

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION

5th Floor, "Metro Plaza", Bittan Market, Bhopal - 462016



Petition No. 30 of 2021

PRESENT:

S.P.S. Parihar, Chairman

Mukul Dhariwal, Member

Shashi Bhushan Pathak, Member

IN THE MATTER OF:

Review petition filed under section 94(1)(f) of Electricity Act 2003 read with Regulation 40 of MPERC (Control of business) (Revision-I) Regulations 2016, seeking review of the order dated 26.11.2020 passed by the Commission in Petition No. 44 of 2019 for Truing-up of Generation Tariff of 2x660 MW Coal Based Super Critical Thermal Power Station at Nigrie District, Singrauli, (M.P.) for FY 2018-19.

M.P. Power Management Company Limited

Shakti Bhawan, Rampur, Jabalpur – 482008.

Petitioner

//Versus//

Jaiprakash Power Ventures Limited

(Jaypee Nigrie Super Thermal Power Plant)

JA House, 63, Basant Lok, Vasant Vihar

New Delhi - 110057

Respondent

ORDER
(Date of Order: 6th December' 2021)

Shri Ravin Dubey, Advocate and Shri Ajasra Gupta, Dy. GM (Commercial) appeared on behalf of the petitioner (MPPMCL).

Shri Sakya Singh Choudhary, Advocate and Shri Ajeya Kumar Tripathi appeared on behalf of Respondent (JPVL)

1. MP Power Management Co Ltd. (hereinafter called "the petitioner" or "MPPMCL") has filed the subject review petition for review of Commission's order dated 26th November' 2020 in Petition No. 44 of 2019 which was filed by the Respondent for true-up of Generation Tariff of its 2 x 660 MW Coal Based Super Critical Thermal Power Station at Nigrie District, Singrauli, (M.P) determined by the Madhya Pradesh Electricity Regulatory Commission (hereinafter called 'the Commission' or 'MPERC') for FY 2018-19 vide Multi Year Tariff Order dated 29th November' 2018. The aforesaid MYT order was based on MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 (hereinafter called "the Tariff Regulations, 2015").
2. The subject review petition is filed under Section 94(1) (f) of Electricity Act 2003 read with Regulation 40 of Madhya Pradesh Electricity Regulatory Commission (Conduct of Business) (Revision-I) Regulations, 2016.
3. The Respondent JPVL has two generating units of 660 MW each. Unit No. 1 and 2 achieved COD on 03.09.2014 and 21.02.2015 respectively.
4. The Respondent (M/s JPVL) had filed petition No. 44 of 2019 for true-up of generation tariff of its Nigrie thermal power station for FY 2018-19 based on the Annual Audited Accounts and other documents. In the aforesaid true-up petition the Respondent (M/s JPVL) had sought true-up of FY 2018-19 based on the additional capital expenditure incurred during FY 2018-19 in accordance with Regulation 8.4 of the tariff Regulations, 2015. Vide Order dated 26th November' 2020 in the aforesaid petition, the Commission determined true-up of tariff in terms of the Regulation 8.4 of the tariff Regulations, 2015, based on the actual additional capital expenditure incurred during FY 2018-19 as per Annual Audited Accounts for FY 2018-19 of Nigrie Thermal Power Project.
5. The petitioner has sought review of Commission's order dated 26th November' 2020, in the subject petition on the following issues:
 - (i) True-up of Primary Fuel is to be made as per Regulation 8.8 (iii) of the Tariff Regulations, 2015.
 - (ii) Interest on Loan is not allowed as per Tariff Regulations, 2015.

6. The petitioner broadly submitted the following in the subject petition:
- i. *Under the provisions of Regulation 8.8(iii) of 2015 Tariff Regulations, True-up of cost of Primary Fuel is required to be done and the Review Petitioner had made specific prayer in its Reply Dated 13.03.2020 for carrying out True-up of cost of Primary Fuel. However, in the Impugned Order True-up of cost of Primary Fuel has not been done.*
 - ii. *The Review Petitioner, in Paras 12 to 16 of its Reply Dated 13.03.2020 to the Petition No. 44 of 2019, had submitted that Regulations 8.7 and 8.8 of Tariff Regulations mandate that true-up of generation tariff is required to be carried out based on performance of both Controllable and Uncontrollable parameters. Besides, in Para 49 (v) of the said Reply, the Review Petitioner had also made specific prayer for carrying out True-up of Primary Fuel Cost in accordance to Regulation 8.8(iii) of 2015 Tariff Regulations.*
 - iii. *The Commission has done True-up of Controllable Parameters in accordance with Regulation 8.7, as recorded in Paras 128 to 132, the Impugned Order. However, regarding True-up based on Uncontrollable parameters in accordance with Regulation 8.8, the true-up order is silent.*
 - iv. *In Para 90 of the Impugned Order, this Commission has allowed Interest on Loan at Weighted Average Rate of 11.46% on the basis of Respondent's revised submissions, which are summarised in Para 88 of the Impugned Order as "petitioner has now revised weighted average rate of interest from 11.78% to 11.46% for FY 2018-19 based on the last true-up petition for FY 2017-18 due to Resolution Plan/ Debt Restructuring Plan which got effective from December 2019.". However, this is not in consonance with Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations and in view of the following facts on record.*
 - v. *However, in "Note 15.2" to the Balance Sheet of the Jaypee Nigrie Super Thermal Power Plant (as on 31.03.2019) (at Page No. 117 of the Petition), it has been disclosed by Respondent that the repayment of principal amount of Rs. 341,31,70,024/- (Three Hundred and Forty One Crore Thirty One Lac Seventy Thousand and Twenty Four only) and payment of interest amount of Rs. 1,695,53,48,460/- (One Thousand Six Hundred Ninety Five Crore Fifty Three Lac Forty Eight Thousand Four Hundred and Sixty only) are overdue for maximum periods of 729 days and 1065 days respectively, which obviously pertain to the period of True-up i.e. FY 2018-19.*
 - vi. *True-up of any Capital Cost (including Interest on Loan) is allowed only on actual basis and not on notional basis under the provisions of Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations. Therefore, Weighted Average Rate*

of interest at 11.46% may not be allowed, as admittedly, the payment of interest on loan is not being made by the Respondent.

