

ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021

Present: Shri U. N. Behera, Chairperson
Shri A. K. Das, Member
Shri S. K. Parhi, Member

Case Nos. 40, 41 & 42/2018

NESCO, WESCO & SOUTHCO Ltd. Petitioners

Vrs.

Shri Akshya Kumar Sahani & others Respondents

In the matter of: **An application under S Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 70 (1) of the OERC (Conduct of Business) Regulations, 2004 for review of order dated 22.03.2018 of the Commission passed in Case Nos. 79, 80 & 81/2017 regarding approval of ARR & Wheeling & Retail Supply Tariff for FY 2018-19.**

For Petitioner: Shri S. K. Sarangi on behalf of NESCO, WESCO & SOUTHCO Limited,

For Respondents: Shri K. C. Nanda, DGM (Fin.), WESCO Utility, Shri B. B. Nayak, Manager (RA), SOUTHCO Utility, Shri S. K. Dey, AGM (Fin.), NESCO Utility and Niharika Pattnaik, ALO, DoE, GoO.

Nobody is present on behalf of Shri Ananda Kumar Mohapatra, (Dr.) Prasanta Kumar Pradhan, Shri R. P. Mahapatra, Shri A. K. Sahani, OPTCL, M/s. Swain & Sons Power Tech. Pvt. Ltd., M/s. Visa Steel Limited, Shri Ramesh Chandra Satpathy, Shri G. N. Agrawal, M/s. Scan Steels Limited, Rourkela Chamber of Commerce & Industry, M/s. Shree Radharaman Alloys (P) Ltd., M/s. D. D. Iron & Steel Pvt. Ltd., M/s. Shree Salasar Castings Pvt. Ltd., M/s. Bajaranga Steel and Alloys Ltd., M/s. Vishal Ferro Alloys Ltd., M/s. Top Tech Steels (P) Ltd., M/s. Maa Girija Ispat (P) Ltd., M/s. Grasim Industries Ltd., M/s. OCL India Limited, JAGADA Welfare Association, Electric Users Association, Sambalpur District Consumers Federation, Sundargarh District Employee Association, Grahak Panchayat, M/s. Indian Energy Exchange Limited, M/s. Vedanta Ltd., Shri M. V. Rao, M/s. Adhunik Metaliks Limited, M/s. Ferro Alloys Corporation Limited, M/s. Tata Steel Limited, M/s. Emami Paper Mills Limited, NOCCI, M/s. Balasore Alloys Limited, M/s. IDCOL Ferrochrome & Alloys Limited, Odisha Consumer Association, Secretary, PRAYAS, Shri Prabhakar Dora, M/s. Open Access Users Association.

ORDER

Date of hearing: 15.01.2019

Date of order:09.04.2019

- The RIL Managed DISCOMs namely NESCO, WESCO and SOUTHCO have filed their review applications for review of the common order dated 22.03.2018 of the Commission passed in Case Nos. 79, 80 & 81 of 2017 regarding approval of Aggregate Revenue Requirement and Retail Supply Tariff for the financial year 2018-19. The said applications were registered as Case Nos. 40, 41 & 42 of 2018 and were clubbed together for analogous hearing as these were arising out of the common order of the Commission. The Commission issued notice to the applicants and the objectors/ respondents those who were parties to the tariff proceedings in Case Nos.79, 80 & 81 of 2017 fixing the date and time for hearing of the matters.
2. The authorised representative of the review petitioners submitted that the Commission vide their order dated 04.03.2015 in Case No. 55 of 2013 had revoked the Distribution license of NESCO,WESCO & SOUTHCO Companies of Odisha under S.19 of the Electricity Act,2003. For continuity of smooth power supply to the electricity consumers of the distribution areas of the RIL Managed DISCOMs, the Commission as an interim arrangement in a separate order dated 04.03.2015 under S.20 of the said Act had vested the management and control of the utilities of NESCO, WESCO & SOUTHCO along with the assets, liabilities and rights with the Chairman-cum-Managing Director of GRIDCO Ltd. as Administrator. The fixed assets owned by the RIL managed DISCOMs are being managed by the Administrator of the NESCO, WESCO & SOUTHCO Utilities for continuity of uninterrupted power supply to the consumers of their area of supply. In their Annual Accounts for FY 2014-15, the RIL managed DISCOMs have recognized revenue up to 03.03.2015, whereas, expenses such as depreciation and interest accrued on loan taken for acquisition of the Fixed Assets were accounted for the full year i.e. upto 31.03.2015. For the subsequent years i.e. for FY 2015-16 onwards (till the interim arrangement continues), the RIL managed DISCOMs are continuing to bear the burden of expenditure on depreciation and interest on loans, even though the Distribution Utilities have been using the Fixed assets (including the distribution network, moveable assets etc.) of the RIL managed Companies.
 3. During tariff proceedings in Case Nos. 79, 80 & 81 of the Commission, the Review Petitioners had filed their objections to the ARR applications of the NESCO, WESCO & SOUTHCO Utilities for FY 2018-19 seeking the following reliefs:-

