is submitted that even the notification/circulars of the Government of MP have termed the covid-19 as a natural calamity. Therefore, the Impugned*

Judgement directing the petitioner to pay Fixed Capacity Charges for the period 24/03/2020 to 31/05/2020 to the respondent no 2 along-with late payment Surcharge is incorrect and commits a grave error on the face of the record.

- vi. It is further submitted that the letter dated 27/03/2020 issued by the Ministry of Power pertains to and was limited to the opening and maintaining of letter of credit as a payment security mechanism by the distribution licensee, Ministry also acknowledged the fact that the situation was a force majeure situation and instructed that the power may be scheduled even if the payment security mechanism is established for 50%. It is submitted that as per Article 11.3.1 (i) of the PPA the covid-19 pandemic (Act of God) is a natural force majeure event therefore, as per clause 11.7.1 (c)(Para-2), no tariff is payable to the petitioner for the duration of Force majeure by the Respondent.*
- vii. It is submitted that the said letter of UOI does not in any manner state that capacity charges have to be paid even if the Petitioner or the purchaser has invoked the force majeure clause. Further, it is reiterated that as per clause 11.7.1 (c)(Para-2) of the PPA, no tariff is payable to the petitioner for the duration of Force majeure by the Respondent.*
- viii. It is submitted that para-3(C) of the letter dated 06.04.2020 of the Union of India highlights that the obligation to pay capacity charges is 'as per the PPA' and therefore, the Hon'ble Commission committed a grave error in this regard and ought to have to examine the payment of capacity charges in terms & provisions of the PPA, which contains rights and obligations of the parties, and in the instant case, the Petitioner has invoked the force majeure clause under Article 11.3 of the PPA and as per Article 11.7.1(C) (Para-2), no tariff is payable to the petitioner.*
- ix. It is further submitted that reliance on the letter dated 28.03.2020 issued by the Union of India issued U/s 107 of the Electricity Act is also of no help to the Respondent as firstly the letter dated 28.03.2020 clearly acknowledges that the covid-19 event is force majeure and secondly the directions given in the said letter are only in relation with reduction in the rate of late payment surcharge and do not give any direction that capacity charges has to be paid even in the event of invocation of force majeure by the procurer under the PPA.*
- x. Lastly the reliance of the Respondent on the letter dated 15.05.2020 is also of no avail as it is a request to the generating company and the transmission company of the central sector by the Union of India, to offer a rebate to the distribution companies. In this regard it is submitted that the respondent has in view of the said letter dated 15.05.2020 been successful in getting a rebate from NTPC and PGCIL to the tune of Rs.147.08 Cr. & Rs. 96.42 Crores respectively. Thus, it is clear that*

Covid-19 pandemic is a Force Majeure and the Commission has blatantly and clearly erred in holding that the same is not a force majeure under the PPA.

- xi. Further another grave error committed is that the exemption from lockdown was for the employees of the Generators, Transmitters' and Distributors to move around freely and not for the Industrial Consumers of the State and hence the any clarification issued by the Ministry of Power Government of India does not in any way restricts the rights and obligations given out in the PPA.*
- xii. That, to summarize it is most humbly submitted that the instant dispute is a contractual dispute governed by the PPA dated 05/01/2011 and in the instant case the lockdown had a far reaching effect and the demand for electricity had unpredictably dropped drastically, due to which the Petitioner could not have performed its obligation under the PPA, the liberty (exemption), granted by Gol to the officials of DISCOMs, TRANSCOMs, to freely move during the lockdown to meet power requirement, cannot be construed otherwise and forgo the fact that the Force Majeure event did exist.*
- xiii. That, therefore it is submitted that there is grave and manifest error committed by the Learned Madhya Pradesh Electricity Regulatory Commission in passing of the Impugned Order resulting in perversity and manifest errors and therefore the Petitioner had filed a Writ Petition under Article 227 of the Constitution of India before the Hon'ble High Court of MP being MP No. 564 of 2022 and the Hon'ble High Court was pleased to grant ex-parte interim stay of the order dated 18.11.2021 vide its order dated 4.3.2022 and then after due consideration of the matter has been pleased to relegate the Petitioner to review jurisdiction of this Hon'ble Commission vide its order dated 1.8.2022, and most importantly has while disposing the matter continued the interim stay granted on 4.3.2022 till the instant review petition along with the application for stay is taken up for hearing.*
- xiv. It is further submitted that the Commission has erred and failed to appreciate that the invocation of force majeure was on account reduction in the demand due to the lockdown and closure of industries and commercial establishments and not on account of insufficiency of funds as has been held in the Impugned Order. It is further submitted that the Petitioner herein and its companies have on account of covid-19 granted the benefit of non-payment of bills to various consumers and in this regard have not recovered substantial charges running in crores from the consumers of the State of MP and therefore it cannot be averred or submitted by the Respondent that the Petitioner is recovering monies from the consumers but not giving the same to the Respondent. It is therefore submitted that the impugned order is grossly erroneous and ought to be reviewed on the facts and grounds mentioned herein.*

