BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

Review Petition No: 16 of 2023
Instituted on: 02.02.2023
Heard on: 15.05.2023
Decided on: **03.06.2023**

CORAM

Devendra Kumar Sharma
CHAIRMAN

Yashwant Singh Chogal
MEMBER (Law)

M/s Leond Hydro Power Private Limited through its Director and Authurised Signatory Sh. Arun Kumar
Office of LHPPL, Village Naura, P.O. Kareri,
Tehsil Shahpur, Distt. Kangra, H.P. **…….Petitioner**

Versus

The HP State Electricity Board Ltd. through
Chief Engineer (Commercial),
Vidyut Bhawan, Shimla-171004. **…….Respondent**

Petition for review of Order dated 07.01.2023 passed by the Commission in Petition No. 42 of 2022 titled as Leond Power Private Limited Vs. Himachal Pradesh State Electricity Board Limited.

Present:-

The Petitioner: Sh. Vipin Pandit and Sh. Dinesh Kumar Ld. Counsel.

For the Respondent: Sh. Kamlesh Saklani, Authorised Representative.

ORDER

This Petition has been filed by the Petitioner for review of the Order dated 07.01.2023 passed in Petition No. 42 of 2022. The Petitioner had filed a Petition for reimbursement of amount deducted as Liquidated Damages from energy bills for the period from 16.12.2017 to 22.02.2018 and for compensation for loss of energy generation on account of instructions to back down power generation and payment of interest on the amount claimed. Per Petitioner, detailed narration of each and every aspect was made in the Petition but the Commission while disposing off the Petition ignored various legal and factual aspects and has drawn non speaking, unreasoned and improper conclusions without any reasonable basis which has not only caused loss and injury to the applicant but has also resulted into failure of justice.

2. As per the Petitioner, the Commission has failed to take into account the existence of two Power Purchase Agreements (PPA for short) i.e. (Annexures P- 10 and 36) & Annexure R-I (Annexures to the main Petition No. 42 of 2022). According to him, while signing PPA Annexure R-I, on 29.09.2017, the Respondent/Himachal Pradesh State Electricity Board Limited (HPSEBL/ Respondent for short) has inserted some additional conditions and modifications in gross violation of the Order dated 24.08.2017 passed by the Commission in Petition No. 41 of 2017 for approval of PPA. According to him, the Petitioner had signed

the PPA (Annexure R-1) and other documents with an intention and understanding that the same are totally in accordance with the PPA approved by the Commission vide Order dated 24.08.2017 in Petition No. 41 of 2017 and, therefore, the HPSEBL has acted in a wrong, arbitrary, unfair and unilateral manner by incorporating unapproved changes in the PPA, without approval of the Commission. The difference in the two PPAs as approval by the Commission vide Order dated 24.08.2017 and the PPA actually signed on 29.09.2017 (Annexure R-I) has been highlighted by the Petitioner as under:-

S. No.	Clause as per approved PPA (P-10 and P-36)	Unilateral Modified Clause inserted by HPSEBL (R-1)
1	2.2.46 "Interconnection Facilities means all the facilities which shall include, without limitation, switching equipment, protection, control and metering devices etc., for the incoming bay(s) for the project line(s), to be installed and maintained by the HPSEBL at existing 33 KV Sub-station at Bithloo i.e. interim connectivity for two years or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL whichever is earlier, through 33kV S/C dedicated line on D/C structure from Leond Small HEP to the existing 33kV Sub-station of HPSEBL at Bithloo at the cost of the company to enable evacuation of electrical output	2.2.46 " interconnection facilities means all the facilities which shall include, without limitation, switching equipment, protection, control and metering devices etc., for the incoming bay(s) for the project line(s), to be installed and maintained by the HPPTCL at existing 132/33 KV Sub-station Chambi. However as an interim arrangement (i.e. till commissioning of Chambi Sub-station of HPPTCL) the project shall be connected at existing 33 kV Sub-station of HPSEBL at Bithloo through 33kV S/C dedicated line on D/C structure from Leond Small HEP to the existing 33kV Sub-station of HPSEBL at Bithloo at the cost of the company to enable evacuation of electrical output from the Project in accordance with the