- i. To direct the administrator of the NESCO, WESCO & SOUTHCO Utilities to accept the claim of the RIL Managed DISCOMs towards reimbursement of the approved cost component (as per RST Orders from FY 2014-15 onwards on prorata basis) on depreciation, interest on loan taken for acquisition of fixed assets and RoE;
 - ii. Pass necessary order to the Administrator of the Distribution Utilities of Odisha to share the status of Fixed Assets owned by the RIL managed DISCOMs as on date of revocation of their licenses.
4. During hearing on 09.02.2018 the representative of the RIL Managed DISCOMs had submitted the facts along with judgments of the Hon'ble Tribunal for Electricity and the Judgments of the Hon'ble Apex Court in respect of payment of monthly compensation to Mula Pravara Electric Co-Operative Society Ltd.(MPECSL) by Maharashtra State Electricity Distribution Company Ltd.(MSEDCL), the new licensee for use of the existing network assets of the former after completion of the license period of the former.
 5. The petitioner further submitted that the Commission vide their order dated 22.03.2018 in Case Nos.79,80 & 81 of 2017 has dealt with the above submissions of the RIL managed DISCOMs vide para 332 which is as follows:-

332. The erstwhile DISCOMs i.e. NESCO, WESCO & SOUTHCO have submitted that their licenses have been revoked w.e.f.04.03.2015 vide OERC Case No.55 of 2013. Since the revocation of licence the DISCOM Utilities are allowed full recovery of costs relating to depreciation, interest and RoE whereas the actual cost is being incurred by the erstwhile DISCOMs. This has increased the loss burden of DISCOMs as no revenue is parted with to the company after revocation of licence. These cost components may be reimbursed to them by the Administrator. However, the representative of DISCOMs present during the hearing could not explain whether this application has been filed with the approval of their respective Boards. In absence of detailed deliberation and views of the Company, the Commission cannot decide the matter without full knowledge in the issue. Therefore, we cannot give any finding on this issue.

6. In the light of the above order of the Commission the RIL managed DISCOMs have submitted the relevant extract of their 100th Board Meeting held on 23.12.2016 and signed by the Chairman which is as follows:

“ Sri P.S.Pandya, Nominee of RIL Associate, placed on the table regarding claim to be raised by the Companies on the Distribution Utilities towards reimbursement of depreciation, interest on loan w.r.t. the Company owned Assets and return on equity(RoE). It was intimated to the Boards that pursuance to the license revocation order passed by the OERC on 04.03.2015 in Case no.55 of 2013, the Fixed assets of the Companies are being operated by the Administrator of the Distribution Utilities for continuity of power supply to the consumers. In FY 2014-15, the Companies have recognised revenue upto 03.03.2015, whereas, expenses such as depreciation and interest

accrued on loan taken for acquisition of the fixed Assets have been accounted for the full year, i.e. up to 31.03.2015.

The Boards were informed that the above status-quo position is also continuing till date and the companies are continuing to incur expenditure in the form of depreciation for the assets. The assets are under the physical control of the Administrator and are being operated by the Distribution Utilities. The costs relating to depreciation, interest and RoE are being recovered through tariffs as per OERC Tariff orders. Full revenue as per Tariff Order are billed and collected by the Utilities.

The Chairman of the Boards opined that the license revocation order passed by the OERC on 04.03.2015 in Case no.55 of 2013 is completely silent on the above issue. Hence, it would be prudent on the part of the Companies to approach OERC on this issue and future course of action can be taken based on the clarification/ direction of OERC.