8. The petitioner in the review petition has raised the following grounds-
- a. *Impugned order dated 18/11/2021 in Petition no. 10 of 2021 is erroneous on the face of the is grossly erroneous.*
 - b. *The Commission has erred in concluding that Lockdown Imposed by the Government of India due to Covid 19 pandemic, was not a force Majeure situation and the petitioner is bound to pay fixed capacity charges to the respondent.*
 - c. *The Parties to the Contract of Power Purchase are their own lexicographers and hence the petitioner in all its legal framework has the right to invoke "force majeure" clause in situation beyond its control to purchase the power as promised in the said contract.*
 - d. *The circulars of the Union of India do not state anywhere that capacity charges have to be paid notwithstanding the provisions of the PPA and invocation of force majeure.*
 - e. *The Commission has erred and failed to appreciate that the exemption from lockdown was for the employees of the Generators, Transmitters and Distributors and not for the Industrial Consumers of the State.*

9. With respect to the aforesaid submissions the petitioner has prayed the following:

In view of the facts and grounds mentioned in the Petition and on the basis of the record of the case in Petition no. 10 of 2021 and further in view of the instant review petition, the petitioner most respectfully prays that the Commission may kindly be pleased to:

- (i) *Be pleased to review the order dated 18.11.2021 passed in Petition no. 10/2021 and recall the order dated 18.11.2021 and consequently dismiss the Petition no. 10 of 2021;*

10. The petitioner has also filed three Interlocutory Applications (IAs) along with the petition. IA seeking Condonation of Delay in filing the subject review petition, IA seeking Interim Relief and IA seeking exemption from filing Certified Copy of the Order 18.11.2021. In the aforesaid IAs, the petitioner has broadly submitted the following-

- i. The petitioner has filed application seeking **Condonation of Delay** in filing the subject review petition. The petitioner submitted that this Review Petition is to be preferred within 60 days under the provisions of the Electricity Act, 2003, but due to pendency of MP No.564/2022, the same could not be preferred well within stipulated time span. However, the Hon'ble High Court Principal Seat at Jabalpur vide its order dated 01.08.2022 passed in MP No.564/2022 made clear that the question of delay will not

come in the way of the petitioner in case the Review Petition is filed within the aforesaid period. Hence, the delay caused in preferring the instant Review Petition is due to abovementioned bona-fide reasons.

With the above submission, the petitioner prayed to condone the delay in filing the review petition against the order dated 18.11.2021 passed in Petition no. 10 of 2021 in light of the order passed by Hon'ble High Court, Principal Seat at Jabalpur vide order dated 01.08.2022 in MP No.564/2022.

- ii. The petitioner has filed second Application seeking **Interim Relief** under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908, read with Section 94(2) of the Electricity Act, 2003 and Regulation 39 of the MPERC (Conduct of Business) Regulations, 2016. The petitioner submitted that Hon'ble High Court of MP has granted ex-party stay on the effect and operation of the Order dated 18.11.2021, and vide Order dated 01.08.2022, after due consideration of the matter, the Hon'ble High Court of MP disposed of the petition with the observation to prefer Review Petition under Section 94 of the Electricity Act before the Commission and directed that interim relief granted on 04.03.2022 by the Hon'ble High Court shall continue till the first hearing before this Commission on instant application for interim relief to be filed along-with the review petition. The petitioner has also submitted that the Respondent vide letter dated 18.12.2021 has demanded the payment of monies in the view of the impugned order dated 18.12.2021 and therefore, it is in the interest of justice that the impugned order be stayed till the final adjudication of the petition.