	from the Project in accordance with the Agreement.	Agreement.
2	2.2.47 " Interconnection point means the physical touch point near the project line(s) and the allied equipment forming a part of interconnection facilities are connected to the existing 33kV Sub-station at Bithloo i.e. interim connectivity for 2 years or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL which ever is earlier. The regular inter connection point for this SHP is 132/33 kV Chambi Sub-station of HPPTCL.	2.2.47 " Interconnection point means the physical touch point near the project line(s) and the allied equipment forming a part of interconnection facilities are connected to the existing 33kV Sub-station at Bithloo during interim connectivity and finally connected at 132/33 kV Chambi Sub-station of HPPTCL on its commissioning.
3	2.2.60 " Project Line" means 33 kV single circuit transmission line on double circuit structure from station to the adjusting 33 kV Sub-station of HPSEBL at Bithloo ie. Interim connectivity for two years or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL whichever is earlier updated and maintained, as a part of the project, by the company for the purpose of evacuation of power from the project. This shall however not include the inter connection facilities.	2.2.60 " Project Line" means 33 kV single circuit transmission line on double circuit structure from station to the adjusting 33 kV Sub-station of HPSEBL at Bithloo through 33 kV S/C dedicated line on D/C structure during interim connectivity and finally connected at 132/33 kV Chambi Sub-station of HPPTCL on its commissioning updated and maintained, as a part of the project, by the company for the purpose of evacuation of power from the project. This shall however not include the inter connection facilities.
4	6.4 Deemed generation	New sub clause added : 6.4.1 " No deemed energy benefit shall be applicable during the period of interim connectivity i.e. At 33/11 kV Sub-station Bithloo of HPSEBL or any other interim

		connection point agreed between HPSEBL and M/s Leond Hydro Power Limited." Further new clause numbered as 6.4.2 inserted as under :
5	6.4.1 "After the COD of the project, loss of generation at the station on account of reasons attributed to the following, or any one of the following, shall count towards deemed generation and it shall be paid / accounted for each time, if only there is water spillage……"	6.4.2 "After the connectivity of the project at regular inter connection point i.e. 132/33 kV Chambi Sub-station of HPPTCL, loss of generation at the station on account of reasons attributed to the following, or any one of the following, shall count towards deemed generation and it shall be paid / accounted for each time, if only there is water spillage……"
6	6.4.3 " HPERC added and approved following paras at the end of clause 6.43 as under :- The deemed energy benefit shall not be applicable till interim arrangement for 2 years (i.e. from the date of signing of connection agreement with HPSEBL) at inter connection point (33kV yard) at 33/11 kV Sub-station Bithloo or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL which ever is earlier. The deemed energy benefit shall also not be applicable in case of outage / over loading of the transmission system of licensee other than HPSEBL system i.e. STU and CTU etc.	This para deleted by HPSEBL in the prepared document of PPA.

3. According to the Petitioner, it could not be apprehended that the HPSEBL, being a State Government undertaking will act with malafides, legal malice and bias in getting the documents signed from the Petitioner, in order to gain undue advantage and unfair gains, therefore, the unapproved portion in the PPA dated 29.09.2017 is void ab-initio and non-est but this factual aspect has not been considered by the Commission resulting in passing of a non speaking order.

4. According to the Petitioner, the Commission has also ignored the following relevant Clause of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources Terms and Conditions for the Tariff Determination) Regulations, 2012 (RE Tariff Regulations, 2012 for short) which reads as under:-

> ***" Promotion of renewable energy sources****. - **(1)** Any renewable energy generator who does not have an arrangement for disposal/use of energy from his project may, with prior consent of the licensee and approval of the Commission, enter into a power purchase agreement, on long term basis or under the REC mechanism, with the distribution licensee as per the provisions of the relevant applicable regulations,*
> *(2) The renewable energy generator, to whom connectivity with the transmission or distribution system of the licensee has not already been granted, shall apply for connectivity to the licensee at-least 24 months prior to intended date of such connectivity or within such time frame as may be mutually agreed"*

5. According to the Petitioner, the Respondent/HPSEBL could not have carried out any modification in the PPA without the prior approval of

the Commission but this vital aspect has been ignored by the Commission resulting in adopting a wrong approach which renders the impugned order unreasonable and non-speaking resulting in failure of justice.

6. According to the Petitioner, the findings of the Commission that there is no evidence with regard to hardship on account of change of connectivity is against the principles of natural justice and fair play as there cannot be of any prudence in coming to the conclusion that connection point having distance of more than 12 km from the earlier point at Bithloo does not create any difficulty to the Petitioner which is without proper appreciation of settled legal position and public Policy of Promotion of Power generation. Infact, the Commission should have held that as per law and the Government policy, the PPA is not only a simple contract between the parties but a “Statutory Contract” and any deviation from law, rules, regulations and statutory provisions does not have any legal force and the same is illegal, void and non-est and the Commission ought to have proceeded in deciding the matter as per PPA Annexures P-10 and 36 (draft approved PPA), which has resulted in drawing wrong conclusions but this vital aspect too has been ignored by the Commission.