- vii. *Because, in Para 49 (1) of the Reply Affidavit Dated 13.03.2020 to Petition No. 44 of 2019, the Review Petitioner had also made specific prayer for carrying out True-up of cost of Primary Fuel in accordance with Regulation 8.8(iii) of 2015 Tariff Regulations. The comments and the prayer of Review Petitioner have been recorded in Paras 14 and 15 of Annexure 1 to the Impugned Order.*

Procedural History:

7. Motion hearing in the subject matter was held on 21st September' 2021. Vide order dated 22nd September' 2021, the petitioner was directed to serve copy of petition on the Respondent in this matter within a week. The Respondent was also directed to file its response on maintainability of the subject petition within two weeks, thereafter.
8. The matter was heard on maintainability on 9th November' 2021 when the Commission observed the following:
- i. By affidavit dated 13th October' 2021, the Respondent No. 1 filed reply to the subject petition;
 - ii. By affidavit 3rd November' 2021, the petitioner filed rejoinder to the reply filed by the Respondent.
 - iii. Ld. Counsels of petitioner and the Respondent concluded their arguments on maintainability of the subject petition.
9. Vide order dated 16th November' 2021, the parties were allowed to file their written submissions in support of their arguments on maintainability of the subject petition within a week. With the above direction, the case was reserved for order.
10. The Respondent (JPVL) and the petitioner (MPPMCL) filed their written submissions on 18.11.2021 and 23.11.2021, respectively.
11. The Respondent (M/s JPVL) in its reply dated 13th October' 2021 broadly submitted the following:
- i. *Answering respondent most respectfully submits that the Commission has examined all the issues in the subject petition in accordance with the principles, methodology and norms specified in MPERC (Terms & Conditions) for determination of Generation Tariff Regulations, 2015. Further, the Commission has also examined/scrutinized all the documents including Annual Audited Accounts and other documents sought by the Hon'ble Commission and provided by the Respondent of the instant petition during the proceedings of True up Petition. In addition to the above, Hon'ble Commission*

had also analyzed the issues/comments raised by the Petitioner of the instant Petition and the reply thereof submitted by the Answering Respondents during the proceedings of True up Petition No. 44 of 2019.

- ii. Answering respondent, hence most respectfully submits that in view of the submissions made by the respondents herein above it is crystal clear that all the issues raised by the petitioner have already been decided by the Hon'ble Commission vide its Order dated 26.11.2020 and there is no error apparent on the face of record in the impugned order dated 26.11.2020, therefore no case for review under the section 94 of the Electricity Act in respect of Order 47 of CPC is made out. Therefore, the Review Petition deserves to be dismissed on the ground of the maintainability itself. Further, it is submitted that Petitioner has right to file appeal if he aggrieved of an order but the Review Petition is to be strictly heard as per the principle of the order 47 of CPC and the petitioner has failed to demonstrate that there is any prima-facie error on the face of record. It is submitted that it is settled law that even an erroneous decisions is not subject matter of the Review and the party should exercise power of Review.
- iii. It is a well settled principle of law that in exercise of jurisdiction under Order XLVII Rule 1 of the Code of Civil Procedure, 1908 ("CPC"), an erroneous order/view/decision cannot be reheard and corrected. In this regard, reliance is being placed upon the following Judgments
- (a) *State of West Bengal and Ors vs Kamal Sengupta and Anr*[2008 (8) SCC 317], wherein it was held that if an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of record for the purpose of Order XLVII Rule 1 CPC. The relevant extract of the Judgment is reiterated hereunder:
- "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not required detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/Tribunal on a point of fact or law. In any case, while exercising the***

power of review, the concerned Court/Tribunal cannot sit in appeal over its Judgment/decision.”

- (b) *Parsion Devi vs Sumiri Devi [1997 (8) SCC 715], wherein the Hon’ble Apex observed as under:*

“Under Order XLVII, Rule 1 CPC a judgment may be open to review inter alia, of there is a mistake or an error apparent on the face of 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 record justifying the Court to exercise its power of review under Order XLVII, Rule 1 CPC. In exercise of the jurisdiction under Order XLVII, 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”

On a reading of the law settled above, one can conclude that the application for review is much more restricted than that of an appeal and the power of review cannot be exercised for an erroneous decision to be reheard and corrected.