With the above submission, the petitioner prayed to stay the order dated 18.11.2021 and letter dated 18.12.2021 issued by the Respondent in the interest of justice till the final disposal of the petition.

- iii. The petitioner has filed third Application seeking exemption from filing **Certified Copy** of the Order 18.11.2021 and submitting that appellant herein preferring instant review petition without certified copy however it will be produced at later stage as and when required by the Commission. Hon'ble High Court has now issued the Certified Copy of the Judgement.

11. At the motion hearing held on 13/09/2022, the Commission heard both the parties on the issue of admissibility of subject review petition and the application for interim relief. Having heard both the parties, the case was reserved for order. Meanwhile, In the daily order dated 19.09.2022, it was mentioned that stay on operation of order dated 18.11.2021 in Petition No. 10 of 2021 passed by this Commission will continue till order is pronounced by the Commission.

12. By affidavit dated 10th September' 2022, the Respondent M/s Jhabua Power Ltd. broadly submitted the following in reply to the subject review petition:
- i. The Review Petition filed by the Review Petitioner – Madhya Pradesh Power Management Company Limited ('MPPMCL') is perverse and an attempt to delay the payment of capacity charges / fixed charges to the respondent No. 1 – Jhabua Power Limited for the period from March, 2020 to May, 2020 and as decreed in the Order dated 18.11.2021 by this Hon'ble Commission in P. No. 10 of 2021.*
 - ii. At the outset, it is stated that there is a subsequent development which needs to be placed on record. The Respondent – Jhabua Power Limited (hereinafter referred as the 'JPL') has been taken over by NTPC Limited after the conclusion of the CIRP process which has culminated in the Order dated 6th July 2022 passed by the National Company Law Tribunal ('NCLT') and upheld by the judgment dated 4th July 2022 passed by the National Company Law Appellate Tribunal ('NCLAT').*
 - iii. A perusal of the Review Petition shows that there is no error apparent on the face of record which necessitates the exercise of review jurisdiction under Section 94 of the Electricity Act, 2003 read with Order 47 of the Code of Civil Procedure 1908.*
 - iv. What MPPMCL has sought to contend to be a manifest error in the Order dated 18.11.2021 is an interpretation of the Power Purchase Agreement dated 05.01.2011 between the parties read with Regulations of the MPERC Tariff Regulations, 2020. A decision arrived at by analysing the words used in the contract cannot be termed as an error apparent on the face of record, let alone be described as a grave or manifest error.*
 - v. It is well settled that an error which has to be found out by a process of analysis and detailed scrutiny cannot be an error apparent on the face of record. The only issue decided by this Commission is whether the COVID-19 pandemic and lockdown imposed can be termed as a non-natural force majeure event under the PPA.*
 - vi. Merely because the judgment cited by MPPMCL were not accepted by this Commission does not give cause to seek review of the Order. A reading of Paras 5 to 19 of the said Review Petition clearly indicates that MPPMCL is re-arguing its case and has not been able to point the error apparent on the face of record. Even an erroneous decision cannot be re-considered in review.*
 - vii. With regard to the above, it is a well settled principle in law that under a Review Petition, it is not open to the Court to rehear the matter. The said principle was laid down by the Hon'ble Supreme Court in the case of Kerala State Electricity Board v. Hitech*

Electrothermics and Hydropower Ltd. and Ors. (2005) 6 SCC 651, whereby the Hon'ble Supreme Court held as under:

10....In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Learned Counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. **We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.** It has not been contended before us that there is any error apparent on the face of the record. **To permit the review Petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise.**

.....”

viii. It is also settled that the scope of review is extremely limited and cannot be used to re-argue the entire case or plead for re-consideration of the matter. The following authorities are relevant on this proposition –

a. Lily Thomas v. Union of India, (2000) 6 SCC 224, the Hon'ble Supreme Court has inter alia held as under:

“52. The dictionary meaning of the word ‘review’ is ‘the act of looking, offer something again with a view to correction or improvement’. It cannot be denied that the review is the creation of a statute. This Court in *Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844*, held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error.”

b. Northern India Caterers (India) Ltd v. Lt. Governor of Delhi (1980) 2 SCC 167

It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Sajjan Singh v. State of Rajasthan..... But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility....."

c. Thungabhadra Industries Ltd vs The Government Of Andhra Pradesh 1964 5 SCR 174.

