

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

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**Present:      Shri U. N. Behera, Chairperson  
                     Shri S. K. Parhi, Member  
                     Shri G. Mohaptra, Member**

**Case No. 49/2020**

OPTCL	.....	Petitioner
Vrs		
DoE, GoO & Others	.....	Respondents

**In the matter of:      An Application under Section 94(1)(f) & 86(1)(k) of the Electricity Act, 2003 read with Regulation 70 of the OERC (Conduct of Business) Regulations, 2004 and other enabling provisions in this regard for review of order dated 26.05.2020 passed in Case No. 11 of 2020 regarding vesting of CESU to M/s. Tata Power Company Ltd. in accordance with Section 21(a) of the said Act, 2003.**

**ORDER**

**Date of hearing: 19.01.2021**

**Date of order: 18.05.2021**

1. The Commission in exercise of power under section 21(a) of the Electricity Act, 2003 passed in the Case No. 11 of 2020 vested the utility CESU in TPCODL with effective from the 1<sup>st</sup> day of June 2020 subject to completion of sale and delivery of the utility by CESU to TPCODL, as outlined in the response of parties in the Suo-motu petition registered as Case No. 11/2020.
2. The OPTCL in the application has sought for review of the aforesaid order dated 26.05.2020 in accordance with section 94(1) (f) read with Section 86(1)(k) of the Electricity Act, 2003 and Regulations 70 (1) of the OERC (Conduct of Business) Regulations, 2004.
3. The petitioner OPTCL stated that it was the Respondent in the aforesaid case No 11 of 2020 and had filed its response on dated 29.04.2020 before the Commission.
4. The Petitioner - OPTCL submitted that in terms of Sec 114 of the CPC the OPTCL as respondent in Case No. 11 Of 2020 has not filed any appeal against the order dt. 26.05.2020 of the Commission before the ATE, New Delhi under Section 111 of the Electricity Act, 2003.

5. The petitioner stated that for the purpose of reviewing its own decisions, the Commission has the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908. Review under the Civil Procedure Code is permissible as per order 47.
6. The Petitioner stated that there exists sufficient reason for review of the aforesaid order dated 26.05.2020 which are briefly enumerated in the petition.
7. The Petitioner stated that it participated in the Case No. 11 of 2020 as Respondent No. 5 and submitted its response through a written submission which was duly filed before the Commission on 29.04.2020. Due to the continuous lockdown/shut down orders by the State Government in order to prevent the COVID-19 pandemic, OPTCL could not submit its submission within the time stipulated by the Commission since the full functioning of offices of OPTCL were restricted/closed.
8. The Petitioner in para 4 & 5 of its submission made on 29.04.2020 had submitted the following for consideration of the Commission, in the interest of OPTCL which reads as under :-
  4. *As per the note-8, annexure-A (Note on Principle of Transfer of assets and liabilities of CESU to Operating Company) the Trade Payable shall remain with CESU except any amount required to be converted in to equity capital as part of transaction structure shall be transferred to the Operating Company. In this regard it is submitted that the transmission bill for the Month shall be raised in the 1st week of next month. Since all the cash and bank balance (note-21) shall be transferred to the Operating Company the legitimate due towards transmission charges and SLDC charges, pertaining to the month during which the transfer is going to be affected may not be recovered from the CESU. Besides, OPTCL has to receive Rs.10.72 crore towards outstanding transmission Charges of Rs.4.84 Crores and Late Payment Surcharges of Rs. 5.88 crore from CESU which will be doubtful.*
  5. *Further, OPTCL has to receive sum of about Rs.271.75 Crore (upto- October 2018) towards UI charges (DSM) Rs. 145.93 Crore and DPS Rs. 125.82 Crore from CESU which are to be paid to GRIDCO and others.*
9. The petitioner submitted that the Commission in para 20 and 21 of the order dated 26.05.2020 observed as under
 

*“20. The Commission admitted the petition and initiated a suo-moto proceeding in Case No. 11/2020, to issue a suitable direction with respect to sale of utility of CESU under Section 20 of the Act and for vesting of utility of CESU to the intending purchaser under Section 21 of the Act. The Commission decided to dispose of the petition through a hearing of the concerned parties namely CESU, TPCL, GRIDCO, OPTCL and the Government of Odisha. On 18.03.2020, the Commission issued a notice directing parties to file written submissions to the suo-moto petition on or before 24.03.2020 and appear for the hearing.*

