

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

Review Petition No: 105 of 2024
Date of Institution: **13.05.2024**
Heard on: **12.08.2024**
Decided on: 10.10.2024

Tidong Power Generation Private Ltd.
Grover Cottage, 2nd Floor,
Above HDFC Home Loans,
Chhota Shimla- Kasumpti Road,
Shimla, H.P. 171002.

.....Petitioner

Versus

1. The HP Power Transmission Corporation Limited through its,
DGM (C&M),
Himfed Bhawan, Near ISBT,
Panjari (Below Old MLA Quarters),
Shimla, HP-171005.

....Respondent

**Petition for Review under Regulation 63 read with Form CB-6 of
the Himachal Pradesh Electricity Regulatory Commission
(Conduct of Business) Regulations, 2005 against the Order dated
12.04.2024 passed in Petition No. 71 of 2023.**

CORAM

**DEVENDRA KUMAR SHARMA
CHAIRMAN**

**YASHWANT SINGH CHOGAL
MEMBER (Law)**

**SHASHI KANT JOSHI
MEMBER**

Present:-

For the Petitioner: Sh. Rohit Sharma, Manager.

For the Respondent: Sh. Sanjeev Kumar, DGM (Planning)

alongwith Sh. Ashish Rana, Law Officer.

ORDER

This Review Petition has been filed by the Petitioner against the Order dated 12.04.2024 passed by the Commission in Petition No. 71 of 2023.

2. As per the Petitioner, M/s Nuziveedu Seeds Private Limited (NSL for short) entered into a Memorandum of Understanding (MoU for short) on 29.09.2004 with the Government of Himachal Pradesh (GoHP) to execute Tidong-I (100 MW) Hydro Electric Project situated near Village Rispa, Tehsil Moorang, Distt. Kinnaur, Himachal Pradesh (Project for short). The NSL and the GoHP also signed Implementation Agreement (IA for short) on 28.07.2006 for a term of 40 years from the Scheduled Commercial Operation Date (SCOD) of the Project which was defined as 48 months from the date of signing of the IA. Clause 4.1 of the IA required the Government of Himachal Pradesh (GoHP) to aid and support the developer for getting approvals and consent and the delay in conveying the approvals would entitle the Project developer for extension of SCOD of the Project.

3. In or around September, 2018, the Project was taken over by M/s Statkraft IH Holding AS but as on the date of transfer, the commercial operation of the Project had not occurred which was taken up after the transfer of ownership. According to the Petitioner, the Project Schedule suffered significant interruptions owing to various

force majeure events like COVID-19 pandemic which delayed the Project by about one and half year and that the Ministry of New and Renewable Energy (MNRE for short) vide Office Memorandums dated 17.04.2020, 30.06.2020 and 13.08.2020 has granted extension of time for ongoing projects for the delay suffered on account of COVID-19 pandemic. Apart from the above, the Project also suffered delay due to the following reasons:-

- i. Delay in the grant of forest clearance for realigned transmission line by the Forest Department;
 - ii. Major accident in the pressure shaft of the project; and
 - iii. Instances of cloudburst and floods.
4. According to the Petitioner, as per the Geological Report (Annexure-3) prepared by the Petitioner post acquisition of the Project, it was discovered that 16 tower locations, proposed on the route of the transmission line prepared by the NSL, were located on poor geological locations and were required to be shifted to a geologically stable and safer place. In addition, two more towers were necessitated alongwith shifting of some towers to maintain proper ground clearance and alignment of transmission line resulting in increase of towers from 56 to 59. The above defaults came to the knowledge of the Petitioner after the above report that the Project is located at a region prone to landslides and cloudbursts.

5. On 10.01.2019, the Petitioner informed the Divisional Forest Officer (DFO), Kinnaur about the survey and technical field investigations and sought amendment for tower locations and Right of Way (RoW). On 18.11.2022, the Forest Department granted clearance subject to several conditions. On 23.12.2022, the Petitioner submitted the revised construction schedule to the Chief Engineer, Energy, GoHP and on 24.01.2023 and the Forest Department granted permission to start felling, carriage and construction work. However, on 21.04.2023, the Deputy Conservator (Forests) Kinnaur directed stoppage of tree felling work till the inspection of site on 01.05.2023 which could finally resume on 09.07.2023. Due to the above, only 3-4 months of working seasons were left in the year 2023 which delayed the transmission line work by about four years.