7. It is averred that the Commission has also not considered the following:-

(a). Prior to the Connectivity Agreement dated 04.08.2017, the HPSEBL had issued letter No. HPSEBL/CE(SP(PH& T/DB-201(Goc)Leond/2016-17-7249 dated 07.02.2017 informing that the bay allocated to the applicant was in the yard of 33/11 kV Sub-station Bithloo detailed as "Proposed Feeder bay at yard of 33/11 kV Sub-station Bithloo (Gaj) of HPSEBL and the terms and conditions of the Connection Agreement specifically mentions Para 'B' to this effect as under:-

> *" The Distribution Licensee has agreed to the connection of the Leond SHEP(2.0MW) facility to the distribution licenses wheeling and communication system (via the applicants site – related connection equipment) at the connection point at 33/11 kV Sub-station of HPSEBL, Bithloo through dedicated 33 kV S/C line on D/C structure from Leond SHEP (2.00MW) to common pooling point and further in joint mode with Gaj Top SHEP (3.8MW), (i.e. interim connectivity for two years or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL whichever is earlier) and using the distribution and communication system of the distribution licensee/ SLDC, to transmit electricity as well as real time data to and or from the facility through the electrical system of distribution licensee. "*

However, the HPSEBL inserted a line at the end of Clause 2.47 of PPA (Annexure R-I) that "the regular interconnection point for this SHP is at 132/33 kV Chambi Sub-station of HPPTCL" which is malafide and contrary to the terms and conditions of the Connection Agreement.

(b) While considering the case of the applicant with regard to the connectivity, the aforesaid condition is required to be interpreted in the light and spirit of the Hydro Policy of the Government of Himachal Pradesh that Small Hydro Projects having generating capacity upto 2 MW are to be given connectivity at nearest available point. Not only this, the Commission in its Order dated 18.12.2007 on Small Hydro Power Projects Tariff and other issues has also dealt with this issue in para 2.20 (a) (ii) as under:-

> *" Interconnection of the project line(s) at its nearest control sub-station and if inter-connection at the nearest control Sub-station is not feasible then transmission licensee or STU to propose to the generator other feasible interconnection Sub-station (s) and the said proposal, along with the reasons for not allowing interconnection at the nearest Sub-station, shall be submitted by the transmission licensee or STU for approval of the Commission. "*

(c). Further while dealing with mechanism for grid connectivity, the Commission has dealt the same at Point 5 and 5.35 in Order dated 18.12.2007 as under:-

5.	*"Inter-connection facility to be provided at nearest sub station of HPSEB. In case an alternative arrangement of inter connection is desired by any of the parties, then such alternatives inter connection arrangement needs to be approved by the commission after scrutiny by empowered committee. "*
5.35	*" this order shall be applicable to all such power purchase agreements (not exceeding 5MW) which have already been approved by the commission with a specific clause*

> *that tariff and other terms and conditions of PPA shall be subject to provisions of Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and co-generation by distribution licensee) Regulations, 2007 and also the power purchase agreements to be approved by the commission herein after. "*

(d) Keeping in view the above, the connectivity to the Project was given at Sub-station, Bithloo. Not only this, during good faith negotiations on 29.03.2022 (Annexure P-6 in the Petition No. 42 of 2022), the HPSEBL had recommended as under:

> *"System Planning wing will sign revised connection agreement with M/s Leond Hydro Power Pvt. Ltd. for allowing permanent connectivity of Leond SHP (2.00 MW) at 33 kV Bithloo Substation in view of feasibility given by fields units with cost of interconnection facilities borne by the IPP alongwith its ownership and separate O&M Agreement will be signed by the IPP."*

However, the Commission has ignored this vital aspect while passing Order dated 07.01.2023 and such lapses on the part of Commission amount to errors apparent on the face of record, resulting into passing of wrong, non-speaking and un-reasoned order. Further, Regulation 50-A of Himachal Pradesh Electricity Regulatory Commission (Conduct of Business Regulations, 2005 (CBR, 2005 for short), the Commission only has the Powers to approve the PPAs.

8. According to the Petitioner, Regulation 2 (5) of Himachal Pradesh Electricity Regulatory Commission (Grant of Connectivity, Long Term

and Medium Term Inter-State Open Access and Related Matters) Regulations, 2010 provides as under :-

> *"Connectivity in relation to a generating station, including a captive generating plant, a bulk customer or transmission/distribution licensee means the Stage of getting connected to the intra-State transmission/distribution system;"*

9. Therefore, there is no temporary or permanent connectivity and improper consideration of such legal position has resulted into wrong approach by the Commission in appreciating the real matter in controversy between the parties. Further Clause 7 of the aforesaid Regulations provides 60 days time for deciding the application of connectivity which is pending with HPSEBL for last more than 4 years and, thus, the connectivity at Bithloo is to be considered as the only point of connectivity for all intents and purposes after 27.01.2018 and any correspondence in this regard is of no consequence. However, this aspect too has been ignored while passing the Order dated 07.01.2023. Further despite repeated taking up the matter with the Respondent and also at 48th meeting of STU, no action has been taken by the Respondent/HPSEBL but this aspect has not been appreciated by the Commission.

10. Also averred that while considering the claim regarding Liquidated Damages, the reply of the Respondent has not been properly considered

and findings that the HPSEBL had suffered loss are not justified. Further the approved date of synchronization was fixed in the month of March 2018, therefore, findings with regard to Liquidity Damages w.e.f. 29.09.2017 to 16.12.2017 are totally contrary to the legal position and amounts to an error and such findings cannot be substantiated in the eyes of law.

