

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

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

Case No. 51/2020

M/s. GRIDCO Limited	Petitioner
Vrs.		
M/s. Vedanta Ltd. & Others	Respondents

In the matter of: **Application under S. 94(1)(f) of the Electricity Act, 2003 read with Order LXVII Rule 1 Code of Civil Procedure, 1908 and Regulation 70 of Odisha Electricity Regulatory Commission (Conduct of Business) Regulations 2004, seeking review of the order dated 22.06.2020 passed by the Commission in Case No.68 of 2018.**

For Petitioner: Shri R. K. Mehta, Sr. Advocate and Ms. Sushmita Mohanty, AGM (PP)

For Respondent: Shri Buddy Ranganathan, Sr. Advocate and Shri Hemant Singh, Advocate on behalf of M/s Vedant Ltd.; Shri B. Mehta, Chief Load Dispatcher, SLDC, Shri Bijay Das, G.M. OPTCL, Shri K.C. Nanda, DGM (Fin.), TPWODL and Ms. Niharika Pattnaik, ALO, DoE, GoO.

ORDER

Date of hearing: 19.01.2021

Date of order: 27.10.2021

The petitioner GRIDCO Ltd. has filed the present petition seeking review of the Commission's order dated 22.06.2020 passed in Case No.68 of 2018 limited to the issue of compensation for non-supply/short supply of power by M/s Vedanta Ltd. and incorporation of compensation clause in the PPA.

2. The petitioner has submitted that the ground of review is non-consideration of its submissions by the Commission with regard to the issue of compensation/penalty for non-supply/short supply of power to GRIDCO as contained in its consolidated rejoinder dated 10.10.2019. GRIDCO has stated that in the said rejoinder it had submitted the following:
 - a. M/s Vedanta Ltd. had lifted linkage coal from MCL during the entire period of FY 2017-18 but had not supplied power to the State, in gross violation of FSA as well as PPA provision.

- b. M/s Vedanta Ltd. leveraged the opportunity to avail state entitlement of power for its own captive consumption, otherwise it would have availed the same from DISCOMs at applicable RST or power exchanges through open access by paying applicable POC charges and losses and cross-subsidy surcharges to DISCOMs.
 - c. M/s Vedanta Ltd. did not supply entitled power to GRIDCO in time and the shortfall quantum has piled up to 4462 MU till March 2019.
 - d. As per the MoM dated 01.11.2016 held among GRIDCO, SLDC, WESCO, OPTCL and M/s Vedanta Ltd., it was mutually agreed for penalty clause for non-supply of state entitlement power by M/s Vedanta Ltd. to GRIDCO. Still M/s Vedanta Ltd. defaulted in supplying state share of power to GRIDCO. Further as per the MoM dated 07.12.2017 between M/s Vedanta Ltd. and GRIDCO, M/s Vedanta Ltd. agreed to supply state entitlement power from alternate sources when the Unit-2 (IPP) is out of operation.
 - e. The Commission in various ARR orders have directed GRIDCO to take up this matter of short supply of M/s Vedanta Ltd. with State Govt. and secure compliance of law through all available options. In fact, GRIDCO should draw the full quantum of state share of power from the IPPs as per the PPA for state use and also to have export earnings after meeting the state requirements, if commercially viable.
 - f. The purpose of penalty is to prevent M/s Vedanta Ltd. from short/no supply of power to the state/GRIDCO even when rest three units are operating to their maximum limit. The deviation from the Commission's order in Case No.21 of 2015 ought not to be allowed which was based on bonafide assurance by M/s Vedanta Ltd.
3. The petitioner GRIDCO has submitted that though the above submissions have been noticed by the Commission in the impugned order, the same has not been appreciated/ considered while dealing with the issue of compensation/penalty for short supply of power by M/s Vedanta Ltd. wilfully. The compensation/penalty in case of wilful default in supply of power cannot be the same as for a bonafide default in supply of power. While reasonable compensation can be granted for a bonafide default, the compensation for wilful default must contain an element of penalty. This aspect has

been completely lost sight of by the Commission. It is a well settled principle of law that no person can be allowed to take advantage of its own wrong.