- iv. *The Petitioner while filing the instant Petition has failed to meet the grounds on basis of which a Review of Judgment can be sought by an aggrieved person. At this stage, it would be relevant to highlight the limited grounds on which a Review of Judgment may be sought which is set out in Order XLVII Rule 1 which are as under:*

- (a) *New and important matter or evidence is discovered which after the exercise of due diligence was not within the knowledge of the Review Petitioner or could not be produced by the Review Petitioner at the time when the decree is passed;*
- (b) *there is some mistake or error apparent in the face of record;*
- (c) *there are other sufficient reasons calling for review of the Judgment*

- v. *It is submitted that the first and foremost requirement of entertaining a Review Petition is that the Order of which review is sought suffers from any error apparent on the face of record and permitting the order to stand will lead to failure of justice. Whereas, in the instant Petition, the Review Petitioner is raising question which goes to the merits of the case, therefore, cannot be adjudicated by this Hon’ble Commission under Review Jurisdiction. In fact the Review Petition has not even made an attempt to qualify the present Petition within the scope of Order XLVII Rule 1. Hence, the Review Petition deserves to be rejected on the threshold itself.*

- vi. At this stage, it would be relevant to consider the interpretation laid down by Hon'ble Apex Court in matter titled *Haridas vs Smt Usha Rani Banik & Ors* [AIR 2006 SC 1634] which is as under:

*"In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lis, permit the defendant to press for 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. **This is amply evident from the explanation in Rule 1 of the Order XLVII which states that 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. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should not exercise the power to review its order with the greatest circumspection...**"*

- vii. Thus, from the bare reading of the provision of Order XLVII Rule 1 of CPC and position of law laid down above concerning the Review Jurisdiction, the position emerges as under:

- (a) First and foremost requirement of entertaining a Review Petition is that the order, review of which is sought, suffers from any error apparent on the face of record and permitting the order to stand will lead to failure of justice. Admittedly, in the present case the Petitioner has not even attempted to bring its Petition within the scope of Review.
- (b) In the absence of any such error, finality attached to the Judgment/order cannot be disturbed.
- (c) Where there are two possible views regarding the interpretation or application of law vis-à-vis the particular facts of a case, taking one view, even if it is erroneous, cannot be said to be an error apparent on the face of record.
- (d) Power of review cannot be exercised for an erroneous decision to be reheard and corrected.

- (e) *Power of review is not confused with the appellate power which may enable the appellate Court to correct all errors of subordinate Court.*
- (f) *Contentions raised and decided in main proceedings cannot be reopened and agitated under the guise of review petition.*

viii. *It is submitted that none of the above requirements are satisfied in the instant Petition as there is no apparent error on the face of it which calls for Review of the Impugned Judgment. The Review Petitioner by filing the instant Petition is seeking reconsideration of the contentions/submission raised by it in the Subject Petition and the alleged errors as raised in the instant Petition are not self-evident and has to be detected by the process of reasoning.*

ix. *In view of the law settled by Hon'ble Supreme Court of India and submission made above, it is evident that the instant Petition filed by the Review Petitioner is bereft of the merit, hence not maintainable and is liable to be dismissed with exemplary cost. Further, this is to humbly submit that answering respondent is not filing parawise reply at this juncture but reserve the right to file the same when ever this Hon'ble Commission directs.*

12. The petitioner in its rejoinder dated 3rd November' 2021 to the aforesaid reply broadly submitted the following:

i. *In its Reply, the Respondent has contended that the present Review Petition is not maintainable because :*

- *This Hon'ble Commission has examined all the issues and documents in Petition No. 44 of 2019, in accordance with the principles, methodology and norms specified in MPERC (Terms & Conditions) for determination of Generation Tariff, 2015.*
- *There is no error apparent on the face of the record in the Impugned Order dated 16.12.2020 therefore there is no case for review under Section 94 of Electricity Act 2003 in respect of Order 47 of CPC is made out.*
- *The Petitioner has right to file appeal if he is aggrieved of an order but Review Petition is to be strictly heard as per the principle of Order 47 of CPC.*
- *Order 47 Rule 1 of CPC provides for following limited grounds for review of a judgment :*

(a) *New and important matter or evidence is discovered which after exercise of diligence was not within the knowledge of the Review Petitioner or could*

not be produced by the Review Petitioner at the time when the decree is passed;

(b) There is some mistake or error apparent in the face of record;

(c) There are other sufficient reasons calling for review of the judgment.

ii. *The Respondent has also sought to rely upon following judgments passed by Hon'ble Supreme Court of India :*

(a) State of West Bengal and Ors Vs. Kamal Sengupta and Anr.

[(2008) 8 SCC 317]

(b) Parsion Devi Vs. Sumiri Devi

[(1997) 8 SCC 715]

iii. *It is most humbly submitted that the legal principles cited or the Case Laws sought to be relied upon by the Respondent are not applicable to the facts of the present case due to reasons given in the subsequent paragraphs. Therefore it is prayed that this Hon'ble Commission may graciously be pleased to ignore the contentions of the Respondent and admit the Review Petition and adjudicate the same on merits.*

iv. *The scope and ambit of powers of Central Electricity Regulatory Commission, particularly on the aspect of "Review" of tariff was clarified by Hon'ble Supreme Court of India in its judgment dated 03.03.2009 passed in Civil Appeal No. 1110 of 2007 [U.P Power Corporation Ltd. Vs National Thermal Power Corporation Ltd. and Ors.]. [(2009) 6 SCC 235]. The relevant portion is extracted below for ready reference:*

"34. While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof. Its jurisdiction, in that sense, as submitted by Mr. Gupta, for the aforementioned purposes would not be barred in terms of Order II, Rule 2 of the Code of Civil Procedure or the principles analogous thereto.

40. Regulations 92 and 94, in our opinion, do not restrict the power of the Central Commission to make additions or alterations in the tariff. Making of a tariff is a continuous process. It can be amended or altered by the Central Commission, if any occasion arises therefor. The said power can be exercised not only on an application filed by the generating companies but by the Commission also on its own motion."

