ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION

4thFloor, Singareni Bhavan, Red Hills, Hyderabad 500004

TUESDAY, THE TWENTY SEVENTH DAY OF JULY
TWO THOUSAND AND TWENTY ONE

Present
Justice C.V. Nagarjuna Reddy, Chairman
Sri P. Rajagopal Reddy, Member
Sri Thakur Rama Singh, Member

R.P. No. 2 of 2019 in O.P.No.47 of 2017

Andhra Pradesh Power Development Company Ltd. (APPDCL) ..Petitioner

AND

Eastern Power Distribution Company of A.P. Limited (APEPDCL) ..Respondents
& Southern Power Distribution Company of A.P. Limited (APSPDCL)

R.P. No. 1 of 2020 in O.P.No.47 of 2017

Eastern Power Distribution Company of A.P. Limited (APEPDCL) ..Petitioners
& Southern Power Distribution Company of A.P. Limited (APSPDCL)

AND

Andhra Pradesh Power Development Company Ltd. (APPDCL) ..Respondent

R.P.No. 2 of 2019 was heard through the web on 21.09.2019, 19.10.2019, 30.11.2019, 21.12.2019, 19.02.2020, 05.06.2020, 26.08.2020, 07.10.2020,16.12.2020 and R.P.No.1 of 2020 was heard through the web on 26.08.2020, 07.10.2020,16.12.2020. The last of the hearings in both the above R.Ps were held on 24.02.2021 in the presence of Sri P. Shiva Rao, learned standing counsel for APSPDCL & APEPDCL and Sri K. Gopal Choudary, learned standing counsel for APPDCL. After carefully considering the arguments of the learned counsel and the objectors and the material available on record, the Commission passed the following.

COMMON ORDER

2. APPDCL and DISCOMs (APEPDCL and APSPDCL) filed separate Review Petitions(R.Ps.) in O.P.No. 47 of 2017 on 30.07.2019 and 10.01.2020 respectively. The petitioners filed IAs also along with R.Ps praying for condonation of delay in filing the

R.Ps beyond the stipulated period in terms of Clause 49(1) of Regulation 2/1999. The delays were condoned by the Commission. In the R.Ps, the petitioners pleaded for review of the order dated 02.03.2019 passed by the Commission wherein the tariff for Stage-I of Sri Damodaram Sanjeevaiah Thermal Power Station (2 X 800 MW) for the period from 05.02.2015 to 31.03.2019 was determined. The R.Ps were taken on the file of the Commision and numbered as R.P.No.2 of 2019 (filed by APPDCL) and R.P.No.1 of 2020 (filed by DISCOMs). The Commission placed copies of the R.Ps on its website and issued Public Notices inviting views/objections/suggestions on the R.Ps from interested persons/stakeholders. Further, it was informed in the Public Notices that the public hearings on R.P.No.2 of 2019 and R.P.No.1 of 2020 will be conducted at 11.00 AM on 21.09.2019 & 04.08.2020 respectively in the Court Hall of the Commission and any interested person/organization desirous of being heard in person, may appear before it on the said dates of the public hearing. Accordingly, the public hearings in R.P.No. 2 of 2019 and R.P.No.1 of 2020 commenced on 21.09.2019 and 26.08.2020(postponed from the original scheduled date 04.08.2020 due to intense spreading of Covid-19 pandemic) respectively.

3. In R.P.No. 2 of 2019, APPDCL pleaded for the following reliefs on the plea that there are errors apparent from the face of the record in the order in O.P.No. 47 of 2017.

   A. The Commission considered the land development cost (Rs.67.33 Crores) as part of the mandatory package, which is erroneous. Therefore, the same ought to have been allowed separately and additionally.