11. It is averred that the Small Hydro Project are installed after taking loans from financial institutions and interest is to be paid on such loans etc., therefore, the delayed payment or withholding payment or deducting payment without any justification amounts to financial loss and, therefore, claim No. 4 should have been decided in favour of the Petitioner. However, the Commission has not appreciated this aspect. Further the Commission has also not considered Clause 8.3 of the PPA which reads as under:-

> ***"LATE PAYMENTS:*** *In case the payment of any bill for charges payable under this Agreement is delayed beyond a period of 60 days from the Date of Presentation of the Bill, a late payment surcharge at the simple interest rated of 1.25% per month shall be charged by the Company for the actual number of days by which the payment is delayed, when the claim no. 1 has been partially allowed, then the returnable amount is a delayed payment and the respondent should have been directed to make payment of interest as per the above mention clause."*

12. Not only this, the Petitioner had duly intimated the Respondent about the date of synchronization in terms of Clause 4.1.4 of PPA which reads as under:-

> *"The HPSEBL, and /or its authorized representative(s) shall inspect any Unit which the Company intends to Synchronize to the Grid System within five (5) days after being notified in writing by the Company pursuant to Section 4.1.3 to determine whether the requirements of Section 4.1.2 have been met. The Company shall provide the HPSEBL with such access to the Station as is reasonably required to make such determination."*

13. This vital aspect of late payment too has escaped the attention of the Commission as the amount ordered to be reimbursed, in the eyes of law amounts to late payment and therefore, the Petitioner is entitled for surcharge or interest on the amount awarded.

14. As per the Petitioner, there are errors apparent on the face of record which has caused grave injustice to the Petitioner and, therefore, the Order dated 07.01.2023 is required to be reviewed.

15. The Petition has been resisted by the Respondent/HPSEBL by filing the reply. It is submitted by way of preliminary objections, interalia, that the Petition is neither maintainable in law nor on the facts as the Commission has passed the Order under review as per the provisions of the Electricity Act, 2003 and the Regulations framed thereunder and that no grounds have been made out by the Petitioner for reviewing the impugned order and that the power of review may not be exercised on

the ground that the decision is erroneous on merits which is the province of the appellate Court and that the entire foundation of the review Petition is on the ground that the impugned order has been passed on erroneous consideration, which is beyond the perview of Review. Further, as per the Respondent, the power of review can be exercised for the correction of a mistake but not to substitute a view but in each and every paragraph, it has been stated that the Commission has passed a wrong order by not appreciating the law on the point etc. and the grounds made out for review are akin to the appellate grounds and that there are no errors apparent on the face of record, therefore, the finality attached to the order cannot be disturbed. As per the Respondent, the review Petition is misuse of the process of law as under the garb of the same, the Petitioner intends the Commission to sit in appeal over its own order.

16. On merits, it is denied that there are inadvertent omissions or non consideration of the factual or legal aspects of the matter. According to the Respondent, the Petitioner and the HPSEBL had filed a joint Petition for approval of the Power Purchase Agreement (PPA for short) which was approved by the Commission on 24.08.2017 and accordingly, the parties signed the PPA on 29.09.2017 (Annexure R-1) with due diligence. Clause 6.4 of the PPA clearly provides that “No deemed energy benefit shall be applicable during the period of interim

connectivity at 33/11 kV Sub-station, Bithloo of HPSEBL or any other interim interconnection point agreed between the HPSEBL and M/s Leond Hydro Power Pvt. Ltd.", and the said provision is not contrary to the provision of the draft PPA approved by the Commission. Not only this, Clause 4.4 of the PPA provides as under:-

" 4.4 Interim Arrangement for Evacuation of Power

In case power cannot be evacuated from the Project at the Interconnection Point due to non-commissioning of the Project Line, non-availability of evacuation system beyond the Interconnection point or any other technical constraints, the Parties may mutually agree to an interim arrangement, alongwith the terms and conditions thereof, for evacuation of power from the Project till such time the same can be evacuated under the regular arrangement envisaged in the Agreement. However, the Deemed Generation benefit under Clause 6.4 or any other provisions of the Agreement shall not be available to the company for the period during which the power is evacuated under such interim arrangement."

Therefore, the parties have mutually agreed that deemed generation benefit under Clause 6.4 or any other provisions of PPA shall not be available to the company/Petitioner for the period during which the power is evacuated under such arrangement.