- v. *It is most humbly submitted that the functions and powers of this Hon'ble Commission under Sections 86 and 181 of the Electricity Act 2003, are analogous to the functions and powers of the Central Commission under Sections 79 and 178 thereof. The powers this Hon'ble Commission are also same as those of the Central Commission under Section 94 of the Electricity Act 2003 which includes its powers of review of its own decisions, directions and orders.*
- vi. *Therefore, it is respectfully submitted that the legal principles laid down by the Hon'ble Supreme Court of India in the judgment passed in case of **U.P Power Corporation Ltd.** (Supra) would be directly applicable to the facts of the present case.*
- vii. *In view of the legal principles laid down by Hon'ble Supreme Court of India, the contention of the Respondent that the review of a tariff order can be sought strictly under Order 47 Rule 1 of CPC is misconceived because while exercising its powers of review, so far as alterations and amendment of a tariff is concerned, this Hon'ble Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof. Its jurisdiction, in that sense, would also not be barred in terms of Order II, Rule 2 of the Code of Civil Procedure or the principles analogous thereto. Besides, tariff determination is a continuous process and if the need arises, the tariff can be revised at any stage.*
- viii. *In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary. It is most humbly submitted that in view of the legal principles laid down by the Hon'ble Apex Court in **U.P Power Corporation Ltd.** while exercising its powers of Review, this Hon'ble Commission is not barred by the provisions of either Section 114 of CPC or Order 47 Rule 1 thereof. On the contrary, tariff determination being a continuous process this Hon'ble Commission is fully empowered to seek further information from the Respondent and review and reconsider the true-up of the tariff on that basis.*
- ix. *Without prejudice and in addition to above, in the Review Petition, the Review Petitioner has clearly set out sufficient reasons and cogent grounds for review / reconsideration of the Impugned Order by this Hon'ble Commission.*
- x. *In view of the submissions made in the foregoing paragraphs, it is most humbly prayed that this Hon'ble Commission may graciously be pleased to admit the Review Petition and review the order dated 26.11.2020 passed in Petition No. 44 of 2019 to the extent prayed.*

13. The Respondent in its notes for arguments dated 18th November' 2021 broadly submitted the following:
- i. *Regulation 40 (1) of MPERC CBR provides as follows:*

*40.(1) The Commission may on its own motion or on the application of any of the person or parties concerned, **within 60 days from the date of making any decision, direction or order**, review such decision, direction or order and pass such appropriate order as the Commission thinks fit.*
 - ii. *As per the Regulation 40 (1) of MPERC CBR the period of making the application is restricted to 60 days. There is no provision for condonation of delay provided in the regulation if the application is filed beyond 60 days. Therefore, no application for review is maintainable after the period of sixty days. The power to condone delay is a specific power and cannot be exercised without a specific provision to this extent. Any other inherent power of the Hon'ble Commission cannot be invoked to condone delay.*
 - iii. *The Hon'ble High Court of Bombay in the case of Madhukar Govindrao Thaware and others Versus Central Bank of India reported in 2011 SCC OnLine Bom 1367 has held as follows:*

“If the relevant special statute provides for the specific period of limitation to prefer appeal without any specific provision for the Court to condone delay, then inherent power of the Court to condone delay under the general law i.e. Limitation Act, 1963 cannot apply and delay cannot be condoned on the ground of equity and hardship.”
 - iv. *In the present case the true-up order was passed on 26.11.2020 which was received on 07.12.2020 and the period of limitation for filing of review has expired on 05.02.2021 taking 60 days from the date of receipt of order. Since Regulation 40 does not provide for any condonation of delay, review petition filed beyond 60 days is not maintainable. Therefore, the Review Petition deserves to be dismissed on the ground of the maintainability itself. Without prejudice to the foregoing, Respondent reserves its right to object to the application for condonation of delay on its merits, if it is so required.*
- Appeal against Impugned Order already filed before Review Petition***
- v. *Order XLVII Rule 1 of CPC allows a review petition inter alia in a situation where:*

(a) *“By a decree or order from which an appeal is allowed, but from which no Appeal has been preferred”*

vi. *A review petition is not maintainable under the Civil Procedure Code where appeal from the same order lies in law, and has already been filed. This is for the reason that once the impugned order is pending for judicial review before a higher appellate body and the validity of the order is in jeopardy, the court passing the impugned order can no longer be allowed to review such order.*

vii. *The Hon’ble Supreme Court in the case of Khoday Distilleries Ltd vs Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd. reported in (2019) 4 SCC 376 has explained the position having regard to the doctrine of merger of lower court orders with the orders of superior forum in the following words:*

“18. ... logic behind this doctrine is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority is subjected to a remedy available under law before a superior forum, then though the decree or order under challenge continues to be operative and binding, nevertheless, this finality is to put in jeopardy. Once the superior court disposes of the dispute before it in any manner it is the decree of the superior court, tribunal or authority which is the final binding and operative decree...”.

viii. *Appeal against the Impugned Order has already been filed by the Respondent on 25.02.2021 whereas the Review Petition has been filed on 26.03.2021 hence the Appeal precedes the Review Petition. In this background, the review petition is not maintainable in law. Copy of the filing proof is enclosed as Annexure – A.*