*".....The fact that on the earlier occasion the court held on an 'identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". **A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. but lies only for patent error.** We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say **that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.....***

....."

- ix. *It is further submitted that the power of review is not to be confused with the appellate power which may enable the appellate court to correct an erroneous decision by process of "rehearing and correcting". Moreover, it is a well settled principle of law that a Review Petition has a limited purpose and cannot be permitted to act as an "appeal in disguise". The said issue has been settled by the Hon'ble High Court of Gujarat in the case **Hage Gumto and Ors. vs. Ninya Bagra and Ors.** wherein the Hon'ble High Court has inter alia held as under:*

“.....
22. Having regard to such submission made by the learned Advocate General, Arunachal Pradesh and also **taking note of the entire factual situation of the case at hand, it transpires that the review petitioners has made an attempt by filing this re view petition to re-hear and correct the entire decision on merit and thereby this court has been made to act as a court of appeal in disguise so as to correct the decision on merit. Moreso, the judgment and order dated 13.11.2006 has already been implemented** as evident from Annexure 'K' appended to the review petition and as such the entertainment of this review petition would be a futile exercise. Having regard to Toulvi Kibami's case (*supra*), we are disinclined to accept the review petition.

23. It is settled law that a power of review is not to be confused with the appellate power which may enable the appellate court to correct an erroneous decision by process of "reheard and corrected". It is always to be noted that a review petition has a limited purpose and cannot be permitted to act as an "appeal in disguise". This has exactly happened in the instant case by this review petition. According to us the re view petitioners have tried to reopen the entire matter to correct the decision rendered.

.....”

- x. *The attempt on the part of MPPMCL is to delay the payment of fixed charges wrongly with held by it along with interest. It is pertinent to state that JPL was supplying power to other Distribution Companies such as KSEBL & WBSEDCL at the relevant time but none have raised the illogical arguments of non-payment of fixed charges.*

- xi. *In the above background the reply to the grounds is as under:*

Ground - A

- xii. *There is no error in the Impugned order dated 18.11.2021, which has been passed after considering all relevant aspects.*

Ground - B

- xiii. *The contents of GROUND B are wrong and are denied. The lockdown imposed due to the COVID – 19 pandemic does not amount to force majeure under the PPA dated 05.01.2011. The payment of capacity charges could not have been with held under the garb of force majeure since the generation, transmission and distribution of electricity were clearly expected under the National Disaster Management Authority ('NDMA') Order dated 24th March 2020. It is stated that the MoP letter dated 06.04.2020 clearly*

holds that fixed charges are payable by all. In so far payment of capacity charges / fixed charges is concerned, no Regulatory Commission has treated COVID to be a force majeure.

Ground - C

- xiv. *The contentions of Ground C are wrong and are denied. Force majeure is a defined term under Article 11.3.1 (i) of the PPA – natural force majeure event. There are certain events which are listed in the Article 11.3.1 (i) and even if it is assumed that the clause contains an inclusive definition, the declaration of lockdown by the Government cannot by any stretch of imagination be termed as a natural force majeure. To the contrary, Article 11.4.1 (e) stated that insufficiency of finance of funds or the agreement becoming onerous to perform is an exception to force majeure.*

Ground - D

- xv. *MPPMCL's contention that the circulars of Union of India do not state that capacity charges have to be paid not with standing the provisions of the PPA are wrong and denied. The issue had been specifically clarified by the Ministry of Power in its letter dated 06.04.2020 as under:*
- “3. Therefore, in brief –*
- (a) The obligation to pay for power within 45 days of the presentation of the bill or as provided in the PPA remains unchanged.”*
- xvi. *The incorrect interpretation of Article 11.3.1(i) of the PPA by MPPMCL having been rejected, there is no ground to deny the payment of capacity charges to JPL.*