6. Consequent upon rolling out the One Time Amnesty Scheme by the GoHP on 07.11.2020 for Hydro Projects under construction stage, the DoE, GoHP on the request of the Petitioner considered the Project (150 MW) under One Time Amnesty Scheme vide letter dated 25.05.2022. Consequently, the Supplementary Implementation Agreement (SIA) was signed on 03.06.2022 amending Clause 5.1 of the IA dated 28.07.2006. The milestones, time period and consequential action were also re-defined and the COD was proposed/

decided to be in consonance with the revised construction schedule approved by the DoE, GoHP. The copy of letter granting approval by the DoE, GoHP dated 25.05.2022 and the copy of SIA have been annexed as Annexures 5 and 6.

7. The Petitioner vide letter dated 19.07.2022 (Annexure-7) requested the DoE, HP for monitoring the milestones as per the One Time Amnesty Scheme. A survey of the Project was carried out under the directions of the DoE on the status of the construction and reasons for delay. On careful consideration of the survey report (Annexure-8), the DoE revised the construction schedule and SCOD was revised to 31.10.2024.

8. On 12.06.2023, the Petitioner informed the Respondent about the force majeure conditions delaying the project and sought extension of SCOD as well as deferment provisional transmission charges for a period w.e.f. 25.03.2023 to 30.04.2023 and later on filed the Petition (Petition No. 71 of 2023) before the Commission which was dismissed by the Commission vide Order dated 12.04.2024.

9. According to the Petitioner, the Order dated 12.04.2024 suffers from patent errors on the face of the record as the Commission has neither dealt with the submissions of the Petitioner nor the documents placed on record nor has considered the various contractual clauses of

the MoU, IA and Long Term Access Agreement (LTAA for short). Further, the MoU dated 29.04.2004 and IA dated 28.07.2006 contain definition of 'Project' & 'Works' under Clauses 1.2.45 and 1.2.57 respectively and as per the definition of the 'Project' and 'Works', interconnection facilities form part of the Petitioner's 'Project' and project 'Works' and, therefore, transmission line is to be considered as a part of the Petitioner's Project which was highlighted during the arguments but was not considered. Further, the Impugned Order suffers from patent errors on the face of the record as the Commission has proceeded on the basis that delay in transmission line has no consequence in the commissioning of the Project without taking into account the contents of the MoU and the IA. Not only this, the Commission has not considered the impact of Clause 4.1 of the IA dated 28.07.2006 while dealing with the issue of extension of SCOD. As per the Petitioner, the Project schedule suffered delay on account of force majeure events including governments clearances and these submissions were raised during the course of hearing but the same have not been considered.

10. Further, the DoE, GoHP vide letters dated 25.11.2023 has extended the SCOD to 31.10.2024 but neither this aspect has been dealt by the Commission nor the report dated 12.10.2023 of the DoE,

GoHP has been considered by holding that no evidence or detail of accident in the pressure shaft has been provided by the Petitioner. It is mentioned that the DoE report being Government report contains the details of the accident and SCOD has been extended on such report. Even no opportunity was provided to the Petitioner to produce further documents.

11. Further, the order suffers from the patent error on the face of the record as the same does not address the issue of interdependency between the IA and the LTAA with respect to the SCOD. Not only this, the Commission has not considered the vital aspect that no additional expenses had been incurred in the transmission system on account of LTAA by the Respondent, as it is consistent case of the Respondent that Kashang-Bhabha transmission line was built for Kashang Hydro Project and the LTAA was only an interim measure as held in Order dated 02.05.2022 in Petition No. 12 of 2022, whereby the period of LTAA was mentioned till the commissioning of Jangi pooling station only or for a period of 25 years and that non-consideration of the documents and submissions has caused a grave prejudice to the Petitioner.

12. The Petitioner has raised on the following issues in the Petition:

- i. Whether review is maintainable in the present case in as much as the Commission has not dealt with the definition of

'Project' and 'Works' under the MoU dated 29.04.2004 and IA dated 28.07.2006 to include interconnection facilities?