Issues raised in review petition without merits / do not disclose error apparent

ix. *For purposes of maintainability, the respondent would like to point out that the issues raised in the review petition are either without merits or do not disclose any error apparent on record.*

x. *The Petitioner has referred to the Regulation 8.8(iii) of Tariff Regulations, 2015, that the true-up of cost of primary fuel has not been considered in the Impugned Order. It is submitted that the review petitioner has left out the reading of the entire clause which clearly shows that the true up process includes only capital cost and the additional capital cost true-up. There is no requirement of providing details of energy cost. Moreover, the provisions of the energy charges provide for cost to be worked out based on landed cost of coal and normative parameters and do not require to be*

trued up. The regulation states that it is only for the details of capital expenditure and additional capital cost that needs to be provided for true up. The review petitioner does not indicate what needs to be allegedly trued up or what their grievance is. Merely citing a legal provision cannot be a ground for seeking review. It is pertinent to point out in this regard that under Order 47 Rule 1, a person aggrieved can file a review. The review petitioner has to demonstrate how he is aggrieved by any particular finding. This has not been done in the present case.

- xi. With regard to the interest cost, review petitioner has sought consideration of various documents to point out alleged erroneous allowance of interest cost, which cannot be done in review jurisdiction as it has to be an error apparent on the face of record.*
- xii. it is settled law that when an error has occurred in an order, the aggrieved party is entitled to appeal, and it is not entitled to review unless there is an error apparent on the face of the record. He submitted that the matter is liable to be dismissed at the very threshold on the issue of maintainability. The law with regard to the limited scope of review jurisdiction has already been set out in the reply of the respondent and is not repeated herein.*

On MPPMCL's contentions w.r.t. maintainability

- xiii. Review petitioner has contended that the review petition is maintainable as the Hon'ble Commission can review its tariff order at any time as set out in the Supreme Court judgment of **UPPCL vs NTPC** reported in **(2009) 6 SCC 235** where the Supreme Court has taken note of Regulation 92 of the CERC Conduct of Business Regulations, 1999 to allow review of tariff order to revise the tariff without referring to the rules of Order 47 CPC. Review petitioner has relied on this judgment to contend that Order 47 will not be applicable to the Hon'ble Commission.*
 - xiv. The judgment referred by the review petitioner relates to Regulation 92 of Central Electricity Regulatory Commission, 1999 (Regulation) issued under Electricity Regulation Commission Act, 1998. However, Regulation 92 is a different provision and is not similar in terms of scope to Regulation 40 of MPERC CBR. Section 94(1)(f) of Electricity Act 2003 clearly makes the principles of CPC applicable to the proceedings before Commissions. Regulation 40 of MPERC CBR has very clearly drawn from Order 47 Rule 1 of Civil Procedure Code (CPC). In this background, the contention of the review petitioner has no merit.*
14. Vide written submission dated 23rd November' 2021, the petitioner (MPPMCL) filed the response on the arguments placed by the Respondent broadly mentioning the following:

- i. At the outset, the Review Petitioner denies and disputes all the contentions and arguments made by the Respondent in its Reply dated 13.10.2021, oral submissions made during hearing dated 09.11.2021 and Written Submissions dated 18.11.2021.*
- ii. The Respondent has argued that the present Review Petition is not maintainable because:*
 - Review Petition cannot be filed beyond a period of 60 days as per Regulation 40(1) of MPERC Conduct of Business Regulations.*
 - As an Appeal against the Impugned Order has already been filed prior to the filing of present Review Petition, therefore Review Petition is not maintainable under CPC.*
 - Issues raised in Review Petition is without merit do not disclose error apparent on record.*
 - The Petitioner has right to file appeal if he is aggrieved of an order but Review Petition is to be strictly heard as per the principle of Order 47 of CPC.*
- iii. Point-wise response to the arguments of the Respondent is given hereinunder.*
- A. **Review Petition cannot be filed beyond a period of 60 days as per Regulation 40(1) of MPERC Conduct of Business Regulations.***
- iv. Due to the outbreak of COVID-19 pandemic in March, 2020, Hon'ble Supreme Court took Suo Motu cognizance of the difficulties faced by the litigants in filing petitions/ applications/ suits/ appeals/ all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central and/or State) and was pleased to pass order dated 23.09.21 in MA No. 665/2021 in SMW (C) No. 03/2020 and in [In Re Cognizance for Extension of Limitation], directing exclusion of period from 15.03.2020 till 02.10.2021 in computing the period of limitation for any suit, appeal, application or proceeding.*
- v. The relevant portion of the Order dated 23.09.21 passed in MA No. 665/2021 by Hon'ble Supreme Court is extracted below :*
 - “8. Therefore, we dispose of the M.A. No.665 of 2021 with the following directions : -*
 - I. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.*

- II. In cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.**
- III. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.”**
- vi. Consequently, the period of limitation provided in Regulation 40(1) of MPERC Conduct of Business Regulations also stood extended. As the present Review Petition was filed on 26.03.21, in view of the order dated 23.09.21 passed by Hon’ble Supreme Court in MA No. 665/2021, there is no delay in filing of present Review Petition. Also, reliance placed by the Respondent on judgment rendered by Hon’ble High Court of Bombay in case of Madhukar Govind rao Thaware & Ors. Vs. Central Bank of India [2011 SCC On Line Bom 1367] is misplaced.
- vii. In view of above, the objection of the Respondent regarding alleged delay in filing of the present Review Petition is misconceived and it is most humbly prayed that this Hon’ble Commission may graciously be pleased to ignore the objection of the Respondent and admit the Review Petition.
- B. Appeal against Impugned Order is already filed before filing of the present Review Petition hence in terms Rule 1 of Order 47 of CPC Review is not maintainable.**
- viii. The Respondent has placed reliance on the judgment passed by Hon’ble Supreme Court of India in case of Khoday Distilleries Ltd. Vs. Sri Mahadeshwara Shakara Sakkare Karkhane Ltd. reported in [(2019 4 SCC 376] wherein Hon’ble Supreme Court has explained the position having regard to the doctrine of merger of lower court orders with orders of superior forum. The Respondent itself has quoted Para 18 of the said judgment, wherein Hon’ble Supreme Court has observed that “.....logic behind this doctrine is that there cannot be more than one decree or operative orders **governing the same subject matter at a given point of time.....”**