21. *The parties filed their written responses separately wherein they have outlined the manner of execution of transaction and requested for resolution of certain issues.”*
10. The petitioner stated that in view of the observation in para 21 quoted above, as made in the order dt. 26.05.2020 and the submission made by this Review Petitioner-OPTCL in its submission a legitimate cause of action has been generated for review of order dt. 26.05.2020.
  11. The petitioner stated that the Commission categorically mentioned in the “Principles of transfer of assets and liabilities of CESU to TPCODL” that Trade Payables shall remain with CESU except any amount required to be converted into equity.
  12. Capital as part of transaction structure shall be transferred to TPCODL. Based on the provisional balances of CESU as of 31.03.2020, the provisional opening balance sheet of TPCODL as of 01.04.2020 is provided in Annexure-2 of the order dated.26.05.2020. This is based on the principles of segregation provided in the suo-moto petition and trade payable has not been transferred to TPCODL (para 53(b) of the order dtd.26.05.2020).
  13. The petitioner submitted that with regards to “ trade payable” the Commission observed the following vide para 32 and 33 are as under:-
 

*“32. The Commission approves the transaction structure proposed by the parties. The trade payables to GRIDCO (in the books of CESU) amounting to Rs. 299.95 crore (Indian Rupee Two hundred ninety-nine crore and ninety-five lacs only) shall be converted to equity share capital of TPCODL. With this, the equity share capital shall be Rs 300 crore (Indian Rupee Three hundred crore only) (including the initial paid up share capital Rs 5 lakhs). TPCL shall purchase equity shares equivalent to 51% of the equity share capital in TPCODL from GRIDCO at the premium of Rs. 25.50 crores (Indian Rupee Twenty-five crore and fifty lacs only) by paying to GRIDCO an amount of Rs. 178.50 crores (Indian Rupee One hundred seventy-eight crore and fifty lacs only).*

*33. The amount of Rs. 178.50 crores (Indian Rupee One hundred seventy-eight crore and fifty lacs only) is already deposited by TPCL with the Commission as per the requirement of RFP documents. The Commission shall, within 30 days of vesting of utility of CESU with TPCODL, remit the amount after deducting the Transaction Process Costs incurred by the Commission for the sale process directly to GRIDCO. Suitable accounting adjustments may be made in the financial statements of CESU and GRIDCO to this effect.”*
  14. The petitioner stated that the commission vide para 54 (c) & (d) of the order on Treatment of Additional Serviceable Liabilities made the following direction which is as under:
 

*“(c) The Commission, however, notes that certain current assets & liabilities pertaining to employees, consumers, suppliers and statutory payments, etc.*

*which were not indicated in the opening balance sheet provided in RFP, must be passed on to TPCODL since CESU will not have any revenue to fund the liabilities. The Commission, therefore, decides that in the interest of the employees, consumers, suppliers of CESU and to ensure that the continuing operation of the utility is not adversely impacted, certain current assets & liabilities shall be passed on to TPCODL.*

*(d) such additional current assets is as mentioned at Table-11 of Para-54 of the order dated 26.05.2020 in OERC Case No-11/2020.”*

15. The petitioner stated that the vesting order dt. 26.05.2020 was issued under the provision of Section 21(a) of Electricity Act, 2003 which is reproduced as under;

*“21. Where a utility is sold under section 20 or section 24, then, upon completion of the sale or on the date on which the utility is delivered to the intending purchaser, as the case may be, whichever is earlier-*

*(a) the utility shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the utility:”*

16. The petitioner further stated that in para 35 of the order dated 26.05.2020 the Commission made following observation on terms of vesting;

*“35. As per section 21(a) of the Act, the utility of CESU shall vest in TPCODL free from any debt, mortgage and similar obligation of CESU. However, certain serviceable liabilities have been transferred to TPCODL along with mechanism for funding of such liabilities as provided in para 54 of this order.”*

17. The petitioner stated that as per the Companies Act, 2013 a payable shall be classified as a “trade payable” if it is in respect of the amount due on account of goods purchased or services received in the normal course of business. Trade payables are classified as current liabilities if payment is due within one year or less. If not, they are presented as non-current liabilities. The transmission charges bills of OPTCL’s are raised on monthly basis, as per the orders of commission the due date is one month, the transmission charges payable is always treated as current liability.

18. The petitioner stated that the commission vide para 60 , 61 and 62 on transfer of license has made the following observations;

*“60. As per Section 21(b) of the Act, the rights, powers, authorities, duties and obligations of the CESU under its license dated 27.10.2006 issued by the Commission shall stand transferred to TPCODL upon completion of sale.*

*61. TPCODL shall be the licensee to carry out the function of distribution and retail supply of electricity covering the distribution circles of Bhubaneswar, Cuttack, Paradeep, and Dhenkanal in the state of Odisha for a period of 25 years from 01.06.2020 unless the LoI is cancelled or this order is withdrawn pursuant to para 34 of this order.*

*63. xxxxxxxxxx. Till the time amended license is granted, the provisions of this order and the rights, powers, authorities, duties and obligations specified in the*