- ii. Whether the Impugned Order suffers from error apparent on the face of record in as much as it had proceeded on the basis that the evacuation infrastructure has not been considered as part of the project for purposes of delay?
- iii. Whether review is maintainable in the present case in as much as the Hon'ble Commission has not dealt with Clause 4.1 of the Implementation Agreement which provide for extension of SCOD in the event of delay in government approvals?
- iv. Whether the Impugned Order suffers from patent error on the face of the record by not considering the letter by DoE dated 25.11.2023 extending the COD of the project to 31.10.2024?
- v. Whether the Impugned Order suffers from patent error on the face of the record to the extent it has not addressed the issue of inter-dependency between the Implementation Agreement and the LTAA Agreement w.r.t. the SCOD?
- vi. Whether the Impugned Order suffers from patent error on the face of the record to the extent it has not taken note of and dealt with the Report prepared by the office of the DoE dated 12.10.2023 and other documents filed by the Petitioner?
- vii. Whether the present review is maintainable for non-consideration of submissions and documents of the Petitioner in the proceedings in Petition No. 71 of 2023?

viii. Whether the Impugned Order suffers from patent error in as much as the Commission has failed to take judicial notice of events e.g. cloud bursts and flooding and even the fact of accident in the Petitioner's project?

Hence, the Petition for review.

REPLY OF THE RESPONDENT

13. The review Petition has been resisted and contended by the Respondent by filing reply raising preliminary objections/ submissions that the review Petition does not fulfill the requirements of Order 47 Rule 1 of the Code of Civil Procedure, 1908 and is not maintainable. Further, the Petitioner has failed to highlight discovery of new and important matter or evidence which after the exercise of due diligence was not within its knowledge and could not be produced at the time of adjudication of the matter in Petition No. 71 of 2023 or on account of some mistake/ error on the face of the record or for other sufficient reasons. On the contrary, the Petitioner in the pleadings has reiterated its case of Petition No. 71 of 2023 and on the same grounds has required the indulgence of the Commission.

14. As per the Respondent, LTAA executed on 03.06.2022 between the Petitioner and the Respondent is independent of Implementation Agreements or Supplementary Agreements and the extension of SCOD vide the SIA under no circumstances gives a right to the

Petitioner to seek applicability of transmission charges under the LTAA dated 03.06.2022 from the date of the SCOD of the Project. According to the Respondent, any extension, renewal, replacement of the LTAA dated 03.06.2022 can only be after the mutual agreement between the Petitioner and the Respondent and not otherwise as per Clause 11 of the LTAA dated 03.06.2022 which has been reproduced in the reply. It is also averred that at no point of time, there has been a mutual agreement between the Petitioner and the Respondent to extend the date for the applicability of transmission charges in terms of LTAA dated 03.06.2022 in accordance with the extended SCOD. Further, as per the common law doctrine of privity of contract, the Respondent cannot be made liable for any extension of the SCOD to which the Respondent is not a party. A reference has also been made to Clause 9.0 of the LTAA dated 03.06.2022 which has been reproduced as under:-

“9.0 The parties shall ensure due compliance with the terms of this Agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party.

But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice of 30 days to the other party to this effect. Transmission/drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.”

15. It is averred that for the first time on 12.06.2023, under the garb of force majeure events, the Petitioner requested for revision of LTAA date from 25.03.2023 to 31.12.2024 but said request was not acceded to by the Respondent. Also that the Petitioner has failed to issue specific mandatory written notice of 30 days in terms of Clause 9.0 of the LTAA Agreement dated 03.06.2022 for claiming the benefit of the said force majeure clause highlighting any such event which took place post execution of the LTAA.

16. It is averred that the Commission has given extensive findings on the force majeure events that the Petitioner, has failed to establish any such event or that the Petitioner had been prevented from implementing the LTAA dated 30.06.2022 due to force majeure events and was entitled for the deferment of transmission charges.

17. It is also averred that the Commission has rightly framed the points for determination based on the pleadings and has narrated all the reasons for findings and also that the Petitioner has failed to narrate even a single instance that the Commission has committed an

error apparent on the face of the record. Paras 48 & 51 of the Order dated 12.04.2024 in Petition No. 71 of 2023 have been reproduced,

18. On merits, the contents made contrary to the record have been denied reiterating that any amendments of the IA & SIA and extension of SCOD shall not impact the LTAA dated 03.06.2022 being independent in nature till the same is renewed and replaced mutually between the parties.

19. In rejoinder, the contents of the reply have been denied and those of the Petition have been re-affirmed that the order under review suffers from patent errors apparent on the face of the record and required to be reviewed.

20. We have heard, Sh. Rohit Sharma, Manager for the Petitioner and Sh. Sanjeev Kumar, DGM (Planning) for the Respondent in detail.