ix. Admittedly, the subject matter of the present Review Petition is entirely different from that involved in the Appeal dated 25.02.21 filed by the Respondent, therefore the legal principles enunciated in judgment passed by Hon'ble Supreme Court of India in case of Khoday Distilleries Ltd. (Supra) will not be applicable to the facts of the present case and the present Review Petition is maintainable.

C. Issues raised in Review Petition is without merit, does not disclose error apparent on record.

x. In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary. The Review Petitioner has also clearly set out sufficient reasons and cogent grounds for review / reconsideration of the Impugned Order by this Hon'ble Commission. The Review Petitioner seeks to rely.

xi. In view of the above, the present review Petition is maintainable under Regulation 40 of the MPERC CBR and also under Order 47 Rule 1 of the CPC.

D. Review Petitioner has referred to Regulation 8.8(iii) of 2015 Tariff Regulations has left out reading of entire clause which clearly shows that true-up process includes only capital cost/additional capital cost and there is no requirement for providing details of energy cost.

xii. This contention of the Respondent is completely incorrect. Regulation 8.8 (iii) provides that this Commission shall carry out true-up of Primary Fuel Cost as one of the uncontrollable parameters. The relevant portion of the Regulation is again extracted below for ready reference:

“8.8 The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters:

- (i) Force Majeure;
- (ii) Change in Law; and
- (iii) Primary Fuel Cost.”

xiii. As may be seen, the language of Regulation 8.8(iii) is precise and unambiguous as regards requirement of truing-up of performance of the Generating Station in respect of Primary Fuel Cost and the requirement of such true-up is mandatory in nature, signified by the use of word “shall”.

xiv. From above it is evident that the contention/ argument of the Respondent that the complete and correct reading of Regulation 8.8 reveals trueing-up of Capital/

Additional Capital Expenditures and do not require true-up of Primary Fuel Cost, as it is entirely misplaced.

- E. Regulation 92 of CERC Conduct of Business Regulations 1999 is a different provision and is not similar in terms and of scope of Regulation 40 of MPERC CBR.**
- xv. *Hon'ble Supreme Court in its judgment in the case of U.P Power Corporation Ltd. Vs National Thermal Power Corporation Ltd. and Ors.]. [(2009) 6 SCC 235] has held that Central Commission stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof and tariff determination is a continuous process.*
- xvi. *Regulation 40 of MPERC Conduct of Business Regulations has the same provisions as Section 114 and Order 47 Rule 1 of Code of Civil Procedures which deal with Review of its orders, judgements and decisions. It is most humbly submitted that the functions and powers of this Hon'ble Commission under Sections 86 and 181 of the Electricity Act 2003, are analogous to the functions and powers of the Central Commission under Sections 79 and 178 thereof. The powers this Hon'ble Commission are also same as those of the Central Commission under Section 94 of the Electricity Act 2003 which includes its powers of review of its own decisions, directions and orders.*
- xvii. *Therefore, it is respectfully submitted that the legal principles laid down by the Hon'ble Supreme Court of India in the judgment passed in case of U.P Power Corporation Ltd. would be directly applicable to the facts of the present case.*
- xviii. *In view of the legal principles laid down by Hon'ble Supreme Court of India, the contention of the Respondent that Regulation 92 of CERC Conduct of Business Regulations 1999 is a different provision and is not similar in terms and of scope of Regulation 40 of MPERC CBR is misconceived because while exercising its powers of review, so far as alterations and amendment of a tariff is concerned, this Hon'ble Commission also stricto sensu does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order XLVII, Rule 1 thereof. Besides, tariff determination is a continuous process and if the need arises, the tariff can be revised at any stage.*
- xix. *In the present Review Petition, the Review Petitioner has pointed out that in the Impugned True-up Order, true-up of Primary Fuel has not been done and interest on loan allowed is not as per 2015 Tariff Regulations. As such the review / reconsideration of the Impugned Order by this Hon'ble Commission is necessary.*

- xx. *It is most humbly submitted that in view of the legal principles laid down by the Hon'ble Apex Court in U.P Power Corporation Ltd. (Supra), while exercising its powers of Review, this Hon'ble Commission is not barred by the provisions of either Section 114 of CPC or Order 47 Rule 1 thereof. On the contrary, tariff determination being a continuous process this Hon'ble Commission is fully empowered to seek further information from the Respondent and review and reconsider the true-up of the tariff on that basis.*
- xxi. *It is most humbly submitted that the legal principles cited or the Case Laws sought to be relied upon by the Respondent are not applicable to the facts of the present case due to reasons given in the foregoing paragraphs. Therefore it is prayed that this Commission may graciously be pleased to reject the contentions and arguments of the Respondent and admit the Review Petition and review the order dated 26.11.2020 passed in Petition No. 44 of 2019 to the extent prayed.*