*license issued to CESU as stated in para 5 of this order, shall apply to TPCODL.”*

19. The petitioner stated that further as per para 73 of the order dtd. 26.05.2020, a part of assets and liabilities of CESU shall get transferred to TPCODL whereas remaining assets and liabilities shall remain in the balance sheet of residual company CESU. To manage the residual assets and liabilities of CESU post vesting of utility to TPCODL, the Scheme under which CESU is operating shall continue till further order of the Commission. Hence, CESU residual company can't be treated as going concern. In this regard. GRIDCO vide Office Order dtd.19.06.2020 notified the responsibilities assigned to GRIDCO in connection of residual company where, recovery of past liabilities of OPTCL has not been covered. As such no cash and bank balance is left with the residual company, hence there is no scope to recover the liabilities of OPTCL from the residual company.
20. The petitioner highlighted para 372 to 373 of the ARR order for OPTCL dtd. 20.03. 2010 for the year 2010-11 in case No. 145/2009 wherein following mechanism of Transmission Charge Payment is mentioned;

*“372. As per clause 11 of the Orissa Electricity Reforms (Transfer of Transmission and Related Activities) Scheme, 2005, the transmission charge of OPTCL shall be duly secured by a first charge over the receivables of GRIDCO from DISCOMs and other Open Access Customers in favour of OPTCL. Receivables of DISCOMs are escrowed in favour of GRIDCO. As on today there is no escrow arrangement between DISCOMs and OPTCL. According to the Transfer Scheme, the charge of OPTCL shall be duly secured by a first charge over the receivable of GRIDCO in favour of OPTCL. DISCOMs are customers of OPTCL. OPTCL will bill the Distribution Companies for the use of transmission services on the basis of meter reading at the delivery point of DISCOMs with a copy to GRIDCO.*

373. *At present in the transmission tariff orders for FY 2008-09 and 2009-10, OPTCL would bill the Transmission Charges to the DISCOMs for the use of transmission services on the basis of meter reading at the delivery point with a copy to GRIDCO. The bill would be paid by GRIDCO to OPTCL from the receivables of DISCOMs escrowed with GRIDCO and the balance amount available shall be utilized for payment of Bulk Supply Price (BSP). This creates a lot of inconvenience for OPTCL and GRIDCO as well as the DISCOMs with regard to reduction of income tax at source consequently the issue of tax deduction certificate by the ultimate disbursing officer. After due consideration of the difficulties pointed out by OPTCL the Commission feels that the existing procedures needs suitable modification. Commission, therefore, directs that GRIDCO shall issue a standing and irrevocable instruction to the DISCOMs and the Escrow Bank (Union Bank of India) permitting the DISCOMs to make payment against the monthly transmission charge bills of OPTCL from the Escrow Account. DISCOMs shall make payment of transmission charges to OPTCL before making payment of bulk supply bills of GRIDCO*

21. Petitioner stated that accordingly CESU has paid all the transmission charges except the outstanding transmission charges relating to FY 2011-12 and FY 2012-13 Rs.4.51crore Rs.0.34 lakhs respectively.
22. The petitioner stated that with regards to outstanding of Rs. 4.51 crore the commission vide letter No. Dir (T) 330/08/1387 dtd. 05.08.2011 and letter No. Dir(T) 330/08/2173 dtd. 22.11.2011 directed both GRIDCO and OPTCL to allow full rebate to CESU if 97% of the current monthly bill at the revised rate applicable for FY2011-12 is paid by CESU within the prescribed period of rebate. These arrangement would be applicable to the bill raised from the month of July,11 to be paid be paid in August 2011 and thereafter. Based on the above direction CESU has not paid the balance 3% which is Rs. 4.51 Crore.
23. The petitioner stated that during the FY 2012-13, CESU paid less amount of Rs.33.53 lakhs against the monthly bill of August-2013. In such bill CESU deducted rebate of 2% even having paid after due date without any suitable justification. Thereafter, CESU had not paid anything to avail the 1% rebate. As a result no rebate had been allowed for that month as per the rebate clause specified by the Commission.
24. The petitioner submitted that the Commission had issued directions that for payment of bills through a letter of credit or payment in cash within two working days, a rebate of 2% shall be allowed. Similarly, in case payment of bills by the licensees is delayed beyond a period of 1 month from the date of billing, a late payment surcharge (LPS) at the rate of 1.25% per month shall be levied by OPTCL. Considering the above the LPS has been calculated and claimed to CESU on the monthly bill. The LPS as on 31.07.2010 is calculated as Rs 6.19 crore.
25. The petitioner stated that several requests were made to release the outstanding dues along with LPS in the monthly transmission bill but the same has been ignored by CESU deliberately. Therefore, the outstanding transmission charges for the period 2011-12 & 2012-13 is still outstanding at Rs.4.84 crore and DPS there on as on 31.07.2020 Rs.6.19 crore
26. The petitioner further submitted that CESU has to further pay Rs. 271.75 crore including DPS Rs.125.82 crore towards unscheduled interchange (UI) charges upto July-2017 which OPTCL(SLDC) will have to pay to GRIDCO and others. These apart, OPTCL is to receive Rs.3.4347 crore towards material supplied to CESU during FANI restoration work