   B. The Commission has not separately allowed the employee cost of APPDCL and the establishment and general expenses of APGENCO towards supervision and incidental expenses during construction. As per clause 21 of CERC Regulations, incidental expenditure during construction is to be considered as a part of Capital Cost. APPDCL, a subsidiary of APGENCO, entered into an agreement with APGENCO for payment of Rs 169 Crores towards expenditure for salaries and other incidental expenditure for supervision and establishment charges during the construction period. Such an amount is to be allowed as part of Capital Cost and not as a part of the mandatory package. In addition, establishment costs of Rs 50 Crores towards Establishment and general charges of APPDCL were incurred during the construction period, which are to be allowed.

   C. The Commission considered that the expenditure incurred towards seawater intake and outfall system is covered under 'external water supply system' and hence it need not be specifically allowed over and above the mandatory package. This was on the presumption arising from the mention of "external water system" at item 2.3.1 under "water system" in Form 5B annexed to the CERC order dated 04.06.2012. The Commission did not notice that Para 10.1 of the CERC order makes it clear that the

inclusions in the benchmark cost are based upon usual scenarios, and that deviation on account of specific issues may be dealt with on a case to case basis. The Commission did not consider or advert to the issue as to whether the seawater intake system or any part of it, for this particular project, is within a "usual scenario" contemplated and encompassed in the CERC benchmark modeling or whether it was beyond, such as to merit separate consideration as a deviation.

As there are no other water sources nearby, and being the coastal plant, seawater alone could be considered as a source of water. As the sea is approximately 5 KM away from the plant, the water needs to be pumped to the plant. Hence, a pump house was constructed along with associated accessories. For the other water requirements i.e., DM water, Service water and Potable water, the source of water is also seawater. Because of high salinity, the seawater is converted into sweet water by the Reverse Osmosis method in SWRO (Seawater Reverse Osmosis) and BWRO (Brackish water Reverse Osmosis) Systems. Hence, only the water system inside the plant premises was covered under the BOP package and the external water system which takes water from the sea as stated above is very essential and is not a part of the BOP package. Therefore, the cost of Rs 268 Crores incurred towards the SWIO system merits consideration as an extra to be allowed as part of capital cost.

4. In response to the R.P.No. 2 of 2019 filed by APPDCL, DISCOMs filed a note contesting the claims of APPDCL as follows.

   A. The plea of APPDCL at this stage in the review, disputing the correctness of benchmark rates decided by CERC either on the ground of the incorrect procedure followed by it or on any other ground is not tenable. APPDCL did not raise such an objection during the hearings that took place from 2017 onwards until the disposal of O.P. No. 47 of 2017. Therefore, such a plea raised now deserves to be rejected. Because there is no Regulation by APERC specifying the norms for the projects beyond 500 MW capacity, the Commission has applied the CERC orders in determining the tariff. If CERC order is not to be followed, the Commission has to go into each and every item of expenditure claimed by APPDCL which will be very difficult. Therefore, the Commission correctly adopted the CERC order dated 04.06.2012 particularly the benchmark cost for the subject project.

   B. Regarding the land development cost in addition to land cost, it can be seen in the CERC order dated 04.06.2012 that leveling of land has already been factored in mandatory packages. Further, in the rejoinder filed in O.P. No.47 of 2017, APPDCL claimed specific items beyond CERC mandatory package which are Seawater intake and outfall external coal conveying system and start-up fuel, but not the land development charges. Therefore, the land development cost claim merits no consideration.

C. Regarding the Employees Cost and Establishment Cost, though the issue was canvassed in the Review Petition, the same was not seriously argued during the hearing.

D. About the expenditure of Rs. 268 crores towards seawater intake, it is to state that the CERC in its order 04.06.2012 considered SDSTPS also under Data inputs of Explanatory memorandum. Further, the Commision at page 47 of the order in O.P.No. 47 of 2017 considered the said issue of Sea Water intake and has rejected APPDCL's claim. Therefore, dehors the correctness or otherwise of such a decision, the same is not amenable for review.