17. With regard to the changes/amendments in the final PPA, as compared to approved draft PPA are concerned, it is submitted that when the Joint Petition No. 41 of 2017 was filed on 29/30.06.2017 for approval of PPA, the connection agreement had not been executed by the Petitioner with the HPSEBL, therefore, terms of connectivity were not

certain. The connection agreement was executed on 04.08.2017 and thus, it was necessitated to align the provisions of the PPA related to connectivity and deemed generation with the provisions of connection agreement dated 04.08.2017. The PPA dated 29.09.2017 has been signed by the Petitioner with open eyes and detailed findings have been given by the Commission while dealing point No. 3 in the impugned Order and there is no scope for review. It is denied that Petition No. 41 of 2017 for approval of PPA had been signed after execution of the connection agreement as Petition No. 41 of 2017 was filed on 29.06.2017 whereas connection agreement was executed on 04.08.2017.

18. It is averred that the Petitioner has miserably failed to point out any patent error manifest on the record and has attacked/challenged the impugned Order dated 07.01.2023 that the decision is erroneous in law which is no ground for a review.

19. It is denied that the modification/changes containing relevant provisions of connection agreement dated 04.08.2017 in the PPA are contrary to law, rules, regulations and the policy of the Government. According to the Respondent, the draft submitted by the parties before the Commission was not the final PPA and cannot be considered the 'statutory contract' and rather, the PPA signed on 29.09.2017 is the only PPA. Though, it is submitted that the approval of the Commission is

required for incorporating the terms and conditions in the PPA but averred that so long the modifications/changes do not contravene any law, rules and regulations, prior approval is not required. Further the parties to the PPA have mutually agreed for the modifications or amendments as carried out in order to align the terms and conditions of the connection agreement dated 04.08.2017. It is also averred that the letter No. HPSEBL CE(P) (PHT)/DB-201 (GC) Leond/2016-2371-77 dated 07.11.2016 granting connectivity is an integral part of the connection agreement dated 04.08.2017. The item 6 (b) 'Point at which connectivity is granted" of said connectivity-III Format is reproduced as under:-

> " i) 33 kV Yard at 33/11 kV Sub-station Bithloo (i.e. interim connectivity for 2 years or till commissioning of 132/33 kV Chambi Sub-station of HPPTCL, whichever is earlier.
> ii) For connecting at 132/33 kV Sub-station Chambi, the IPP shall take up the matter with HPPTCL and shall erect the 33 kV infrastructure from 33 kV Sub-station Bithloo to 132/33 kV Chambi Sub-station to be suggested by HPPTCL, well before the commissioning of 132/33 kV Sub-station Chambi. Therefore, the interface point shall be 132/33 kV Sub-station Chambi."

20. Thus, the interface point of the project is 132/33 kV Sub-station, Chambi of HPPTCL and only interim connectivity had been provided at 33 kV Bithloo Sub-station for two years as 132/33 kV Chambi Sub-station was not ready at that time. Therefore, the provisions in the PPA relating to interconnection point/interface point are neither contrary to the

provisions of connection agreement nor unilateral and rather, the same were mutually agreed by the parties. It is also averred that the interconnection point/facility at nearest Sub-station is dependent upon the feasibility of the Sub-station and due to constraint in said Sub-station, Bithloo, Permanent connectivity could not be given to the Petitioner but the HPSEBL provided the interim connectivity to the Project at Bithloo Sub-station with bonafide intention to avoid generation loss to Petitioner pending completion of 132/33 kV Chambi Sub-station.

21. It is averred that the reliance on the provisions to the Electricity Act, 2003, Rules and Regulations is misplaced as a PPA had been signed with the consent of both the parties. No deviation of any provisions has been made by the Respondent. Regarding non consideration of Regulations 2(5) of HPERC (Grant of Connectivity, Long Term and Medium Term Inter-state Open Access and Related Matters) Regulations 2010, it is submitted that the said clause only defines connectivity in relation to a generating station, including a captive generating plant, a bulk customer or transmission/distribution licensee as the stage of getting connected to the Intra-state transmission/distribution system and does not provide any guidance or mandate with respect to the determination of temporary or permanent connectivity. According to the Respondent, the contention of the Petitioner considering connectivity at Bithloo as the only point of connectivity for all intents and purposes is

incorrect and that the correspondence between the parties with regard to the connectivity is vital for the process of determining the feasibility for the purpose of connectivity. Also averred that the parties to the contract are bound by the law to adhere to the terms and conditions duly agreed and since the PPA was executed with open eyes, the Petitioner cannot take u-turn.

22. Also averred that the reliance of the Petitioner on clause 9 of the connection agreement (Annexure P-23) is also misplaced as said clause provides for an amicable settlement between the parties in case of any difference or dispute arising out of or in connection with the agreement exists but said clause does not absolve the Petitioner from fulfilling its obligations under the agreement, including the requirement of obtaining permanent connectivity as per the relevant Regulations.

23. Also averred that as per Article 16.2 of the PPA, the Respondent is entitled to the Liquidated Damages if there is delay in synchronization of units and the Commission has considered all the material and documents and finding of the Commission regarding damages is as per the provisions of PPA. It is denied that there are errors apparent on the face of record, as such, the Petition is required to be dismissed.