- a. Insulator worth Rs10.47 lakh supplied to CESU in the FY 2007-08,
  - b. During the Sever Cyclone **FANI** for quick restoration of networks, OPTCL had diverted material amounting to Rs. 7.75 crore procured under the Scheme DDUGJY and IPDS against which balance Rs. 3.33 crore is yet to paid.
27. The petitioner submitted that since the distribution activities in Central Odisha is transferred from CESU to TPCODL, the successor company M/s TPCODL is liable to honor all the revision towards past period without any dispute.
  28. The petitioner therefore submitted that Commission in view of the stated facts may review the order dated 26.05.2020 passed in Case No. 11/2020 and be pleased to make provision to recover the following outstanding dues towards:
    - a. Transmission charges for the period 2011-12 & 2012-13 amounting to Rs.4.84 crore
    - b. DPS there on as on 31.07.2020 Rs.6.19 crore.
    - c. Insulator Cost of Rs10.47 lakhs supplied in FY 2007-08.
    - d. Material amounting Rs.3.33 crore given to CESU for restoration work of network damaged due to cyclone FANI.
    - e. UI Charges Rs.271.75 Crores which includes DSP Rs.125.82 crore.
    - f. Debit or Credit Adjustment of transmission charges of past period.
    - g. Any other dues of OPTCL liable for payment by CESU which may be detected on a later date.
  29. The petitioner prayed that these amounts may be paid to OPTCL from the sale proceeds of CESU or TPCODL may be directed to make such payment by transferring the above liability of CESU to TPCODL.
  30. The objectors in this case made their submissions before the Commission in response to the petition of the petitioner.

#### **Submissions of TPCL**

31. Respondent TPCL submitted that the present Petition is liable to be dismissed as it has been filed by the Petitioner with the intent to unnecessarily convolute and delay the execution of the Vesting Order. In the present petition, the Petitioner has failed to establish any grounds for review as provided under Order 47 Rule 1 of the Code of Civil Procedure, 1908 ("CPC"). TPCL submitted that as per Order 47 Rule 1 of the CPC as well as settled law, review of an order is permissible only when a new and important matter or evidence is discovered which was not in the knowledge of the

applicant previously, there is some mistake or error apparent on the face of the record or there is any other sufficient reason.

32. TPCL submitted that the Petitioner has no actual grounds to seek review of the Vesting Order. It is submitted that in the instant Petition, the Petitioner has merely repeated its submissions, already made in Case No. 11 of 2020, which have already been considered and deliberated upon by the Commission. The Petitioner has neither brought forth any new evidence or matter nor has the Petitioner been able to establish any mistake or error apparent on the face of the record. The Petitioner has also failed to provide any other sufficient reason into re-appreciating and reconsidering old submissions of the Petitioner, when the issue of trade payables has already been decided upon by the Commission with finality. The present Petition is liable to be dismissed immediately. Additionally, there is a delay of 3 days in filing the present Petition.
33. TPCL submitted that the instant Petition is liable to be dismissed as there exists no grounds for review. It has been held by the Hon'ble Supreme Court of India that a party is not entitled to seek a review of a judgment merely for the purpose of rehearing and a fresh decision of the case, hence, the instant petition is not maintainable as the petitioner is in effect seeking re-appreciation of submissions already made by it in Case No. 11 of 2020. The Hon'ble Supreme Court of India has also held that review is not a matter of right but an exception to general rule that once a judgment is signed or pronounced, it should not be altered. The instant Petition is liable to be dismissed as the Petitioner herein has failed to establish grounds for review in accordance with Order 47 Rule 1 of the CPC.
34. TPCL submitted that in the instant petition, the Petitioner has placed reliance on its submissions already made in Case No. 11 of 2020 and is merely seeking the Commission to reconsider the same which is not within the scope of review under Order 47 Rule 1 of the CPC. It is also submitted that the submissions made by the Petitioner herein in Case No. 11 of 2020 were duly considered and deliberated upon by the Commission and accordingly the Vesting Order was passed in compliance with Section 21 (a) of the Act.
35. TPCL submitted that in the instant petition the Petitioner is placing reliance upon alleged submissions made in Case No. 11 of 2020 when in fact, in Case No. 11 of 2020, the Petitioner never sought any relief from Respondent No.5, The Tata Power Central Odisha Distribution Limited ("Respondent No. 5/TPCODL"). In Case No. 11 of 2020,



the reliefs sought by the Petitioner herein were only against CESU, therefore, admittedly, the Petitioner accepted the liability of CESU with respect to payment of trade payables. Hence, the Petitioner is relying upon submissions never made by it in Case No. 11 of 2020 which cannot be allowed.