21. Sh. Rohit Sharma, Manager for the Petitioner has submitted that the impugned order suffers from errors apparent on the face of the record, *inter-alia*, that the Commission has not dealt with the definition of the 'Project' and 'Works' as mentioned in the MoU and IA as the evacuation system also form part of Project and that the Commission has not considered the report of the DoE dated 12.10.2023 and the letter of the DoE dated 25.11.2023 extending the SCOD of the Project uptill 31.10.2024 despite the fact that there is interdependency

between the IA and the LTAA with respect to the SCOD and that the Commission has not taken note of the cloudburst, flooding in the area and the accident which had occurred in the Project on 07.05.2022 causing stoppage of work for about 9-10 months. He has also submitted that though the accident occurred on 07.05.2022 prior to signing of the LTAA dated 03.06.2022 yet the delay caused by the accident continued till 2023 which was not within the control of the petitioner. Further, the transmission line against which the LTAA dated 03.06.2022 was signed was initially constructed for evacuation of power of Kashang HEP and Tidong-I is to be connected to Jangi and once the same is commissioned, the Petitioner's project shall be connected to Jangi, as such, there was no assured evacuation of 100 MW of Tidong-I in the Kashang line and that no additional line has been constructed and even if the Project has been delayed, the Respondent has not suffered any loss on non-fulfillment of the terms and conditions of the LTAA.

22. Sh. Sanjeev Kumar, DGM (Planning) for the Respondent on the other hand has submitted that the Commission has considered each and every aspect of the matter as well as the events highlighted by the Petitioner and there are no errors apparent on the face of record and Petition is liable to be dismissed. He has further submitted that the

Petitioner has voluntarily signed the LTAA dated 03.06.2022 and is liable to pay the charges as per the same as the agreement is binding on the parties.

23. We have carefully gone through the submissions and perused the entire record carefully. The following points arise for determinations in the Petition:-

Point No. 1: Whether there are sufficient reasons for reviewing the Order dated 12.04.2024 in Petition No. 71 of 2023?

Point No. 2: **Final Order**

24. For the reasons to be recorded hereinafter in writing, our point wise findings are as under.

Point No. 1: No.

Point No. 2: The Petition dismissed per operative part of the Order.

REASONS FOR FINDINGS

Point No. 1:

25. It is well settled 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. The review cannot be treated like an appeal in disguise. 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 at the time when the order was made. It may also be exercised where some mistake or error apparent on the face of the record is found but may not be exercised on the ground that the decision was erroneous on merits which is the domain of a court of appeal. While exercising the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. In this regard, reliance may be placed in *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715 wherein it is held as under:-

“9. 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”.”

26. Similarly in *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170 it has been held by the Hon’ble Supreme Court that the review proceedings are not by way of appeal and have to be strictly

confined to the scope and ambit of Order 47, Rule 1, CPC. Para 8 of the aforesaid law is reproduced as under:-

“8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. In connection with the limitation of the powers of the court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389 : AIR 1979 SC 1047] , speaking through Chinnappa Reddy, J., has made the following pertinent observations: (SCC p. 390, para 3)

“It is true as observed by this Court in Shivdeo Singh v. State of Punjab [AIR 1963 SC 1909] , there is nothing in Article 226 of the Constitution to preclude the 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 power which may enable an appellate court to correct all manner of errors committed by the subordinate court.”

27. A similar view has been taken by the Hon'ble Supreme Court in Ram Sahu v. Vinod Kumar Rawat, (2021) 13 SCC 1.

28. The Petitioner has highlighted as many as eight issues in Para 8 of the Review Petition that the Commission has not considered the

same in the Order dated 12.04.2024 in Petition No. 71 of 2023 and, therefore, the order under review suffers from errors apparent on the face of the record warranting review.

29. In the first and second issues as raised in Para 8 of the Petition, the Petitioner has claimed that the definition of 'Project' and 'Works' as mentioned in the MoU and IA dated 29.04.2004 and 28.07.2006, respectively include interconnection facilities but the evacuation infrastructure and interconnection facilities have not been considered as the part of the 'Project' and 'Works' for the purpose of delay by the Commission which is an error apparent on the face of the record. The Commission in Order dated 12.04.2024 in Petition No. 71 of 2023 has clearly held on the material on record that the clearances from the Government/ Forest Departments/ Panchayats/ locals bodies were pertaining to the transmission towers and 220 kV transmission line from the Project to Kashang Bhaba transmission line and neither such clearances had anything to do with the SCOD of the Project nor such clearances have affected the Project work in any manner. In fact, in the Original Petition No. 71 of 2023, the deferment of LTAA charges was sought on the ground of force majeure events i.e. natural calamities and stoppage of work due to accident in the pressure shaft area in May, 2022 due to which the work in the pressure shaft had to

be stopped. The evacuation infrastructure had not impacted the construction work of the Project in any manner. The Commission has elaborately considered each and every aspect of the matter including evacuation infrastructure and the plea as raised has no merits.