24. In rejoinder, the contents of the reply of Respondent have been denied and those of the Petition have been reaffirmed.

25. We have heard Sh. Vipin Pandit and Sh. Dinesh Kumar, Ld. Counsel for the Review Petitioner and Sh. Kamlesh Saklani, Authorised Representative for Respondent No. 1. We have also carefully perused the entire record as also record of Petition No. 41 of 2017 for approval of the PPA and Petition No. 42 of 2022 in which the impugned Order has been passed.

26. Sh. Vipin Pandit, Ld. Counsel for the Petitioner has submitted that as per Section 86 (1) (b) of the Electricity Act, 2003 and Regulation 50-A of the CBR Regulations, 2005, no PPA without the prior approval of the Commission can be executed and, as such, Joint Petition No. 41 of 2017 was filed by the parties for approval of the PPA alongwith the draft PPA which was allowed by the Commission vide order dated 24.08.2017 and approved draft PPA was also sent to the HPSEBL by the Commission and, the PPA was therefore, required to be signed only in accordance with the approved draft PPA but the HPSEBL without prior approval of the Commission has modified the terms and conditions of the approved draft PPA on its own and made the Petitioner to sign the PPA on 29.09.2017 as if the same had been in accordance with the approved draft PPA. According to him, the HPSEBL, being a Govt. of HP undertaking, the Petitioner bonafidly believed that no mischief would be committed by it but in order to put the Petitioner at disadvantage, the HPSEBL has acted with legal malice and bias. According to him, the

unapproved portion in the PPA regarding shifting of interconnection point to a distance of 12 km from the Project, denial of deemed energy benefit and Project line etc., as specifically mentioned in the Petition, have no binding effect on the Petitioner being void ab-initio but the Commission has ignored these vital aspects while disposing of the Petition No. 42/2022 which has not only caused huge financial loss but has also resulted in gross injustice to the Petitioner. He has also submitted that by ignoring the mischief of the HPSEBL in respect of the unauthorised modifications, a non-speaking and unreasoned order has been passed by the Commission and that there are errors apparent on the face of the record and good reasons for reviewing of the impugned order. He has relied upon the law laid down by Hon'ble Supreme Court in case titled as MORAN MAR BASSELIOS CATHOLICOS VERSUS MOAT REV. MAR POULOSE ATHANASLUS LAWS (SC) 1952 5 15, 2021 (4) CIVIL COURT CASE 691 (ALLAHABAD), (2005) 4 SUPREME COURT CASES 741 AND 1970 (3) SUPREME COURT CASES 643 in support of the case of the Petitioner.

27. Sh. Kamlesh Saklani, Authorised Representative, appearing for the HPSEBL has submitted that the Commission has dealt each and every aspect of the matter as per the record and there are no errors apparent on the face of the record in the impugned Order and the Petition is sheer misuse of the process of the Commission and the law, as such, the Petition is liable to be dismissed. He has also submitted that when the

Joint Petition No. 41 of 2017 was filed for approval of the PPA on 29.06.2017/ 30.06.2017, the parties had not signed the Connection Agreement which was signed by the parties on 04.08.2017 which necessitated the PPA to align the same with the terms and conditions but no material additions or alterations have been carried out and the PPA dated 29.09.2017 is in accordance the approved draft PPA and order dated 24.08.2017 approving the Joint Petition No. 41/2017 and the Connection Agreement as agreed by the Petitioner. According to him, the Petitioner had signed the Power Purchase Agreement dated 29.09.2017 with open eyes and neither any undue influence has been exercised nor the HPSEBL has acted in malice to put the Petitioner in disadvantage nor any undue advantage has been gained by the HPSEBL. He has also submitted that the Petitioner has pointed out several infirmities in the order and the grounds on which the review has been sought are akin to the Appeal which is the domain of the Appellate Tribunal but the Petitioner intends the Commission to sit over its own order as an Appellate Authority which is not permissible.

28. Under Section 94 of the Electricity Act, 2003 read with Section 114 and order 47 Rule I of the Code of Civil Procedure, 1908, the Commission has the powers to review its own order in order to prevent miscarriage of justice or to correct grave and palpable errors committed by it. However, there are definitive limits to exercise the power of review

which may be exercised only 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 or it may also be exercised on any analogous ground. However, the power of review may not be exercised on the ground that the decision was erroneous on merits which is the domain of the court of appeal. Therefore, the power of review is not to be confused with the appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an error is far from self-evident and has to be established by lengthy and complicated arguments, such an error cannot be cured in a review. Under Order 47 Rule I of the Code of Civil Procedure, 1908 while exercising the powers of review, it is not permissible for an erroneous decision to be reheard and corrected.