5. In R.P.No. 2 of 2019, APPDCL filed an additional affidavit and also a note on CERC benchmark capital cost on 19.03.2021 which are as follows.

A. In the additional affidavit, APPDCL furnished details of the breakup of the land development cost of Rs.101 Crores incurred towards items like leveling and grading, construction of the compound wall, formation of the approach road, plantation, etc.

B. In the note on CERC benchmark capital cost, APPDCL cited various paras of CERC order dated 04.06.2012 and stated that

I. The Commission did not consider, deal with and/or decide the issue at all with any reasons in the original order. The Commission simply proceeded on the premise that the benchmark amount as per the CERC order is to be applied, as if it is mandatory, to the items considered as falling within the mandatory package without any further consideration. Thereafter, consideration was limited only to whether a head of expenditure fell within the mandatory package as per the CERC order or whether it was to be considered additionally being outside the mandatory package.

II. The benchmark capital cost is not a mandatory fixation of capital cost such that the capital cost that may be allowed is limited by the benchmark according to the order. Indeed, if that were considered to be so by a State Commission, it would be tantamount to abdication of the jurisdiction of the State Commission to determine the capital cost of a project for the determination of tariff.

III. The benchmarks are clearly, in terms of the order itself, intended to be a guideline for prudence checks for identifying outliers, by way of a means of management by exception, for carrying out detailed prudence checks and assessing the reasonableness of capital cost. It is incumbent on the Commission to apply its own mind on the costs presented to it in the facts of the case before it, and the benchmark is merely a tool to guide the Commission in determining the extent and scope of its prudence check. It is recognized that the costs of particular projects, such as projects with supercritical technology, may require recognition of variation in the facts and circumstances of the particular case.

IV. The benchmark for 800 MW plants has been arrived at by extrapolation from 500 MW data. It is an impermissible method and nothing so extrapolated can have any sanctity, much less so as to be considered as a mandatory limitation of capital cost.

V. There are various influencing variable factors due to a lack of data that have not been accounted for in the purported benchmarking. It is clear that benchmarking is merely a tentative and interpolatory exercise. More particularly, the discrepancy with regard to Krishnapatnam may be noticed. There was no actual cost for the project as of Jan 2009 since the work on the plant had only just begun. The statement of 4.34 Cr/MW being the actual cost is ex-facie untrue, arbitrary and irrational. The benchmark cost arrived at by extrapolation is purported to be shown as the actual cost. There was no data on 800 MW with supercritical technology. The Krishnapatnam plant was the first of its kind. Adopting such an extrapolated benchmark as a mandatory limitation on capital cost is irrational, arbitrary and a grave error apparent from the record.

VI. There is a further danger arising for the future from the grave error of the Commission in considering the benchmark in the CERC order as a mandatory fixation. The Commission's order would hereafter be seen by the CERC and others as the determination by APERC based on actual cost and prudence check and future determination of benchmarks would wrongly take it to be so when the Commission had not, in fact, considered the capital cost with the proper perspective and by an erroneous view of the nature and scope of the CERC order and the benchmark therein. It is a case of an error serving to confirm an error so as to be held out to be right.

VII. It is therefore clear that the Hon'ble commission's approach in the original order by considering the CERC benchmark as a mandatory fixation of cost of the “mandatory package" and for items considered by the Commission as falling within the mandatory package, and without considering or dealing with or returning a finding on the issue raised by APPDCL is an error apparent from the record.

VIII. In the present review petition also, the issues raised by APPDCL are being contested on the question as to whether or not the items in the review petition fall within or outside the "mandatory package". Such consideration is misconceived and incorrect. This project has unique special features, technology and circumstances which were beyond real qualitative or quantitative experience. Therefore, the pleas of APPDCL with regard to the issues raised in the review petition ought to be considered on their own merits, irrespective of whether or not they fall within or without the "mandatory package" and without considering that

the CERC benchmark cost is a limitation on the capital cost or a mandatory fixation of the capital cost.