Commission's Observations and Finding:

15. In accordance with Rule 1 Order 47 of the Code of Civil Procedure (CPC), 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.
16. Keeping in view of the above provisions and on perusal of the submissions made by the petitioner, the Commission has examined the issues raised in the review petition as discussed under:

Issue No. 1 – True-up of Primary Fuel as per Regulation 8.8 (iii) :

17. Regarding the true-up of cost of primary fuel, the petitioner has contended that the true-up of cost of primary fuel is required to be done under the provisions of Regulation 8.8(iii) of the Tariff Regulations, 2015. Let us look into the relevant provisions of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2015.
- i. Regarding the true-up of tariff, Regulation 8.4 of the Generation Tariff Regulations, 2015 provides as under:

“A generating company shall file a petition at the beginning of the Tariff period. A review shall be undertaken by the Commission to scrutinize and true up the Tariff on the basis of the capital expenditure and additional capital expenditure actually incurred in the Year for which the true up is being requested. The generating company shall submit for the purpose of truing up, details of capital expenditure and additional capital expenditure incurred for the period from 1.4.2016 to 31.3.2019, duly audited and certified by the auditors.”

- ii. With regard to truing-up of tariff of generating station on uncontrollable parameters, Regulation 8.7 provides as under:

“The generating company shall carry out truing up of tariff of generating station based on the performance of following Controllable parameters:

Controllable Parameters:

- i) Station Heat Rate;*
- ii) Secondary Fuel Oil Consumption; and*
- iii) Auxiliary Energy Consumption; “*

- iii. With regard to truing-up of generating station on uncontrollable parameters, Regulation 8.8 of the Generation Tariff Regulations, 2015 provides as under:

“The Commission shall carry out truing up of tariff of generating station based on the performance of following Uncontrollable parameters:

- i) Force Majeure;*
- ii) Change in Law; and*
- iii) Primary Fuel Cost.”*

- iv. Regarding the cost of fuel for working capital, Regulation 34.2 of the Generation Tariff Regulations, 2015 provides as under:

*“The cost of fuel shall be based on the landed cost incurred (taking into account normative transit and handling losses) by the generating company and gross calorific value of the fuel as per actual for the three months preceding the first month for which tariff is to be determined and **no fuel price escalation shall be provided during the tariff period.**”*

- v. Regulation 36.5 of the Generation Tariff Regulations, 2015 provides the mechanism recovery of energy charges on monthly basis:

*“The energy charge shall cover the primary and secondary fuel cost and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the **calendar month** on ex-power plant basis, at the energy charge rate of the month **(with fuel price adjustment).**”*

- vi. For details of the actual parameters of GCV and landed cost of coal, Regulation 36.7 of the Generation Tariff Regulations, 2015 provides as under:

“The generating company shall provide to the beneficiaries of the generating station the details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, etc., as per the forms prescribed to these Regulations:

Provided that the details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal and the weighted average GCV of the fuels as received shall also be provided separately, along with the bills of the respective month:

Provided further that copies of the bills and details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the generating company. The details should be available on its website on monthly basis for a period of three months.”

18. On conjoint reading of the aforesaid provisions under MPERC Generation Tariff Regulations, 2015, the Commission has noted the following:
- i. The true-up petition No 44 of 2019 was filed by the Respondent (JPVL) under Regulation 8.4 of the MPERC Tariff Regulation 2015. As per Regulation 8.4, the truing-up exercise is limited only to the extent of capital expenditure and additional capital expenditure actually incurred in the year.
 - ii. Regulation 8.7 provides the truing-up of tariff in respect of controllable operating parameters like Station Heat Rate, Specific Fuel Oil Consumption and Auxiliary Energy Consumption. The Commission in Para 128 to 132 of the order dated 26.11.2021 has deliberated at length the issue of true-up of tariff based on the controllable parameters and held that the petitioner (Respondent in the subject review petition) incurred a loss of Rs. 0.43 Crore on account of the inferior performance and poor actual operating parameters achieved by it during FY 2018-19.
 - iii. Further, Regulation 8.8 provides for true-up of tariff on uncontrollable parameters like Force Majeure, Change in Law and cost of Primary Fuel. However, during the proceeding in the order under review in this petition, no uncontrollable circumstances in respect of primary fuel were neither placed on record by Respondent herein nor pointed out by the petitioner. Therefore, the

provision under this Regulation could not be exercised under normal condition.