29. Coming to the first ground of review that the HPSEBL has carried out the unauthorized modifications by inserting additional terms and conditions in the PPA, as highlighted in Para 2 above with regard to

changing of 'Interconnection facilities', the Commission has dealt this aspect in detail in the impugned order dated 07.01.2023 that the Petitioner had been granted temporary/ interim connectivity at Sub-station, Bithloo for a period of two years or till the completion of the permanent facility at 132/33 kV Chambi Sub-station of the HPPTCL (Himachal Pradesh Power Transmission Corporation Limited), whichever is earlier and nowhere in the approved draft PPA, as approved by the Commission, it was mentioned that the Petitioner was granted permanent connectivity at Sub-station Bithloo. Here, it is relevant to refer to the reply of the Respondent that Permanent Connectivity was not given to the Petitioner at Bithloo Sub-station due to constraint in the Sub-station. The HPSEBL has categorically mentioned in their reply that the modifications had necessitated on account of signing of the connection agreement which was signed by the Petitioner with Respondent only on 04.08.2017, Whereas, the Petition for approval of PPA had been filed on 29.06.2017/ 30.06.2017 (Petition No. 41/2017) for the approval of PPA. We have also perused Para 'B' of Connection Agreement dated 04.08.2017, executed by the Petitioner with the HPSEBL (Annexure P-23 at Page 113 of the Petition No. 42 of 2022), wherein it is clearly mentioned that the Project of the Petitioner was allowed interim connectivity at Bithloo Sub-station in a joint mode with other Project developers for two years or till commissioning of 132/33 kV Chambi Sub-

station of the HPPTCL, whichever is earlier. This is also evident from the Annexure (Connectivity-III) Form, attached to letter No. HPSEBL CE (P) (PHP/DB-201(GC) Leond/2016- 2371-77 dated 07.11.2016 (Page 127 of the Petition No. 42 of 2022) that connectivity at Bithloo Sub-station was allowed to the Petitioner, as an interim measure for two years or till commissioning of Chambi Sub-station of the HPSEBL, whichever is earlier. Not only this, it was also clearly mentioned therein that the Petitioner had to erect the 33 kV infrastructure from 33 kV Sub-station Bithloo to 132/33 kV Chambi Sub-station and the interface station shall be at 132/33 kV Sub-station Chambi. The PPA dated 29.09.2017 and Connection Agreement dated 04.08.2017 were signed by the Petitioner voluntarily without any pressure or coercion, therefore, the same are binding upon him as also Respondent and it does not lie in the month of the Petitioner that he had signed the PPA dated 29.09.2017 without going through its contents believing that the same as per the approved draft PPA. Even otherwise, in the draft approved PPA, as per order dated 24.08.2017 in Petition No. 41 of 2017, broad contours had been given as to how the PPA is to be executed and it was specifically mentioned in Para 3 that other terms and conditions shall be subject to the provisions of the RE Tariff Regulations, 2017 and Commission's order dated 20.05.2013 and 30.06.2015 in the matter of determination of tariff. The Petitioner has failed to point out that the modifications which

had necessitated due to the connection agreement are against the RE Tariff Regulations, 2017 or beyond the terms and conditions agreed upon by the parties. Though the Petitioner has claimed that he had filed an application with the HPSEBL about 4 years back for providing him permanent connectivity at Bithloo Sub-station which is not yet decided but merely on said count, when there is system constraint at Bithloo Sub-station, the permanent connectivity to the Petitioner was not possible as evident from the reply of the Respondent. Here, it is relevant to mention that there are other Power Projects also in the same region which too were provided the interim connectivity at Bithloo in a joint mode. The Petitioner has not been able to point out that ignoring him, some other Power Producer has been granted Permanent Connectivity at Bithloo Sub-station. The whole aspect has been dealt by the Commission elaborately in the impugned order dated 07.01.2023 and there are no errors apparent on the face of the record.

30. Regarding the another ground of review regarding modification of deemed energy generation benefit Clause, it is relevant to refer to Para 2.11 of order dated 24.08.2017 which reads as under:-

> “Since the commissioning schedule of 132/33 kV Chambi Sub-station of Himachal Pradesh Power Transmission Corporation Limited (HPPTCL) i.e. the STU has not been provided in the

Petition, so the Clause 6.4 relating to Deemed Generation may be rationalised accordingly."

31. It is, thus, apparent from the aforesaid that the provision regarding 'Deemed Generation' was to be rationalised as per the Commissioning Schedule of 132/33 kV Chambi Sub-station which is the permanent interface of the Project of the Petitioner. Accordingly, the provision regarding 'Deemed Generation' was rationalised by the parties at the time of signing of PPA on 29.09.2017 which was also existing at Clause 4.4 of the PPA and merely because there is change in the serial number of the Clauses of agreement, it does not mean that the same is unauthorised or has operated as a hardship to the Petitioner. Once, the Petitioner is party to the PPA dated 29.09.2017, it can be safely be believed that the PPA was signed by the Petitioner after understanding each and every clause of it.