6. In R.P.No. 1 of 2020, DISCOMs stated that there are errors apparent from the face of the record in the order in O.P.No. 47 of 2017 and prayed for disallowing the following costs.
   A. The Commission considered the startup fuel cost of Rs. 48 Crores beyond the mandatory package, which is erroneous. The startup fuel cost is part of the mandatory package, and it shall not be allowed separately and additionally. The reasons for considering the said cost under the head of Mandatory Package are that the expenditure for startup fuel comes within the ambit of the head of Construction & Pre- Commissioning Expenses as per 3.0 of Form-5B at Part-I of CERC order dated 04.06.2012 in the matter of Benchmark Capital Cost (Hard cost) for Thermal Power Stations with Coal as Fuel. The said expenses are common to all the Thermal Power Plants and are not project-specific. Accordingly, CERC while approving the generation tariff of Mauda STPS, Stage-I (2x 500 MW) of NTPC Limited in Petition No. 69/GT/2013 vide its order dated 21.09.2015 has allowed the startup fuel cost under the Hard Cost of Benchmark capital cost (December'2011) only, and not allowed it separately over and above the Mandatory Package/hard cost.
   B. The expenditure of Rs. 17 Crores towards Civil works like Guesthouse, street lighting, BT road for ash transportation and Rs. 5 Crores towards ash pond garlanding and surrounding road totaling Rs. 22 Crores are also covered within the Mandatory Package. The reasons for considering the said cost under the head of Mandatory Package are that as per the clarification and decision given by CERC for Issue No. 7 in its CERC order dated 04.06.2012 with regard to Scaling down factors in case of Greenfield vs. Brownfield projects/ Additional units, it was clarified that the difference between Greenfield and Brownfield projects was worked out on account of the fact that the Greenfield project requires a newly established guest house.
   C. In Annexure-II of benchmark hard cost of CERC order dated 04.06.2012, it was clearly stated that the hard cost covers the Grounding & Lighting packages. The expenditure towards the Road & Drainage and Area Development for Ash Disposal was covered under Civil Works within the head of Mandatory Package at Point 2.13 of PART-I, FORM-5B of the above order.
7. In R.P.No. 1 of 2020, DISCOMs filed a note on 24.03.2021. In the note, DISCOMs prayed for deduction of the following costs from the Capital Cost of the project.
   A. Rs. 48 crores towards startup fuel have been separately computed beyond mandatory package cost by the Commission. Such consideration is contrary to the CERC order. Annexure-II of the CERC order dated 04.06.2012 clearly says that the hard cost with December 2011 as a base for indices includes fuel oil unloading and storage.

B. The expenditure of Rs. 17 Crores towards Guesthouse and Rs. 5 Crores towards ash pond garlanding form part of the mandatory package specified by CERC. However, the Commission has considered the above costs separately beyond the mandatory package.

8. **Commission's analysis and decision**

A. The grounds on which APPDCL sought review in R.P.No. 2 of 2019 and the points in the Additional Affidavit and Note filed subsequently on 18.03.2021 are summarised below.

I. The land development cost should be allowed separately and additionally as it is not part of the mandatory package.

II. The Employee Cost of APPDCL and the establishment and general expenses of APGENCO towards Supervision and incidental expenses during construction should be allowed as clause 21 of CERC Regulations permits, incidental expenditure during construction to be considered as a part of the Capital cost.

III. Seawater intake and outfall system should be allowed over and above the mandatory package as Para 10.1 of the CERC order makes it clear that the inclusions in the benchmark cost are based upon usual scenarios, and that deviation on account of specific issues may be dealt with on a case to case basis.

IV. The Commission simply proceeded on the premise that the benchmark amount as per the CERC order is to be applied, as if it is mandatory, to the items considered as falling within the mandatory package.

B. The grounds on which APPDCL sought review in R.P.No. 1 of 2020 and points in the Note filed subsequently on 24.03.2021 are summarised below.