36. TPCL further submitted that Section 21(a) of the Act states that '*the utility shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the utility*'. Hence, no liability whatsoever including that of the Petitioner herein can be transferred to Respondent No.5. The dues to the Petitioner herein can be divided into two areas viz (a) Pertaining to loaning material to CESU; and (b) pertaining to power purchase by CESU.
37. TPCL submitted that as regards providing/loaning material to CESU, it is submitted that it is examining and processing the same and hence, these claims need not be linked to the Vesting Order which is under review. It is further submitted that in any case, if the claim of the Petitioner is under "Additional Service Liabilities" as identified by the Commission, the same would be payable as per the terms provided in the Vesting Order.
38. TPCL submitted that that any claim relating to past period (i.e. prior to effective date of 01.06.2020) with regards to dues for power purchase would not be a part of balance sheet of TPCODL and would therefore, not be a liability for TPCODL. All the claims made by the Petitioner herein relate to the period prior to 01.06.2020. As per the Vesting Order therefore, no claims of the Petitioner would be included in the liability of the TPCODL and such liabilities would have to be retained by CESU. In the Vesting Order under Principles of segregation of balance sheet under the Trade Payables it is mentioned that this shall remain with CESU except any amount required to be converted into equity capital as part of transaction structure shall be transferred to TPCODL
39. TPCL submitted that as per such Principles of segregation of balance sheet in the vesting order the liability of the Petitioner which is included in item no. 3 (b) under "Trade payables" is to be fully/partially retained by CESU themselves. Hence, no amount can now be claimed from TPCODL.
40. TPCL submitted that at the time of bidding as well, trade payables were not envisaged to be a part of the Opening Balance Sheet in the Request for Proposal ("RFP") dated 24.11.2017. The RFP documents lay down the rules of the game, hence, the RFP

formed the basis of the financial structuring and operational plans drawn by Respondent No.3 to submit its bid for CESU. Pursuant to the issue of RFP, Respondent No.3 herein submitted its bid quoting a price of equity of Rs.350 Crores for equity stake in TPCODL on the basis that trade payables would not form a part of the liabilities of the utility to be transferred from CESU to the successful bidder. Therefore, if the reliefs as sought by the Petitioner herein in the instant Petition are granted by the Commission, it would cause grave prejudice to TPCL herein as not only would it be in violation of the statute but would also amount to changing rules of the game after it has begun which cannot be allowed in light of the trite law as held by the Hon'ble Supreme Court that rules of the game cannot be changed once players have entered into the arena.

41. TPCL submitted that though trade payables are in the nature of current liabilities, it is not the current liability of TPCODL herein. In the terms of vesting as laid down by under item no. 3 (b) of Annexure- 1 to the Vesting Order as well as already laid down in the RFP documents, trade payables are to be a part of the liabilities of CESU and not TPCODL. The issue, if any, pertaining to transfer of trade payables has been deliberated and decided upon by the Commission in the Vesting Order and has attained finality to that effect.
42. TPCL submitted that the Petitioner has filed no appeal on this issue and in the instant Petition as well, the Petitioner has failed to establish any grounds for review, hence, the present Petition is liable to be dismissed. The Petitioner was well aware of the fact that the trade payables were never envisaged to be transferred to the purchaser, in line with the statutory mandate and the same was never objected to by the Petitioner also. Therefore, the Petitioner has also waived off any right to claim any amount from TPCODL by way of its conduct. Accordingly, the Petitioner can now be not allowed to claim otherwise just because, it now seems more convenient to it.
43. TPCL submitted that in the instant Petition, the Petitioner herein is in essence seeking winding up of CESU which is absurd and cannot be allowed under the present Petition. TPCL submitted that as per the terms in the Vesting Order, CESU is very much a going concern as only a part of its liabilities as a utility are being transferred to TPCODL herein. The petitioner's interpretation and understanding of the terms of transfer of utility as laid down in the Vesting Order is grossly misplaced and wrong and therefore, in the present Petition as well, the Petitioner is wrongly implying that CESU is being wound up which is vastly beyond the scope of the present Petition as well as the Commission. The non-ability of payment of alleged obligation by CESU cannot in any

manner shift onus on TPCODL under the extant regulatory and statutory framework. Any averment seeking transfer of onus cannot be countenanced in law and therefore ought to be rejected at the outset.