30. The third issue as raised in para 8 of the Petition that the Commission has not considered Clause 4.1 of the IA dated 28.07.2006 providing for extension of the SCOD in the event of delay and since there was delay, the SCOD has been extended. The Petitioner was already aware of each and every aspect of the matter before signing the LTAA dated 03.06.2022 but no reference of any such events was mentioned in the LTAA dated 03.06.2022 that the SCOD may be delayed on account of certain force majeure events having occurred at the site, as such, the Commission was not inclined to concur with the prayer of the Petitioner for deferment of LTAA charges. This aspect too has been considered in detail in various paras of the order under review, as such, there is no substance on this plea. Moreover, the Petitioner being an experienced developer was aware of the consequences of the accident which occurred on 07.05.2022, much before the signing of the LTAA on 03.06.2022.

31. In issues no. four, five, six and seven ((iv), (v), (vi) and (vii)) as raised in Para 8 of the Petition, the Petitioner has tried to highlight that the Commission has not considered the letter dated 25.11.2023 of the DoE extending SCOD, interdependency between the IA and the LTAA w.r.t., the SCOD, report of the DoE dated 12.10.2023 and various documents. The submissions in this regard are erroneous for the reasons that the Commission has considered each and every document which had been placed on record. The report dated 12.10.2023 alleged to be prepared by the DoE had not been produced in Petition No. 71 of 2023 for the perusal of the Commission. The Petitioner only had produced the photographs vide affidavit dated 24.02.2024 which are at Pages 271 to 278 in Petition No. 71 of 2023, which simply depict the structure. So much so, even the copy of letter dated 25.11.2023 of DoE was also not produced for the perusal of the Commission. What prevented the Petitioner from producing such documents on record, no explanation has been offered. The Commission has clearly observed in order dated 12.04.2024 that neither the record of the accident was brought on record nor any other record on which the extension was sought has been produced.

32. Regarding interdependency between IA and LTAA, the Commission had framed the following point for determination as Point No. 1 in Petition No. 71 of 2023:-

“Point No. 1. Whether consequent upon the extension of SCOD upto 31.10.2024, the effective date of LTAA is also required to be made effective from the revised SCOD?”

33. The Commission has observed in the order dated 12.04.2024 that the Petitioner had only highlighted the events in the Petition prior to the signing of LTAA dated 03.06.2022. In fact, the LTAA is independent and has to be interpreted in the manner the same has been signed by the parties. As such, this contention is also not tenable. In fact, the Commission has made the following observations in Para 48 of the Order:-

“48. Now the question arises whether the Petitioner becomes entitled ipso facto for the extension of the operation of LTAA dated 03.06.2022 in line with the extended SCOD dated 31.10.2024. The plain answer is in negative for the reason that no satisfactory record, much less record of the incident occurred on 07.05.2022 has been placed on record. Petitioner might have produced some valid and relevant record before the GoHP seeking extension of SCOD but as per LTAA, but no such record has been produced alongwith the Petition. In order to claim the benefit as per Clause 9 of LTAA, the Petitioner was required to substantiate the existence of such ‘Force Majeure’ events as mentioned in Clause 9 of the LTAA.”

Thus, there is no merit in the submissions of the Petitioner that there are errors apparent on the face of the record for non-consideration of above documents.

34. Coming to eighth issue that the Commission has failed to take judicial notice of the events i.e. cloudburst, flooding and accident in the Petitioner's Project. This contention is also not tenable. The cloudburst, flooding etc. are matter of facts which need to be proved by sufficient evidence and there is no provision in the law that judicial notice of such events may be taken. Otherwise also, the Commission has elaborately discussed each and every aspect of the matter in various paras of the Order under review. The alleged force majeure events had happened prior to signing of the LTAA dated 03.06.2022 but still the agreement was signed without making any reference to such incidents.