- iv. Regarding fuel cost for working capital, it is provided in Regulation 34.2 provided that “no fuel price escalation shall be provided during the tariff period”. In accordance to the Regulation 1.3 of the Generation Tariff Regulations, 2015, the Regulations shall remain in force from 1st April to 31st March’ 2019. It means that the fuel cost for working capital shall be remain same for the entire control period as determined in MYT order.
 - v. Further, Regulation 36.5 provides the mechanism for monthly recovery of energy charges / fuel cost corresponding to the scheduled energy for the month. In this Regulation, it is specifically mentioned that the monthly energy charges shall be “**with fuel price adjustment**”. Therefore, in accordance to the Regulation 36.5, monthly energy charges are paid to the generating company based on the actual GCV and actual landed cost of fuel for the respective month.
 - vi. In accordance to the Regulation 36.7, the generating company has to provide all the details/documents related to primary coal like actual GCV and price of coal of Coal, blending ratio of domestic coal, imported coal, e-auction coal etc. along with bills on monthly basis. The generating company is required to provide all such details to the beneficiary duly filled up in form TPS 15 of the Regulations, 2015.
 - vii. As a matter of fact, the petitioner (MPPMCL) recovers monthly actual fuel cost towards any variation in landed cost of fuel in terms of fuel cost adjustment (FCA) from the consumers as approved by the Commission on quarterly basis in accordance with Regulation 9 of the MPERC (Terms and Conditions for determination of tariff for Supply and Wheeling of electricity and method and principles for fixation of charges) Regulations, 2015.
19. In view of the above, it is observed that in the Generation Tariff Regulations, 2015, the scope for truing up exercise is confined to the extent of capital cost and additional capitalization actually incurred in the year based on the Annual Audited Accounts. The provision for true-up of primary fuel was provided only on account of uncontrollable factors/circumstances. It is further observed that in terms of the provisions under the Regulations, the generating company is entitled to recover monthly energy charges based on the actual GCV and actual landed cost of coal.
20. In accordance to the provisions under the Regulations, 2015, the generating company is required to provide all the details and documents related to landed cost of coal and GCV of coal. The petitioner (MPPMCL) is required to pass on the actual cost of coal on monthly basis after examination of all the details/documents and no true-up of primary fuel is required in accordance to the provisions under the tariff Regulations, 2015. Moreover, the Commission had to followed the similar approach in truing-up

exercise for past financial years of other thermal power stations of the review petitioner, however, the petitioner has not preferred to file any review on the aforesaid true-up orders issued by the Commission. Therefore, the prayer of the petitioner for review of true up of the primary fuel cost in the subject review petition has no merit, hence, not considered.

Issue No. 2: Interest on Loan allowed is not as per Regulations

21. Regarding the Interest on Loan, the review petitioner in the subject review petition has contended that the Commission has allowed interest on loan at weighted average rate of interest @12.25% on the basis of details provided in form TPS 13 of the petition. However, in “Note 15.2” to the Balance Sheet, it has been mentioned that the repayment of principal and interest amount are overdue which falls in the period of True-up i.e. FY 2018-19. The petitioner further submitted that the true-up of any Capital Cost (including Interest on Loan) is allowed only on actual basis and not on notional basis under the provisions of Regulations 8.4 and Regulation 32.5 of 2015 Tariff Regulations.
22. Regarding the Interest on Loan of thermal power stations Regulation 32 of MPERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015, provides the following:
 - 32.1 *The loans arrived at in the manner indicated in Regulation 25 shall be considered as gross normative loan for calculation of interest on loan.*
 - 32.2 *The normative loan outstanding as on 1.4.2016 shall be worked out by deducting the cumulative repayment as admitted by the Commission up to 31.3.2016 from the gross normative loan.*
 - 32.3 *The repayment for each of the year of the tariff period 2016-19 shall be deemed to be equal to the depreciation allowed for the corresponding year/period. In case of de-capitalization of assets, the repayment shall be adjusted by taking into account cumulative repayment on a pro rata basis and the adjustment should not exceed cumulative depreciation recovered upto the date of de-capitalisation of such asset.*
 - 32.4 *Notwithstanding any moratorium period availed by the generating company, the repayment of loan shall be considered from the first year of commercial operation of the project and shall be equal to the depreciation allowed for the year or part of the year.*
 - 32.5 *The rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio after providing appropriate accounting adjustment for interest capitalized:*

Provided that if there is no actual loan for a particular year but normative loan is still outstanding, the last available weighted average rate of interest shall be considered:

Provided further that if the generating station does not have actual loan, then the weighted average rate of interest of the generating company as a whole shall be considered.

- 32.6 The interest on loan shall be calculated on the normative average loan of the year by applying the weighted average rate of interest.*
- 32.7 The generating company shall make every effort to re-finance the loan as long as it results in net savings on interest and in that event the costs associated with such re-financing shall be borne by the beneficiaries and the net savings shall be shared between the beneficiaries and the generating company in the ratio of 2:1.*
- 32.8 The changes to the terms and conditions of the loans shall be reflected from the date of such re-financing*
23. The above Regulation provides that the rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio after providing appropriate accounting adjustment for interest capitalized. The petitioner has contended that the Commission allowed Interest on Loan at Weighted Average Rate of 11.46%, which is not in accordance with Regulation 32.5 of 2015 Tariff Regulations.
24. With regard to weighted average rate of interest filed in the in the true-up petition No. 44 of 2019, while examining the aforesaid petition, detailed computation of the weighted average rate of interest was sought from the Respondent on the basis of the actual loan portfolio.
25. On perusal of the details filed by the Respondent M/s JPVL, it was observed that the respondent (JPVL) had claimed the weighted average rate of interest @ 11.46% based on the rate of interest applicable on the Respondent (JPVL). The Respondent had submitted the required supporting documents in terms of the weighted average rate of interest during FY 2018-19 with the Petition No 44 of 2019. Therefore, the weighted average rate of interest was considered based on actual loan portfolio for FY 2018-19 as per the provisions under Tariff Regulations, 2015 without considering the overdue amount towards repayment and interest on interest. In 'Note-15.3 of the Annual Audited Accounts, the Auditor has mentioned that the interest rates (excluding penal interest) on above loans for Nigrie TPP varies from 11.65% to 13.75%" per annum.
26. Having discussed and deliberated at length on both the issues on which review is being sought 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 (CPC), 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

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

(Mukul Dhariwal)
Member

(Shashi Bhushan Pathak)
Member

(S.P.S Parihar)
Chairman

Date: 6th December '2021

Place: Bhopal