44. TPCL submitted that, the Petitioner on one hand is stating that there exists a Scheme for managing the residual assets and liabilities of CESU post vesting of utility to TPCODL herein while simultaneously stating that CESU is not a going concern. It is submitted that these are self-contradictory statements.
45. TPCL submitted that the trade payables are current liabilities which remain with CESU as per the terms of the Vesting Order and RFP Documents, hence, any alleged claims of the Petitioner regarding such trade payables must be raised against CESU and not Respondent TPCODL herein. It is submitted that any attempt to shift onus on TPCODL from CESU is contrary to the provisions of Electricity Act, 2003 and therefore this Commission cannot consider such averments of the Petitioner.
46. TPCL submitted that it is pertinent that, all the alleged claims raised by the Petitioner in the instant Petition pertain to past period i.e. before 01.06.2020 and as per the terms of the Vesting Order, it is amply clear that any claim relating to dues for power purchase would not form a part of the Opening Balance Sheet of Respondent No.5 herein and therefore, would not be a liability of Respondent No.5. It is submitted that despite the above stated and admitted position, the Petitioner herein is seeking reliefs in relation to alleged claims pertaining to period prior to 01.06.2020 against Respondent No.5 herein which cannot be allowed.
47. TPCL further submitted that the Commission's decision under the Vesting Order is in accordance with Section 21 ( a) of the Act. Hence the Vesting Order in relation to the trade payables has been issued as per the provisions under the Act and the Petitioner cannot conceivably ask the Commission to act in contravention of four corners of the statute. It is also submitted that the Petitioner's alleged grievance with respect to payment against trade payables is not a legally sound grievance as no legal grievance can be raised against lawful action of a statutory authority such as the decision of terms of vesting relating to the trade payables by the Commission.
48. TPCL submitted that the alleged claims towards amount for materials supplied to CESU by the Petitioner for restorative work during cyclone FANI is irrelevant to the present Petition as the same was neither a part of the Petitioner's submissions in Case No. 11 of 2020 nor was it discussed in the terms under the Vesting Order by the Commission. It is submitted that any claims beyond the scope of the Vesting Order

ought to be raised by the Petitioner separately as it is beyond the scope of the instant Petition.

49. TPCL submitted that the terms of vesting relating to the trade payables have been expressly deliberated upon and then laid down by the Commission in the Vesting Order in accordance with Section 21 (a) as well as the RFP documents. It is submitted that hence, TPCODL's liabilities are limited to the extent what has been vested in it as per the Vesting Order and is not liable for any actions beyond what has been specified in the Vesting Order.
50. The petitioner responded to the above objections and submitted its rejoinder to such objections which are briefly discussed below:

**Rejoinder by the Petitioner**

51. Petitioner replied that TPCL's submission that the petition is devoid of merit, beyond the scope of the present petition and is liable to be rejected is not correct. Petitioner seeks review of the order dated 26.05.2020 passed in Case No. 11 of 2020, the contention in the petition are within the scope of review and has its merit writ large on the face of it.
52. Petitioner submitted that the TPCL has raised uncalled for objections that the present review petition of the Petitioner has been filed with 3 Days of delay which is not correct. The delay is of one day only and the Petitioner submitted that such a delay deserves to be condoned on the facts and the grounds for review.
53. Petitioner replied that the review sought for hearing is on the merits of the grounds taken for review and not rehearing the entire issue settled in the impugned order. The contention of objection has no merit and is liable to be ignored.
54. Petitioner replied that the TPCODL was not a party to the proceeding in case 11 of 2020 and it came into the field only after the vesting order date 26.05.2020 was passed. It is wrong to say that the Petitioner is relying upon submission never made in Case 11 of 2020.
55. Petitioner replied that the materials supplied by this Petitioner to CESU during the Cyclonic Storm "FANI", having been utilized and added to the transferred asset of CESU, the Respondent cannot take any plea to avail the same free of its cost. The plea taken by the Respondent No.3 that "if the claim of the Petitioner is under "Additional Service Liabilities" as identified by the Commission, the same would be payable as per

terms provided in the vesting order” is contrary to its own plea taken that “ the claims need not be linked to the vesting order” and it is liable to be rejected.