4. GRIDCO has submitted that even though the Commission has referred to section 73 of the Indian Contract Act, 1872, in view of the provision contained in section 172 of Electricity Act, 2003 which reads overriding effect to the provisions of Electricity Act, 2003 over any other law for the time being in force, Regulatory Power of the Commission under section 86 of the Electricity Act, 2003 is not controlled by section 73 of the Indian Contract Act, 1872.
5. With prejudice to the above, GRIDCO has submitted that as per the direction of the Commission in the impugned order, while calculating the compensation payable by M/s. Vedanta Ltd. for short supply of power, the tariff of M/s. Vedanta Ltd. has to compensate the variable cost of marginal ISGS sources. GRIDCO has submitted that the burden of fixed charge irrespective of drawal from ISGS sources is borne by GRIDCO in the interest of the consumers of the State. Therefore, the benefit of the payment of such fixed charge by GRIDCO cannot be passed on to M/s. Vedanta Ltd. for its wilful default in supplying State entitlement power to GRIDCO.
6. The respondent M/s. Vedanta Ltd. has submitted that as per the provision of the Electricity Act, 2003, for reviewing its decisions, the Commission acts as a Civil Court and resultantly the provisions of Civil Procedure Code, 1908 become applicable. As per order 47 Rule-1 of CPC, 1908 the scope of review is extremely limited. Review can be filed in the following cases:
 - Upon discovery of new or important matter or evidence, which could not be produced during the time passage of an order, despite due diligence;
 - If there is a mistake or error apparent on the face of record;
 - Any other sufficient reason, as per the discretion of the Court;

As per Rule-1 (2) of order 47 of CPC, 1908, no review is maintainable if these matters can be raised before the Appellate Forum. M/s. Vedanta Ltd. has submitted that the above provision has been interpreted by the Hon'ble Supreme Court of India in many judgments. Summarizing the judgments of the Hon'ble Supreme Court, in Case of Parsion Devi and Others Vrs. Sumitri Devi and Others reported in (1997) 8 SCC 775 and Kamalesh Verma Vrs. Mayawati, reported in (2015) 8 SCC 320, M/s. Vedanta Ltd. has submitted that:

- a. A review cannot at all be an “appeal in disguise”;
 - b. The issue raised in the review should not be reheard and corrected;
 - c. If a “process of reasoning” is required to point out an error, the same cannot all be termed as an error apparent” on the face of the record justifying exercise of review jurisdiction; and
 - d. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for a patent error. This means that even for an erroneous decision, a review cannot be filed, and that the only remedy available to an aggrieved party is to file an appeal.
7. M/s. Vedanta Limited further submitted that before filing of the review petition by GRIDCO, M/s. Vedanta had filed an appeal before the Hon’ble ATE, being DFR No. 296 of 2020, against the impugned order dated 22.06.2020 of the Commission. In the said appeal M/s. Vedanta Ltd. had challenged the following findings of the impugned order :
- a. The computation of compensation/damages for shortfall in power supply, is to be borne on 15 minutes time block basis, as against the agreed terms between the parties i.e. monthly basis whose reference has been drawn from MoM dated 07.06.2019;
 - b. The compensation to be computed with respect to marginal sources, as appearing in the MoM dated 07.06.2019, will also include “un-requisitioned” power from ISGS, power overdrawn under deviation settlement mechanism and power drawn from exchanges;
 - c. For the payment of annual fixed charge/capacity charge to M/s. Vedanta Ltd. for the power supply to GRIDCO, the plant availability factor for the month shall be computed based on the actual energy supplied by M/s. Vedanta Ltd., without any reference to the deemed supply, being the shortfall quantity compensated/agreed to be compensated by M/s. Vedanta Ltd. to GRIDCO;
 - d. For computing compensation payable by M/s. Vedanta Ltd. for short supply of power to GRIDCO, additional transmission/POC charges and losses incurred by GRIDCO will also be reimbursed by M/s. Vedanta Ltd.;