35. It has also been highlighted by the Petitioner that the Commission has not dealt with the alternate submissions of the Petitioner that no additional expenditure had been incurred in the transmission system on account of LTAA for the Petitioner as Kashang Bhaba Transmission line was built for Kashang Hydro Project and the LTAA was allowed to be signed as an interim measure till the commissioning of Jangi Pooling Station. This contention of the Petitioner is also not tenable as the LTAA was signed on 03.06.2022 agreeing to pay the transmission charges. It was specifically agreed in Clause 6 of the LTAA dated 03.06.2022, that in case the developer

fails to construct the generating station/ dedicated transmission system or makes an exit or abandon its Project, the HPPTCL shall have the right to collect the transmission charges/ damages, as the case may be, in accordance with Notification/ Regulations issued by the HPERC from time to time. It was further agreed in Sub-clause (d) of Clause 6 of the agreement dated 03.06.2022 that in the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4, the HPPTCL shall pay proportionate transmission charges to concerned Long Term Open Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long-Term Open Access Customer(s) to HPPTCL provided generation is ready and HPPTCL fails to make alternate arrangement for dispatch of power.

Clauses 6 (a) and 6 (d) of the LTAA dated 03.06.2022 are reproduced as under:-

“6.0 (a) In case any of the developers fail to construct the generating station/ dedicated transmission system or makes an exit or abandon its project, HPPTCL shall have the right to collect the transmission charges and/ or damages as the case may be in accordance with the notification/ regulation issued by HPERC from time to time. The developer shall furnish a bank guarantee from a nationalized bank for an amount which shall be equivalent to Rs. 5 (five) Lakhs/ MW to compensate such damages.

The bank guarantee format is enclosed as Annexure-Y. The details and categories of bank would be in accordance with Clause 2 (h) above. The Bank guarantee would be furnished in favor of HPPTCL within 3 (three) months of signing of this Agreement.

6(d) In the event of delay in commissioning of concerned transmission system from its schedule, as indicated at Annexure-4. HPPTCL shall pay proportionate transmission charges to concerned Long Term Open Access Customer(s) proportionate to its commissioned capacity (which otherwise would have been paid by the concerned Long-Term Open Access Customer(s) to HPPTCL provided generation is ready and HPPTCL fails to make alternate arrangement for dispatch of power.”

Therefore, had there been lapse on the part of the HPPTCL, the Petitioner too would have claimed the proportionate transmission charges. The terms and conditions of the agreement, therefore, are on level playing field, clear and unambiguous. Once, the Petitioner has signed the agreement voluntarily, it does not lie in its mouth that no additional expenditure has been incurred by the Respondent in the transmission system and consequently no loss has been incurred by the HPPTCL with the signing of the LTAA.

36. Once, the LTAA dated 03.06.2022 was signed by the Petitioner agreeing to pay the transmission charges w.e.f. 03.06.2022, any deferment has to be in accordance with Clause 9 of the agreement which has been elaborately dealt by the Commission in Order dated 12.04.2024. Once, the Petitioner has freely signed the agreement, the

terms thereof are binding and enforceable and cannot be frustrated for the reasons that no additional expenditure has been incurred. Similarly, the sanctity of the agreement cannot allowed to be breached in order to derive advantage on the basis of alleged force majeure events which occurred before signing of the LTAA on 03.06.2022.

37. It is held by the Hon'ble Supreme Court that the courts cannot re-write a contracts mutually executed between the parties and cannot through its interpretative process re-write or create a new contract for the parties and has simply to apply the terms and conditions of the agreement as agreed between the parties. In this regard, reliance may be placed in the law laid down by the Hon'ble Supreme Court in *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory* taken from *Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission*, (2022) 4 SCC 657 wherein it is held as under:-

“178. The proposition that courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores v. Surat People's Coop. Bank [Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd., (2020) 13 SCC 564, para 20] , cited by Ms Divya Anand. This appeal is an attempt to

renegotiate the terms of the PPA, as argued by Ms Divya Anand as also other counsel. It is well settled that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in Nabha Power Ltd. v. Punjab SPCL [Nabha Power Ltd. v. Punjab SPCL, (2018) 11 SCC 508, paras 45 and 72 : (2018) 5 SCC (Civ) 1], cited by Ms Anand.”