I. The startup fuel cost is part of the mandatory package, and it shall not be allowed separately and additionally.

II. The expenditure of Rs. 22 Crores towards guesthouse, ash pond garlanding, etc., are also covered within the Mandatory Package. Hence, the same should be disallowed.

C. Before discussing the points raised by the learned counsel for the petitioners, it is necessary to deal with the scope of review. Section 94 (1)(f) of the Electricity Act 2003 (for short "The Act'') confers power of review of its decisions, directions and orders on the Commission. However, neither the Act nor the Rules framed thereunder indicated any parameters for exercise of this power. In the absence of any indicia, it is not only apt but also permissible to follow the law laid down by the constitutional courts in this regard.

D. In Sow Chandra Kanta & Another vs Sheik Habib (1975 SCC(4) 457) the Hon'ble Supreme court held that a review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has

crept in earlier by judicial fallibility. In P.N. Eswara Iyer vs The Registrar, Supreme Court of India (1980 AIR 808) a constitution bench of the Supreme Court reaffirmed the ratio in Chandra Kanta (1 supra). In Shri Ravinder Kumar vs Kamal Sen Gupta (2008)8, the Hon'ble Apex Court held that unlike in appeal, the scope of review is grossly circumscribed to such cases where the review seeker has made a discovery of a new and important matter of evidence, which, after exercise of due diligence, was not within his knowledge and could not be produced by him when the decree or order where some mistakes or errors apparent on the face of the record have been made or when the court has overlooked some obvious facts on the basis of which decision could be made. The court further held that for a review, one of the above three considerations should be established.

E. In Devender Pal Singh vs State of NCT of Delhi (2003) 2 SCC 501, the Apex court held that review is not a rehearing of appeal all over again and that scope of interference is very limited to aspects such as miscarriage of justice.

F. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389, the Hon'ble Supreme Court held:

" there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

G. In Haridas Das v. Usha Rani Banik in Civil Appeal No.7948 of 2004, the Hon'ble Supreme Court held:

"13. In order to appreciate the scope of a review, Section 114 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 47 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 to Rule 1 of Order 47 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 exercise the power to review its order with the greatest circumspection."

H. In the State of West Bengal and Others vs. Kamal Sengupta and another in Civil Appeal No. 1694 of 2006, the Hon'ble Supreme Court held:
"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 require 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 court/tribunal concerned cannot sit in appeal over its judgment/decision.

I. In Parsion Devi v. Sumitri Devi2, 1997 8 SCC 715, the Hon'ble Supreme Court held:
"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". A review petition, it must be remembered, has a limited purpose and cannot be allowed to be "an appeal in disguise"".

J. As regards the review under 'For any other sufficient reason' ground, the expression means 'any other sufficient reason' used in Order 47 Rule 1 which states that it should be a reason sufficiently analogous to those specified in the Rule. Even under this head also, the Petitioners could not establish sufficient grounds to merit a review of their petitions.

K. In Ajit Kumar Rath v. the State of Orissa, (1999) 9 SCC 596, the Hon'ble Supreme court held:

"The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression 'any other sufficient reason' used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the Rule."

L. As regards the mistakes and errors apparent on record as canvassed by the petitioners, it may be noted that the Commission has already deliberated and taken a view on all the issues now raised in the present RPs such as costs towards seawater intake, start-up fuel, land development, employee cost, guest house & others at pages 39, 40 and 49 of the original order in O.P.No. 47 of 2017. As held by the Hon'ble Supreme Court, 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 and a review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. As no such errors have arisen, much less pointed out, these petitions do not satisfy the parameters for review.

9. Hence, the review petitions are dismissed. No costs.

Sd/-	Sd/-	Sd/-
Thakur Rama Singh	**Justice C.V. Nagarjuna Reddy**	**P. Rajagopal Reddy**
Member	**Chairman**	**Member**