- e. A factually incorrect observation is made in the impugned order regarding utilization of linkage coal by M/s. Vedanta Ltd. for purposes other than supply of power to GRIDCO.
8. M/s. Vedanta Ltd. submitted that any of the ground raised by the GRIDCO in the present review petition, which concern with the aforesaid issues raised in the appeal filed by M/s. Vedanta Ltd., cannot at all be adjudicated by this Commission on account of the applicability of Rule-1 (2) of order 47 of CPC, 1908. In this regard M/s. Vedanta Ltd. has referred the order dated 30.09.2019 of the Punjab State Electricity Regulatory Commission in Petition No-1 of 2018 titled Punjab State Power Corporation Ltd. Vrs. GVK Power (Goindwal Sahib) Ltd.
9. In light of the aforesaid principles, M/s. Vedanta Ltd. has submitted that the issues raised in the present review petition cannot at all be agitated as the same essentially required a re-hearing the entire dispute, which is prohibited in terms of the aforementioned judgments of the Hon'ble Supreme Court.
10. M/s. Vedanta Ltd. has submitted that the issue of MoM dated 01.11.2016 raised by GRIDCO in the present review petition, is also recorded in the impugned order and the Commission have passed the impugned order after considering the same. Therefore, a re-argument on the issues which were dealt in Case No. 68/2018, cannot at all be allowed in the present review petition. If the contention of GRIDCO is allowed, then it will render otiose the principles laid down by the Hon'ble Supreme Court in its judgments (Supra) where it has been held that in a review proceeding, a re-hearing of the issues cannot be permitted.
11. Regarding contention of GRIDCO that M/s. Vedanta Ltd. did not supply State share of power as per the previous orders of the Commission, M/s. Vedanta Ltd. has submitted that when there is a shortfall in the supply of goods under a contract, then the only remedy available is to seek damages. The protocol for such damages has been elaborated by the Commission and the argument of alleged shortfall in supply of power by M/s. Vedanta Ltd. has already been taken care of and considered in the impugned order. Therefore, the said argument is not relevant to be made in a review petition.
12. On the contention of GRIDCO that the Commission should levy penalty on M/s. Vedanta Ltd., in addition to the compensation for short supply of power, M/s. Vedanta Ltd. has submitted that this issue has already been considered by the Commission at

Para-10 (d) of the impugned order after recording the submissions of both the parties. On this issue, the Commission has applied Section 73 of the Contract Act, 1872 while deciding the protocol qua compensation to be given by M/s. Vedanta Ltd. to GRIDCO. As per Section 73 of the said Act, there is no provision for a penalty in excess of the damages/compensation which is payable for not complying with the provisions of the contract. Therefore, the review filed by the GRIDCO on the above issue is devoid of any merits. The only remedy available with GRIDCO against an order which is perceived to be erroneous is to file an appeal before the Hon'ble ATE.

13. Regarding the allegation of GRIDCO that its share of power was wrongfully diverted to the captive units of M/s. Vedanta Ltd., there by resulting in an alleged profit/savings, M/s. Vedanta Ltd. has submitted that as such GRIDCO is seeking imposition of penalty on M/s. Vedanta Ltd. over and above the damages/compensation. But there is no legal principle or case law which has been referred by GRIDCO in support of the above averments that penalty should be automatically provided in a contract over and above compensation/ damages. However, the said arguments cannot at all be permitted, for the reason that there is no provision under the PPA dated 19.12.2012 executed between M/s. Vedanta Ltd. and GRIDCO which provides for any penalty. In such a situation, the principles under Section 73 of the Contract Act becomes applicable. The Commission cannot add words to a contract/ PPA providing for penalty, as it is a settled principle of law that Courts cannot add words to a contract. In this context M/s. Vedanta Ltd. has referred to the judgment of Hon'ble Supreme Court in *Rajasthan State Industrial Development & Investment Corporation Vrs. Diamond & Gem Development Corporation Ltd. reported in (2013) 5 SCC 470* and in *Kailash Nath Associates Vrs. DDA reported in (2015) 4 SCC 136*.
14. M/s. Vedanta Limited has submitted that the issue of short fall of power supply from FY 2017-18 to 2019-20, as submitted by GRIDCO in its review petition, has already been adjudicated by the Commission in the impugned order. Therefore, raising the same issue again and again before the Commission has no relevance. Regarding the allegation of GRIDCO that M/s. Vedanta Limited has profiteered by diverting State share of power to its captive units, M/s. Vedanta Limited has submitted that the allegation of GRIDCO is purely speculative and without any evidence and cannot at all be used to insert any penalty provision in the PPA. M/s. Vedanta Limited has

submitted that all the material submissions of GRIDCO made in its pleadings, have been recorded in the impugned order, and therefore, it cannot be alleged that the said submissions were not considered by the Commission. None of the grounds raised by the GRIDCO in the present review petition, amount to a mistake or an error apparent on the face of record. GRIDCO wants a complete re-hearing of the finding of the impugned order as the said order is erroneous as per GRIDCO. In the event GRIDCO is aggrieved by the findings of the impugned order qua the aforesaid minutes of meeting, then the only remedy available is to file an appeal as it is settled law that an erroneous order cannot be reviewed. Therefore, M/s. Vedanta Limited has prayed the Commission to dismiss the present review petition.