Ground - E

- xvii. *There is no merit in the contents of Ground E. For MPPMCL to interpret the NDMA Order dated 24th March 2020 only as an exemption for employees of generators, transmitters and distributors is preposterous the NDMA order only recounts the exceptions to its applicability. The capacity of MPPMCL to sell the electricity to its consumers cannot be an excuse for non-payment of fixed charges under the PPA dated 05.01.2011.*
- xviii. *The Hon'ble Central Electricity Regulatory Commission in the case of Maharashtra State Electricity Distribution Company (MSEDCL) Vs M/s GMR Warora Energy Limited & Coastal Gujarat Power Limited, in Petition No. 187/MP/2021 has inter alia held as under:*
- “Further, the concessions to the distribution companies through MOP, GOI advisory dated 15.5.2020/16.5.2020 for deferment of capacity charges for power not scheduled, to be payable without interest after the end of lockdown period in three equal instalments and a rebate of about 20-25% on power supply billed (fixed cost)*

to Discoms and inter State Transmission charges levied by PGCIL, are applicable only to the Power Generation and Transmission CPSEs and all Subsidiaries/Joint Ventures of Power Generation and Transmission CPSEs under the MOP, GOI and not to the independent power projects of the Respondents herein. Hence, the question of extending the said advisory dated 15.5.2020/16.5.2020 to the power projects of the Respondents, to provide rebate and interest free deferment of capacity charges to the Petitioner, does not arise. -----

One more submission of the Petitioner is that the outbreak of Covid and resultant impact has been held to be a force majeure event by various Government authority notifications and therefore the Commission may acknowledge Covid-19 as a force majeure event and grant reliefs as prayed in the petition. In response, the learned counsel for the Respondent GMRWEL has pointed out that the Commission in its order dated 20.1.2022 in Petition No.594/MP/2020 (GMRWEL v DNHPCL) had decided that that lockdown due to outbreak of Covid-19 cannot be considered as a force majeure event hindering performance of obligations under the PPA. The relevant portion of the order dated 20.1.2022 is extracted below:

“36. The Respondent has sought to argue that the reliance on above notification providing for exemption from lockdown is misconceived as the exemption was for the purpose that power supply should not be disconnected. However, the said argument, in our view, is misconceived. On one hand, the Respondent has sought to rely upon the Notifications issued by Ministry of Finance, MNRE and MoP in contending that Covid-19 and nationwide lockdown have been considered as force majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoHA Order dated 24.3.2021, in our view, such lockdown cannot be considered as force majeure event that prevents, hinders or delays the Respondent/distribution licensee in performing its obligations as specified in the DNH PPA”

*In line with the above decision, the prayer of the **Petitioner to acknowledge Covid-19 as a force majeure event and grant reliefs, as prayed for, is not acceptable.**”*

- xix. The Prayers of MPPMCL are without any basis. Instead of pointing out the error apparent, MPPMCL is re-arguing its original case and seeking a fresh interpretation of the PPA, which is impermissible under the Review jurisdiction. There can be no question*

of recalling the Order dated 18.11.2021 since the Review Petition itself is not maintainable under section 94 of the Act read with Order 47 of the CPC. MPPMCL must be directed to immediately release the capacity charges of Rs. Approx. 38 Crores for the Period March,2020 to May 2020 crores along with Late Payment Surcharge thereon as per Para 30 of the Order dated 18.11.2021.

- xx. *In view of the above facts and circumstances it humbly prayed before this Commission that the present Review Petition should be dismissed with heavy costs.*