32. The another grounds of review regarding loss and damages, synchronisation date, payment of energy bills, liquidated damages and late payment surcharge, etc have also been dealt by the Commission in detail in the impugned Order dated 07.01.2023 and no material detail has escaped the attention of the Commission warranting review. In fact, the Petitioner has not been able to point out any error apparent on the face of the record which goes to the root of the case resulting in miscarriage of justice or injury or loss to the Petitioner. Therefore, the law

relied upon by the Ld. Counsel for the Petitioner is not applicable to the facts and circumstances of the present Petition.

33. The scope and ambit of the power of review was elaborately considered by the Hon'ble Supreme Court in case titled as Ram Sahu (Dead) through L.Rs and Others Vs. Vinod Kumar Rawat and Others MANU/SC/0821/2020 wherein it is held in paras 6, 7 and 8.1 as under:

"In the case of Haridas Das vs. Usha Rani Banik (Smt.) and Others,(2006) 4SCC 78 while considering the scope and ambit of Section 114 CPC read with Order 47 Rule 1 CPC it is observed and held in paragraph 14 to 18 as under:

"14. In Meera Bhanja v. Nirmala Kumari Choudhary (1995) 1 SCC 170 it was held that:

"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, this Court, in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy J. has made the following pertinent observations:

'It is true 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.'

15. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought: (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the Applicant; (b) such important matter or evidence could not be produced by the Applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

16. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, AIR 1979 SC 1047, this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under: (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 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 matters 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."

17. The Judgement in Aribam case has been followed in Meera Bhanja. In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long-drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in Satyanarayan Laxinarayan Hegde v. Millikarjun Bhavanappa Triumale, AIR 1960 SC 137 were also noted:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the Rule governing the powers of the superior court to issue such a writ."

18. It is also pertinent to mention the observations of this Court in Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715. Relying upon the judgments in Aribam and Meera Bhanja it was observed as under:

"9. Under Order 47 Rule 1 CPC a judgment may be open to review interalia 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 proves 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 of 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'."

6.2 In the case of Lily Thomas vs. Union of India, (2000) 6 SC 224, it is observed and held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power.

It is further observed in the said decision that the words "any other sufficient reason" appearing in Order 47 Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526.12.3 In the case of Inderchand Jain vs. Motilal, (2009) 14 SCC 663 in paragraphs 7 to 11 it is observed and held as under:

7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code mean subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration. Section 114 of the Code although does not prescribe any limitation on the power of the court

but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under:

"17. The power of a civil court to review its judgment/decision is traceable in Section 114 CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

'1. Application for review of judgment.—(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order.' "

8. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajendra Kumar v. Rambai this Court held: (SCC p. 514, para 6)

> *"6. The limitations on exercise of the power of review are well settled. The 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 the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed."*

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an

application for review shall also lie for any other sufficient reason.

10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India this Court held: (SCC p. 251, para 56)

"56. It follows, therefore, 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."

7. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. In the case of Patel Narshi Thakershi vs. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844, this Court has held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise.

8. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by this Court in the case of T.C. Basappa vs. T.Nagappa, AIR 1954 SC 440. It is held that such an error is an error which is a patent error and not a mere wrong decision. In the case of Hari Vishnu Kamath vs. Ahmad Ishaque, AIR 1955 SC 233, it is observed as under:

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

8.1 In the case of Parsion Devi vs. Sumitri Devi, (Supra) in paragraph 7 to 9 it is observed and held as under:

7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372 this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an 'error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

34. A careful perusal of the review Petition and the record show that the Commission has considered each and every aspects of the matter in detail and has given its findings on merits while disposing off the Petition vide Order dated 07.01.2023. It appears that the Petitioner has misconstrued the Permanent Inter-connection Point with the Temporary Inter-connection Point. The Petitioner in the various grounds in the present Petition has pointed out several infirmities in the impugned Order dated 07.01.2023, for which the Petitioner was at liberty to approach the Hon'ble Appellate Court but under the garb of review, the Petitioner cannot make this Commission to re-hear the matter and substitute a

view. Hence, the law laid down aforesaid by the Hon'ble Supreme Court is squarely applicable to the facts and circumstances of the present matter.

35. As observed above, the Commission has dealt each and every aspect of the matter in detail. The Petitioner has miserably failed to point out that there are errors on the face of record justifying the review of impugned Order dated 07.01.2023 passed by the Commission in Petition No. 42 of 2022. Similarly, the Petitioner has failed to point out discovery of any new and important matter or evidence which after exercise of due diligence was not within its knowledge or could not be produced at the time when Order dated 07.01.2023 was made or there is any sufficient reason warranting review.

36. In view of the foregoing discussion and limited scope of review jurisdiction, we are of the view that there are no merits in the Review Petition. Thus, the present Review Petition deserves dismissal and accordingly the same is dismissed.

The file after needful be consigned to records.

Announced
03.06.2023

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

-Sd-
(Devendra Kumar Sharma)
Chairman