7. Accordingly, the present review petition has been filed.
8. The representatives of WESCO, NESCO & SOUTHCO Utilities have submitted that at the outset the above cases are not maintainable in the eyes of law in view of the fact that the issue raised by the petitioners gives rise to fresh cause of action for which they require to file separate petitions. The above cause of action emerges from the proceeding of revocation of licenses under S. 19 of the Electricity Act, 2003 vide Case No. 55 of 2013. The petitioners could have filed petition in the said revocation proceeding. Further, the petitioners could also have raised such issues in respect of payment of compensation by the Distribution Utilities in lieu of use of fixed assets of the RIL Managed DISCOMs before the Hon'ble APTEL in Appeal No. 64/2015 filed by them against the revocation of license order dated 04.03.2015 of the Commission passed u/S. 19 of the Act, 2003. Moreover, the review petitioners could also have raised the issue before the Hon'ble Supreme Court of India in Civil Appeal No. 18500 of 2017 as they had challenged the order dated 21.08.2017 of the Hon'ble APTEL passed in Appeal No. 64 of 2015. Instead of raising the issues on such occasions, the petitioners now raising the said issues in the RST determination proceedings for FY 2017-18 which are purely misconceived and not in consonance with the prevailing positions of law. It is relevant to submit that, determination on the issues of the expenditure on depreciation of fixed assets, interest on loans etc. are limited to recovery of the same through tariff fixation from the consumers. In the instant case the Administrator of the Distribution Utilities being appointed by the Commission u/S. 20 (d) of the Act, 2003 as an interim arrangement for smooth functioning of the distribution and supply of electricity to the consumers. The said arrangement was made by virtue of the revocation of licenses of the petitioner's u/S. 19 of the Act, 2003. The Commission has rightly observed that issues raised by the petitioners cannot be adjudicated without full knowledge on the same. The term "full knowledge" refers to submission of complete documents as regards the detailed list of assets, addition

and alteration on the same and details of expenses incurred by the petitioners etc. Thus there is no scope on the part of the petitioners to seek review of the said observation of the Commission as rendered under Para-332 of the RST order for FY 2017-18.

9. The petitioners have not approached the Commission in the manner as decided in the 100th Board meetings. As per the decision of the Board, the petitioners ought to have approached the Commission through separate petitions. Further, the Board has never decided to raise the issues in the tariff proceedings. The issues raised by the petitioners pertain to grant/alternation of licenses and therefore raising the same in the tariff proceeding is improper and contrary to the regulatory provisions as prescribed under the Act, 2003 as well as the OERC Tariff Regulations.
10. They have further submitted that the facts and circumstances of the case of MPESCL is all together different from that of the present matter. In that case the MERC initiated the proceeding for grant of license and awarded the license granted to MSEDCL by merging the area which were earlier operating under the MPESCL. The license was also granted through bidding process u/Ss. 14 & 15 of the Act, 2003. In the instant case the appointment of the Administrator is an interim arrangement u/S. 20 (d) of the Act, 2003 by virtue of the revocation licenses of the petitioner's u/S. 19 of the Act, 2003. The management and control of the utilities along with assets, rights and interests were vested with the Administrator as per order dated 04.03.2015 in Case No. 55 of 2013. The said order has not dealt with the transfer of title and ownership of the existing assets, which would arise when the sale proceedings u/S. 20 of the Act is initiated.

It is further submitted that the order dated 16.11.2011 of the Hon'ble APTEL passed in Appeal No. 39/2011 as relied by the petitioners vide Para-74 of the petition is as follows:

"The decisions cited by the State Commission would not apply to the present fact in the present case, the power to vest the transfer of assets with another person are exercisable u/S. 19, 20 & 24 of the Act, 2003 as mentioned earlier, those provisions can be invoked only when the licensees have been suspended and revoked i.e. not the case here as the present proceedings is u/Ss. 14 & 15 of the Act and not u/S. 19 of the said Act, 2003."

11. The Hon'ble APTEL while making distinction between the proceedings u/S. 14 & 15 of the Act, 2003 and u/S. 19, 20 & 24 of the said Act has made it clear that, in the latter case the issue of payment of compensation by the Utility to DISCOMs would not arise. Therefore, demand of compensation from the Utilities by DISCOM does not arise. Further, the review petitioners have not quantified the details of assets created through infusion of their own capital or through loan fund from FY 1999 to 2015 upon which depreciation have been claimed by the RIL Managed DISCOMs. As per records the assets

as on April, 1999 were handed over to the review petitioners for providing service to the consumers and the subsequent assets are created through consumer contribution and by government funding only. Thus RIL Managed DISCOMs have not created assets through its own capital for which the demand have been made. Hence, the claim of the RIL Managed DISCOMs is irrelevant and not sustainable as such. In view of the aforesaid facts as well as the settled positions of law, the instant petitions filed by the petitioners for review of RST order dated 22.03.2018 of the OERC passed in Case Nos. 79, 80, 81 & 82 of 2017 being not maintainable and being devoid of any merit are liable to be dismissed at the threshold.