Commission's Observations and Findings

13. M.P. Power Management Co. Ltd, has filed this petition under section 94 of the Electricity Act, 2003 for review of the Commission's order dated 18.11.2021 passed in Petition No. 10 of 2021 regarding non-payment of Capacity Charges / Fixed Charges by MPPMCL to M/s Jhabua Power Ltd. for the period from 24.03.2020 to 31.05.2020 by invoking 'Change in Law' provision under PPA due to Covid-19 pandemic.
14. Vide aforesaid impugned Order dated 18.11.2021, the Commission had observed that the reasons/conditions for invocation of Force Majeure clause by MPPMCL were not in accordance to the provisions of the PPA dated 05.01.2011 and MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2020. Therefore, MPPMCL was directed to pay the Capacity Charges / Fixed Charges for the period of 24.03.2020 to 31.05.2020 along with late payment surcharge in accordance to the provisions under the MPERC Tariff Regulations, 2020 & the PPA executed between the parties.
15. Aggrieved with the aforesaid Order, MPPMCL had filed a petition MP No. 564/2022 with Hon'ble High Court of Madhya Pradesh. Vide order dated 01.08.2022 Hon'ble High Court while disposing of the aforesaid petition, had stated in order dated 01.08.2022 that it is not inclined to entertain the writ petition but relegates the petitioner to avail remedy of review under Section 94 of the Act by filing the same within a period of three weeks along with the application for interim relief. Regarding applicability of stay, in the aforesaid order dated 01.08.2022, it was mentioned that the reviewing authority shall consider the application for interim relief and pass such appropriate orders in accordance with law after hearing both the sides. It was also mentioned that the interim order granted by this Court on 04.03.2022 shall continue till the date of first hearing by the Commission.
16. Accordingly, the petitioner has filed this review petition along with three Interlocutory Applications. The observations of the Commission on each ground raised by the petitioner in subject review petition are as follows:

Ground:

- i. *“Impugned order dated 18/11/2021 in Petition no. 10 of 2021 is erroneous on the face of the is grossly erroneous.”*

Commission’s Observations:

The Commission has passed impugned order dated 18.11.2021 after considering all relevant orders issued by Government of India in this regard, relevant provisions under PPA dated 05.11.2011 and the provisions under MPERC (Terms and Conditions for determination of tariff) Regulations, 2020. Therefore, the contention of the petitioner seeking review on this ground has no merit.

Ground:

- ii. *“The Commission has erred in concluding that Lockdown Imposed by the Government of India due to Covid 19 pandemic, was not a force Majeure situation and the petitioner is bound to pay fixed capacity charges to the respondent.”*

Commission’s Observations:

The Commission in Para No. 25 of Order dated 18.11.2021 had observed the following:

25. *“On perusal of the aforesaid conditions of force majeure in PPA, the events for Natural force majeure as articulated under PPA are act of God, including but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the Site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years. When in a definition certain terms are used and thereafter there is a general term, the general term has to be construed to the words used prior in the very same definition. However, in the instant case, the reasons enumerated by the Respondent like sharp decrease in demand due to closure of industries, shops and other major establishments due to the lockdown and disruption in the economic activity caused reduction in collections of revenue by the Respondent from the consumers does not fall under the events/conditions for natural force majeure under clause 11.3.1 of the PPA. Further, Article 11.4 which deals with Force Majeure exclusion states that the conditions like insufficiency of funds or the agreement becoming onerous to perform would not include under Force Majeure event.”*

In view of the above, the lockdown imposed due to the Covid – 19 pandemic does not cover under force majeure in terms of the provisions under PPA dated 05.01.2011. Further, services of power generation, transmission and distribution, being essential in

nature, were exempted from the purview of the said lockdown. Ministry of Power, Govt. of India vide its letter dated 06.04.2020 has also stated that the obligation to pay for Capacity Charges as per the PPA shall continue, as does the obligation to pay for transmission charges. Therefore, the contention of the petitioner seeking review on this ground has no merit.

Ground:

- iii. *“The Parties to the Contract of Power Purchase are their own lexicographers and hence the petitioner in all its legal framework has the right to invoke “force majeure” clause in situation beyond its control to purchase the power as promised in the said contract.”*

Commission’s Observations:

Force majeure is defined under Article 11.3.1 of the PPA and Natural Force Majeure events are defined under Article 11.3.1(i) of the PPA. There are certain events which are listed under natural force majeure and condition on which natural force majeure was invoked by the petitioner, is not covered under the PPA signed between both the parties.

Further, in Para 25 of the impugned order, the Commission had observed that reasons enumerated by the Respondent like sharp decrease in demand of electricity because of closure of industries, shops and other major establishments due to lockdown and disruption in the economic activity caused reduction in collection of revenue by the Respondent from the consumers does not fall under the events/conditions for natural force majeure under the PPA. Further, Article 11.4 which deals with Force Majeure exclusion states that the conditions like insufficiency of funds or the agreement becoming onerous to perform would not include under Force Majeure event. Therefore, the contention of the petitioner seeking review on this ground has no merit.