56. The Petitioner stated that it will not forego its claim on transmission charges prior to 01.06.2020 which remained unpaid by CESU and its successor is bound by the default /delay of its predecessor utility while the entire asset is enjoyed by it. The decision that “Trade Payable” is to be retained with the defunct utility- CESU or the “residual company” is totally an injustice to OPTCL and also to GRIDCO. The issue is liable to be looked into and decided in proper perspective to avoid hollowness and render it to be concrete.
57. Petitioner stated that the RFP is not a document to be shared with the Petitioner nor it has been so shared at any time until the vesting order was passed on 26.05.2020. The RFP document is silent about trade payable in their bid. The Respondent No 3 is obliged to share the calculation and queries made by it before submitting the Bid. It is not clear from the RFP that all the trade payable are not included in the provisional Opening Balance sheet of the utility. The Respondent No.3 while admitted in its objection that trade payables are current liabilities yet denies it to be current liabilities of TPCODL.
58. Petitioner replied that there is no cash and bank balance left with the residual company, hence there is no scope to recover the liabilities of OPTCL from the residual Company. As per Accounting Standard the Fundamental Accounting Assumptions is that “The enterprise is normally viewed as a going concern that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor necessity of liquidation or of curtailing materially the scale of the operations.” The going concern assumption is a fundamental principle in the preparation of financial statements. Under the going concern basis of accounting an entity would be required to prepare the financial statements on the assumption that:
- ❖ An entity is a going concern and
  - ❖ It would continue its operations for an unforeseeable future.
59. Petitioner replied that the assets and liabilities are recorded on the basis that the entity would be able to realise its assets, discharge its liabilities, and obtain refinancing (if necessary) in the normal course of business. In case an entity has the intention to liquidate or cease operations or has no realistic alternative but do so, then in such case the entity should not prepare financial statements on a going concern basis.

60. Petitioner submitted that in view of above, the contention of the Respondent that CESU is going concern has no logic. Such contention is based on mis-interpretation of the Respondent No.3. The Section 21 (a) of Electricity Act,2003, based on which the vesting order has been passed reads as under.

*“ 21. Vesting of utility in purchaser:- Where a utility is sold under section 20 or section 24, then, upon completion of the sale or on the date on which the utility is delivered to the intending purchaser, as the case may be, whichever is earlier-*

*(a) The utility shall vest in the purchaser or the intending purchaser, as the case may be, free from any debt, mortgage or similar obligation of the licensee or attaching to the utility:*

*Provided that any such debt, mortgage or similar obligation shall attach to the purchase money in substitution to the utility; and”*

61. Petitioner therefore submitted that relying upon the above provision the Respondent 3 has alleged that no liability whatsoever including that of the Petitioner herein can be transferred to Respondent No.5. In the light of the above provision of Section 21(a) of the Act, 2003, if the contention of Respondent No.3 is accepted then it naturally raises a question as to under what section the liabilities such as grants received/adjustment, security deposits, Deposits from Supplier/Contractors, Deposits for service connection, short-term borrowings, Sundry Creditors, other Liabilities, Electricity Duty payable, Interest payable on security deposit, payable to Franchisees have been transferred to the operating company. Thus the contentions in the objection of Respondent No.3 are liable to be ignored and rejected.

### **Commission's Order**

62. The Commission heard the Petitioner and the Respondent in the matter, and went through all the materials on record. The petitioner in this case, OPTCL has filed this petition to modify/review the Commission's order dt.26.5.2020 passed in case No.11/2020 vesting the Utility of CESU into the new operating company TP Central Odisha Distribution Limited (TPCODL). The petitioner has raised certain issues in the said vesting order for review and modification. Before taking up the issues raised in the petition, the Commission observes that the bid process for selection of the successful bidder TPCL, was undertaken in a transparent and diligent manner. Wide consultations were undertaken with all the stakeholders such as GRIDCO, Government of Odisha and TPCL in order to arrive at a consensus on all the issues keeping the interest of the consumers paramount. Thereafter the RFP Documents namely Share Acquisition Agreement (SAA), Shareholders Agreement (SHA), Bulk Supply Agreement (BSA)

and Bulk Power Transmission and SLDC Agreement (BPTA) were shared with the executing parties namely TPCL, GRIDCO and OPTCL. The parties were accorded the opportunity to seek clarifications. The Commission then issued the vesting order on 26.05.2020 in case No.11/2020. The OPTCL was a necessary party in this proceeding and submitted its views and opinions in the matter. The Commission considered all such submissions before issuing the vesting order. In view of this, the Commission, in the first place itself, does not find sufficient grounds for reviewing the terms of vesting. Nonetheless, now we will take up the issues raised by the petitioner in the petition.

63. The petitioner OPTCL has submitted that the Commission should make provision to recover the following outstanding dues towards:
- a. Transmission charges for the period 2011-12 & 2012-13 amounting to Rs.4.84 crore
  - b. DPS there on as on 31.07.2020 Rs.6.19 crore.
  - c. Insulator Cost of Rs10.47 lakhs supplied in FY 2007-08.
  - d. Material amounting Rs.3.33 crore given to CESU for restoration work of network damaged due to cyclone FANI.
  - e. UI Charges Rs.271.75 Crores which includes DPS Rs.125.82 crore.
  - f. Debit or Credit Adjustment of transmission charges of past period.
  - g. Any other dues of OPTCL liable for payment by CESU which may be detected on a later date.
64. From the prayer of the OPTCL it is observed that they are seeking recovery of the old dues from the new successor company TPCODL. The petitioner stated that as per the Companies Act, 2013 a payable shall be classified as a “trade payable” if it is in respect of the amount due on account of goods purchased or services received in the normal course of business. Trade payables are classified as current liabilities if payment is due within one year or less. If not, they are presented as non-current liabilities. The transmission charges bills of OPTCL’s are raised on monthly basis, as per the orders of Commission the due date is one month, the transmission charges payable is always treated as current liability.
65. The Commission with regard to this issue observes that Section 21(a) of the Electricity Act does not envisage passing on the past liabilities to the successor entity, however, the assets and liabilities of current nature need to be handled by the new operating company as a going concern. Further, the Commission has already “ring fenced” TPCL by providing a mechanism under which additional assets have been transferred for