38. Similarly the Hon'ble Supreme Court in *Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd.*, (2020) 13 SCC 564 : 2020 SCC OnLine SC 92 has held as under:-

“20. This Court, while interpreting the contract of insurance must interpret the words of the contract by giving effect to the meaning and intent which emerges from the terms of the agreement. In a Constitution Bench decision of this Court in General Assurance Society Ltd. v. Chandumull Jain [General Assurance Society Ltd. v. Chandumull Jain, AIR 1966 SC 1644], it was observed thus : (AIR p. 1649, para 11)

“11. ... In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves.”

The court through its interpretative process cannot rewrite or create a new contract between the parties. The court has to simply apply the terms and conditions of the agreement as agreed between the parties.”

39. The Hon'ble Supreme Court has also held that once the parties committed themselves to a written contract reducing the terms and conditions agreed upon by them in writing, the same would be binding

and in the event of breach of the conditions, the consequences must necessarily follow and if resisted would be legally enforceable. In this regard reliance may be placed in *Venkataraman Krishnamurthy v. Lodha Crown Buildmart (P) Ltd.*, (2024) 4 SCC 230 : 2024 SCC OnLine SC 182, Paras 19, 20, 21 and 22 thereof are reproduced as under:-

“19. Once the parties committed themselves to a written contract, whereby they reduced the terms and conditions agreed upon by them to writing, the same would be binding upon them. In the event such a written contract provided for the consequences that are to follow in the event of breach of the conditions by one or the other of the parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable. In the case on hand, the agreement stipulated the date of delivery of possession of the apartment for fit outs with a grace period of one year. In terms thereof, the date for delivery of possession of the apartment for fit outs, with the grace period, was 30-6-2017. Admittedly, the respondent Company did not offer delivery of possession of the apartment for fit outs by that date.

20. The “date of offer of possession”, under Clause 1.14, linked with issuance of the “Occupation Certificate” was distinct and separate from the “date of delivery of possession for fit outs” and Clause 11.3 unequivocally provided the consequences in the event of delay in that regard. The right of election given thereunder to the appellants to either continue or to terminate the agreement within ninety days from the expiry of the grace period was absolute and it was not open to NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of the apartment, such delay was not unreasonable enough to warrant cancellation of the agreement. It was not for NCDRC to rewrite the terms and conditions of the contract between the parties and apply its own subjective criteria

to determine the course of action to be adopted by either of them.

21. In this regard, we may refer to the Constitution Bench decision in *General Assurance Society Ltd. v. Chandumull Jain* [*General Assurance Society Ltd. v. Chandumull Jain*, (1966) 36 Comp Cas 468 (SC) : AIR 1966 SC 1644] , wherein it was observed that, in interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Thereafter, in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corporation Ltd.* [*Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corporation Ltd.*, (2013) 5 SCC 470 : (2013) 3 SCC (Civ) 153] , this Court reiterated that a contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves.

22. More recently, in *Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd.* [*Shree Ambica Medical Stores v. Surat People's Coop. Bank Ltd.*, (2020) 13 SCC 564] , it was observed that, through its interpretative process, the court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties. Again, in *GMR Warora Energy Ltd. v. CERC* [*GMR Warora Energy Ltd. v. CERC*, (2023) 10 SCC 401] , it was observed that courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It was held that the explicit terms of a contract are always the final word with regard to the intention of the parties.”

40. In fact, LTAA dated 03.06.2022 has not been extended or varied mutually. Once, the Petitioner has voluntarily signed the agreement, the same is binding on it and the Petitioner cannot escape the liability

that with the extension of the SCOD, the date of applicability of the LTAA is also liable to be extended.

41. In the entire Petition, the Petitioner has not been able to show that the order under review suffers from any error apparent on the face of record or that the review is necessitated on the discovery of new and important matter of evidence which after exercise of due diligence was not within the knowledge of the Petitioner or could not be produced when the order was made. Thus, the Petitioner has failed to establish that there are sufficient reasons for reviewing the Order dated 12.04.2024 in Petition No. 71 of 2023. Point No. 1 is accordingly decided against the Petitioner.

Final Order

42. In view of the above discussions and findings, the Petition fails and is accordingly dismissed.

43. The pending applications, if any, are also dismissed.

The file after needful be consigned to records.

Announced
10.10.2024

-sd/-
(Shashi Kant Joshi)
Member

-sd-
(Yashwant Singh Chogal)
Member (Law)

-sd-
(Devendra Kumar Sharma)
Chairman