15. In its rejoinder, GRIDCO has submitted that Order XLVII Rule-1 (2) of CPC only prohibits filing of review petition by a party who has already filed an appeal against the order of which review is sought. The bar of Order XLVII Rule-1 (2) of CPC does not extend to the party who has not filed any appeal against the order sought to be reviewed. Further, the filing of an appeal by M/s. Vedanta Ltd. before the Hon'ble ATE against the impugned order is irrelevant and cannot come in the way of GRIDCO filing the present review petition or the jurisdiction of the Commission to entertain the same. The grounds raised by the GRIDCO in the present review petition are completely different from the grounds of appeal filed by M/s. Vedanta Ltd. before the Hon'ble ATE.
16. GRIDCO has further submitted that Section 73 of Indian Contract Act, 1872 will not be applied in view of Section 174 of Electricity Act, 2003 which gives overriding effect to provisions of Electricity Act over other laws. Regulatory power of the Commission is not controlled or curtailed by Section 73 of the Indian Contract Act, 1872. In that event, Section 73 only applies to bonafied breach of contract and not malafied breach of contract in violation of the order of the Commission. Reasonable compensation is for a bonafied default, where as wilful default must entail some amount of penalty to prevent violation in future. Therefore, Section 73 of the Indian Contract Act, 1872 will not apply to the facts of the present case.
17. In view of the above, GRIDCO has prayed the following:
 - i. To review the impugned order with regard to the issue of compensation/ penalty for non-supply/short supply of power by M/s. Vedanta Ltd. and incorporation of penalty/compensation clause in the PPA.

- ii. To direct for payment of adequate compensation including an element of penalty for wilful default of M/s. Vedanta Ltd. in supply of State entitlement of power to GRIDCO w.e.f. April, 2015 in gross and flagrant violation of order dated 27.01.2016 of the Commission.
 - iii. To direct consideration of two parts tariff of ISGS marginal sources for calculation of compensation payable by M/s. Vedanta Ltd. for non-supply/short supply of State entitlement of power to GRIDCO.
18. Heard both the Petitioner and the Respondent. The written submission and rejoinder submitted by the Petitioner and Respondents are taken on record.
19. As per Section 94 (1) (f) of the Electricity Act, 2003, this Commission has the same power as are vested with the Civil Court under the Code of Civil Procedure, 1908 in respect of reviewing its decisions, directions and orders among others.

As per Order 47 Rule 1 of the Civil Procedure Code, review of an order can be made on the following grounds:

- (a) Error apparent on the face of the record;
- (b) New and important matter or evidence which is relevant for the purpose was discovered which could not be produced after exercise of due diligence or if there appears to be some mistake;
- (c) Any other sufficient reason.

Error contemplated under the rule must be such that is its apparent on the face of the record and not an error which is to be fished out and searched. It must be an error of inadvertence.

20. The Commission observed that GRIDCO has filed the present review petition mainly on the ground that in the impugned order dated 22.06.2020 passed in Case No. 68/2018, the Commission has not considered the submission of GRIDCO with regard to the issue of compensation/penalty for non-supply/short supply of power to GRIDCO as contained in its consolidated rejoinder dated 10.10.2019. However, the Commission observed at Para-10 (a & d) of the impugned order dated 22.06.2020 as follows:

“a. Whether the basis of calculation needs to be 15 Minutes Block wise or Monthly