Ground:

- iv. *“The circulars of the Union of India do not state anywhere that capacity charges have to be paid notwithstanding the provisions of the PPA and invocation of force majeure.”*

Commission’s Observations:

With regard to contention of the review petitioner that the circulars of Union of India do not state that capacity charges have to be paid notwithstanding the provisions of the PPA, it is pertinent to mention that the Ministry of Power vide letter dated 27.03.2020 issued certain directions to generating companies and distribution licensees regarding payment security mechanism. Subsequently, vide letter dated 06.04.2020, the Ministry of Power issued a clarification to its earlier order dated 27.03.2020 and stated that

there has been some misconception regarding interpretation of its previous order and clarified that the obligation to pay for Capacity Charges by the procurer as per the PPA shall continue, as does the obligation to pay for transmission charges. Therefore, the contention of the petitioner seeking review on this ground has no merit.

Ground:

- v. *“The Commission has erred and failed to appreciate that the exemption from lockdown was for the employees of the Generators, Transmitters and Distributors and not for the Industrial Consumers of the State.”*

Commission’s Observations:

At para 26 of the impugned order dated 18.11.2021, the Commission had observed that National Disaster Management Authority (NDMA) vide Order dated 24.03.2020 issued directions to take effective measures for ensuring social distancing so as to prevent the spread of Covid-19 in the country. The Guidelines issued by NDMA provided for a complete lockdown in the country, while ensuring maintenance of essential services and supplies. The services of power generation, transmission, and distribution, being essential in nature, were exempted from the purview of the said lockdown. Therefore, the interpretation of NDMA Order dated 24th March 2020 by the petitioner that the exemption was only for employees of generators, transmission and distribution is incorrect and the contention of the petitioner seeking review on this ground has no merit.

17. Having discussed and deliberated at length on the grounds stated by Petitioner for review in the subject petition, the Commission has examined the subject review petition in accordance with Rule 1 Order 47 of the Code of Civil Procedure, which provides that a person aggrieved by an order may apply for a review under the following circumstances:
- (a) On discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at a time when the order was made;
 - (b) An error apparent on the face of the record;
 - (c) For any other sufficient reason
18. In view of foregoing observations, the Commission has noted that grounds raised by the review petitioner had been appropriately dealt in detail by the Commission in the order under review. Further, no new and important matter or evidence is produced in this review petition, nor any error apparent on the face of the record. Further, no any other sufficient reason is filed by the petitioner. Therefore, contention of the petitioner seeking review has found no merit.

19. Let us refer to a few judgments passed by the Hon'ble Supreme Court and various High Courts for the scope and effect of review under the CPC:
- (i) The judgment of the Hon'ble Supreme Court in Parsion Devi and Others vs. Sumitri Devi and Others [1997 (8) SCC 715], wherein it was held as under: *"Under Order 47 Rule 1 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, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise"."*
 - (ii) In the case of Lily Thomas vs. Union of India, (2000) 6 SC 224, it is observed and held that: *"the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. It is further observed in the said decision 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 vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs Most Rev. Mar Poulouse Athanasius, AIR 1954 SC 526"*.
 - (iii) The Hon'ble Madhya Pradesh High Court in Sharda Begam v. Kallu, [2020 SCC On Line MP 2419], decided on 23/10/20 held that: *"it is well settled that in the guise of review, a rehearing is not permissible. In order to seek review it has to be demonstrated that order suffers from error apparent on the face of record. The Court while deciding the application for review cannot sit in appeal over the judgment or decree passed by it. The review petitioner cannot be given liberty to readdress the Court on merits because it is not an appeal in disguise where the judgment/order is to be considered on merits."*

20. In light of the issues examined in preceding paragraphs of this order, it is observed that the issues raised by the petitioner in the present review petition do not fall under any of the circumstances articulated in Rule 1 Order 47 of CPC for review. Therefore, the subject review petition is not found admissible, hence disposed of and dismissed, accordingly.

(Gopal Srivastava)
Member (Law)

(Mukul Dhariwal)
Member

(S.P.S. Parihar)
Chairman