12. Shri R. P. Mahapatra and Shri A. K. Sahani, the objectors to the original proceedings in Case Nos. 79, 80 & 81 of 2017 have submitted that determination of issues of the expenditures on depreciation of fixed assets, interest on loans etc. is limited to recovery of the same through tariff fixation from the consumers. In the instant cases the Administrator has been appointed by the Commission u/S. 20 (d) of the Act, 2003 as an interim arrangement for smooth functioning of the distribution and supply of electricity to the consumers. The said arrangement was made by virtue of revocation of licenses of the petitioner's u/S. 19 of the Act, 2003. The Commission after going through the objection submitted by the petitioners has rightly observed that the issue raised by the petitioners cannot be adjudicated without full knowledge on the same. The term full knowledge refers to submission of complete documents as regards the detailed list of assets, addition and alteration on the same and details of expenses incurred by the petitioners. Further, the petitioners have not quantified the details of assets created through infusion of their own funds or through loan from FY 1999 to 2015 upon which depreciation have been claimed by the RIL Managed DISCOMs. As per record the assets as on April, 1999 were handed over to them for providing service to the consumers and the subsequent assets have been created through consumer contribution and government funding only. Due to their inefficient operation, the petitioners were never able to recover the depreciation, interest and RoE. Para-3.02 (c) (i) of the Minutes of the 100th Meeting of the Board of Directors of the RIL Managed DISCOMs noted that the petitioners have neither been able to meet the distribution loss target of 18.35 % for NESCO, 19.60% for WESCO and 25.5% for SOUTHCO nor the collection efficiency of 99%. In fact, for the years 2014-15 there is sharp reduction in collection efficiency. The RIL Managed DISCOMs have also utilised heavily amounts deposited in pension fund and gratuity fund and also have illegally utilised part of the security deposit made by the consumers and have also availed loans by

pledging the security deposit held in fixed deposits. In view of the above facts and circumstances the review petitions are to be dismissed as devoid of any merit.

13. The GRIDCO Ltd. has not submitted its reply in the above cases but their representative during hearing has submitted that GRIDCO Ltd. has supported the submissions made by the respondents and the same are to be considered.
14. After hearing the parties and perusal of the case records we opine that for review under Order 47 Rule 1 of CPC, a judgment *inter alia* needs to have 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 record justifying the court to exercise its power to review under Order 47 Rule 1 of CPC. In exercise of jurisdiction under Order 47 Rule 1 of CPC, it is not permissible for an erroneous decision to be reheard and corrected. There is clear distinction between an “erroneous decision “and “an error apparent on the face of record”. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be “an appeal in disguise”. The Hon’ble Apex Court in case of **Parsion Devi Vrs. Sumitri Devi** has observed as follows:-

“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 dictated 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 jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be ‘reheard and corrected’. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of review jurisdiction. A review petition has a limited purpose and cannot be allowed to be ‘an appeal in disguise’.”

15. All those issues raised by the review petitioners now had been considered by the Commission in Case Nos.79, 80 & 81 of 2017 and it is not open to the Commission to reconsider and decide the same now. The issues raised by the review petitioners in the present cases were also raised before the Hon’ble Tribunal for Electricity in Appeal No.64 of 2015 and so also before the Hon’ble Supreme Court of India in Civil Appeal No.18500 of 2017, wherein both the Hon’ble APTEL and the Hon’ble Apex Court considering the same had passed their judgments. The said Judgments have attained their finality as the review petitioners had not preferred review of the above judgment of the Hon’ble Supreme Court passed in Civil Appeal No.18500 of 2017. There is no new facts which are being raised now by the review petitioners those have come to their knowledge

after the order was passed by the Commission in Case Nos. 79, 80 & 81 of 2017. In the above facts and circumstances, the review petitions filed by the RIL Managed DISCOMs are not maintainable being devoid of any merit and the same are being accordingly dismissed.

16. With the above observation the review petitions are disposed of.

Sd/-
(S. K. Parhi)
Member

Sd/-
(A. K. Das)
Member

Sd/-
(U. N. Behera)
Chairperson