servicing the liabilities and in the event of any shortfall in meeting the liabilities, TPCODL has been allowed to avail of appropriate funding instruments, the cost of which shall be allowed in the ARR. The Commission emphasizes that as the utility is being transferred as a going concern, in the interest of consumers and suppliers it is imperative that these liabilities be serviced by TPCODL.

66. The Liabilities of the OPTCL as claimed in the petition are of old periods of the years 2007, 2011 and 2012 which includes DPS, UI Charges, etc. These outstanding should have been settled between OPTCL and CESU as and when these became due during the previous years. The spirit of the Act as enshrined in the section 21 does not envisage passing of old liabilities and the commission accordingly has not passed on such old liabilities to the successor entity. The RFP document also did not envisage passing of such old liabilities and the principles of the segregation of the Balance sheet was based on such premise. The intending bidders accordingly submitted their bid basing on such provisions in the RFP. Moreover the petitioner OPTCL also participated in the suo moto proceedings before the passing of the vesting order by the commission in case no 11/2020 and such issues were not raised by the petitioner in such proceedings.
67. In view of such observations there is no error apparent on face of the record which is required to be reviewed. The Electricity Act, 2003 at Section 94(1)(f) confers power on the Commission to review its order which is similar to Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure on the following grounds: (a) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed. (b) Some mistake or error apparent on the face of record, (c) For any other sufficient reason. The scope and ambit of review has been delineated by Hon'ble Supreme Court in the following judgments. In Sow. Chandra Kanta and Anr. v. Sheik Habib AIR 1975 SC 1500 the Hon'ble Apex Court dismissed a review application observing as under: "..... Once an order has been passed ..... a review thereof must be subject to the rules of the game and cannot be lightly entertained. A review of a judgment is a serious subject and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility." Similar view has been reiterated by the Hon'ble Supreme Court in Sajjan Singh and Ors. V. The State of Rajasthan and Ors., and many other cases. In Subhash vrs. State of Maharastra and Anr. AIR 2002 SC 2537, the Hon'ble Apex Court emphasized that the Court should not be misguided and should not lightly



entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review. In Civil Appeal No. 5217 of 2010 the Hon'ble Supreme Court vide their recent judgement dated 01.02.2019 between Asharfi Devi THR. LRs Vrs. State of UP and Others reiterating the settled position of Law on review held that every error whether factual or legal cannot be made subject matter of review under Order 47 Rule 1 of the Code of Civil Procedure, though it can be made subject matter of appeal arising out of such order. In other words, in order to attract the provisions of Order 47 Rule 1 of the Code, the error/mistake must be apparent on the face of the record of the case. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other "sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in Order 47 Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged innings for making submissions, nor does review lie merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Even the judgment given subsequent to the decision in a case can be no ground for entertaining the review. Review lies only when there is error apparent on the face of the record and that fallibility is by the oversight of the Court. If a Counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a Counsel, he cannot be permitted even under the garb of doing justice or substantial justice, to engage the court again to decide the controversy already decided. If a party is aggrieved of a judgment, it must approach the Higher Court but entertaining a review to re-consider the case would amount to exceeding its jurisdiction, conferred under the limited jurisdiction for the purpose of review. Justice connotes different meaning to different persons in different context, therefore, Courts cannot be persuaded to entertain review application to do justice unless it lies only on the grounds mentioned in the statutory provisions.

68. In view of aforesaid statutory provisions and position of law settled by Hon'ble Apex Court, we observe that the OPTCL has sought review of the vesting order mainly on the

grounds which are contrary to the spirit of the Act. The petitioner seeks to claim its old unsettled dues basing on its own surmises which cannot be allowed to be accepted as grounds for review. In the light of the above, we are of the considered view that there is no merit in the Review Petition and the same is accordingly dismissed as devoid of merit.

Sd/-

**(G. Mohapatra)**  
**Member**

Sd/-

**(S. K. Parhi)**  
**Member**

Sd/-

**(U. N. Behera)**  
**Chairperson**