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Commission Observation

- *We heard both the parties on this issue. As per Clause 6.5.1 (2) of Odisha Grid Code, 2015, all generators including IPP shall provide the 15 minutes block MW/MVAr availability (00.00-24.00 hours) of their respective units to SLDC on day-ahead basis. Further, as per Annexure-1 to Chapter-6 of the Odisha Grid Code under the heading “Complementary Commercial Mechanisms”, all beneficiaries shall pay capacity charges to the generator corresponding to plant availability and energy charges for the scheduled dispatch as per the relevant notifications and orders of the OERC. Therefore, any generator injecting power to the grid is monitored under 15 minutes block for its injection. Beneficiaries are affected if the scheduled generation is not maintained by the generator. The present case arises out of bi-partite agreement between Vedanta and GRIDCO. If Vedanta injects less power in any 15 minute block, GRIDCO has to source the shortfall quantity in that time block only from other generators/sources. Therefore, GRIDCO must be compensated on 15 minute block basis. We fully agree with the argument of GRIDCO in this regard. The computation of bill and compensation due to shortfall shall be made on 15 minute basis and the bill shall be paid on monthly basis after deducting the compensation.*

d. Compensation for short supply and Incorporation of Compensation Clause in PPA

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Commission’s Observation:

- *The present dispute is all about compensation to GRIDCO in case M/s. Vedanta fails to supply the State entitlement of power. The PPA between GRIDCO and M/s. Vedanta is nothing but a contract for supply of power by the latter to GRIDCO. This contract is governed under Indian Contract Act, 1872 once it is approved under Electricity Act, 2003 and OER Act, 1995. In case the contract is not honoured the affected party can move the appropriate forum under Indian Contract Act. Section 73 of the Indian Contract Act defines compensation for breach of contract as follows.*

“Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

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When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.”
Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

- *From the above explanation in the Contract Act it is clear that the remedy for non-supply of power by M/s. Vedanta lies in purchase of same quantity of*

power by GRIDCO from marginal ISGS sources, un-requisitioned ISGS sources, IEX and DSM sources. In case GRIDCO draws power from marginal ISGS sources it has to pay variable charges only since the capacity charge is payable anyway irrespective of whether power is drawn or not since the GRIDCO has long term contract with them. Similarly, in case of un-requisitioned ISGS sources, the GRIDCO has to pay both fixed and variable charges. In case of IEX and DSM sources the price of the power is to be paid on single part basis. In case of non-supply of power by M/s. Vedanta, GRIDCO is to bear expenses to purchase same quantity of power by paying variable charge to ISGS sources, both fixed and variable charge to un-requisitioned ISGS sources and single part tariff to IEX and DSM sources. GRIDCO must be compensated if it incurs loss while purchasing such power. The loss here is additional price GRIDCO pays to those sources over and above the price GRIDCO would have paid to M/s. Vedanta had it purchased power from them. This is the inconvenience to GRIDCO and must be remedied through a compensation as per the Contract Act. The compensation shall always be positive or nil depending upon the price at which GRIDCO purchases power from marginal sources. In no case it can be negative, which otherwise means GRIDCO is able to purchase power from sources cheaper than that of M/s. Vedanta. However, when shortfall for a particular period is compensated by more than one marginal source, the highest cost of marginal source of power would get compensated first, then the balance shortfall is compensated by second highest cost of marginal sources of power and so on, till the recovery of complete shortfall in energy for that period. Accordingly, both the parties are directed to incorporate a clause in the revised PPA on the issue of compensation arising out of non-compliance of commitment of M/s. Vedanta for supply of State entitlement of power.

- *The issue of agreement with M/s. JITPL on compensation for non-supply of power to GRIDCO has no application here. In case of JITPL it supplies 12%/ 14% of generated power to GRIDCO on variable cost basis only whereas M/s. Vedanta supplies power on full cost basis which consists of both fixed and variable charges. In case of short supply or no supply of power from Unit-II (IPP unit) of Vedanta, it is duty bound to replenish the same from its converted CGPs which is not the case of M/s. JITPL.”*

21. From the above order of the Commission it is clear that the issues have been discussed in the impugned order and the present submissions made by GRIDCO in the review petition have already been considered by the Commission at different paragraphs of the said order. Therefore, we do not see any reason for any apparent error creeping into our order. The present petition appears more to be an appeal than prayer to review our order and, therefore, does not merit consideration, and hence is dismissed.
22. With this direction, the case is disposed of.

Sd/-
(G.Mohapatra)
Member

Sd/-
(S. K. Parhi)
Member

Sd/-
(U. N. Behera)
Chairperson