

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Review Petition No.4 of 2012**

**In**

**Appeal No. 82 of 2008**

**Dated:27<sup>th</sup> Aug, 2012**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member,  
Hon'ble Mr. Justice P.S Datta, Judicial Member**

**In The Matter Of**  
**Bharat Coking Coal Ltd,**  
**Koyla Bhavan, Koyla Nagar,**  
**Dhandbad-826 006**

**Appellant/Review Petitioner**

**Versus**

- 1. DLF Power Limited  
DLF Galleria, 12<sup>th</sup> Floor,  
DLF City, Phase-IV,  
Gurgaon-122 002**
- 2. Jharkhand State Electricity Regulatory Commission,  
2<sup>nd</sup> Floor, Rajendra Jawan Bhawan-cum-Sainik Bazar,  
Main Road,  
Ranchi-834 001**

**....Respondent(s)**

**Counsel for Appellant(s): Mr. K K Rai, Sr. Adv  
Mr. A.B Singh  
Mr. Anupam Lal Das**

**Counsel for Respondent(s): Mr. Krishnan Venugopal, Sr. Adv.**

Mr. Kamal Budhiraja  
Mr. Aman Gupta  
Mr. Gaurav Ray  
Mr. Kaushik Misra  
Mr. Manu Seshadri  
Ms. Simar K. Narula  
Ms. Sanyukta Singh

**ORDER**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,**  
**CHAIRPERSON**

1. Bharat Coking Coal Ltd has filed the present Review Petition seeking review of the judgment dated 6.2.2012 of this Tribunal dismissing the Appeal in Appeal No.82 of 2012 filed by the Review Petitioner.
2. The Review Petitioner filed the Appeal No.82 of 2012 against the tariff order dated 28.3.2008 passed by the Jharkhand State Commission. This Tribunal after hearing the parties, dismissed the said Appeal observing that though the State Commission did not have jurisdiction to determine the tariff in terms of the PPA entered into between the parties to the Appeal namely Bharat Coking Coal Limited and DLF Power Limited, the impugned tariff order could not be interfered with because both the parties themselves approached the State Commission requesting for fixing the tariff by the Chairman of the Commission as an impartial, natural and mutual expert and as

such, the said tariff order has to be construed to be an Arbitral Award under the doctrine of “Extra Cursum Curiae”.

3. Aggrieved by this judgment, the Appellant/Review Petitioner, has presented this Review Petition raising the following grounds:

(a) This Tribunal failed to consider the Appellant’s submissions on the inapplicability of the doctrine of “Extra Cursum Curiae” to the present case.

(b) The Tribunal incorrectly found that both the parties had approached the Commission for fixing the tariff.

(c) The State Commission had failed to follow the principles of natural justice because the Appellant/Petitioner had not been given opportunity to raise any objection with regard to the jurisdiction of the Commission and this aspect has not been considered by this Tribunal.

4. In reply to these grounds, the learned Senior Counsel for the Respondent-1 i.e. DLF Power Limited (Eastern India Power Tech Limited) has submitted the following:

(a) This Review Petition is not maintainable since already the Review Petitioner has filed a Statutory Appeal before the Supreme Court. So, the review is not

maintainable as against the order against which the Appeal has already been filed Under Section 120 (2) (f) of the Electricity Act read with Section 114 and order 47, Rule 1 of the Civil Procedure Code, 1908.

(b) The arguments of the Appellant/Petitioner regarding the inapplicability of the doctrine of 'Extra Cursum Curiae' has been dealt with by this Tribunal in the judgment by giving valid reasons. So, it is not correct to contend that the Tribunal did not deal with the said arguments advanced by the Appellant.

(c) The grounds raised by the Review Petitioner in the Review Petition have been raised in the Appeal filed before the Hon'ble Supreme Court. Therefore, the issues which are the subject matter of the Appeal filed before the Hon'ble Supreme court cannot be raised before this Tribunal as the Review Petition cannot be treated to be the Appeal over the judgment under Review.

(d) Bharat Coking Coal Limited has made a number of incorrect statements for the purpose of misleading this Tribunal. This Tribunal's observation that both the parties approached the Commission for fixing the tariff is factually correct.

5. The Learned Counsel for both the parties have cited a number of authorities to substantiate their respective pleas.
6. On behalf of the Review Petitioner the following decisions were cited:
  - (a) Rasiklal Manikchand Dhariwal V. M S S Food Products (2012) 2 SCC 196 in which it is held that in case the contentions raised by the Appellants were not considered by the Judicial Forum, the party can file a Review Petition before that Forum.
  - (b) Judgment in Thungabhadra Industries Ltd V Government of Andhra Pradesh, (1964) 5 SCR 174 in which it is held that if a Review Petition has been filed when no Appeal has been filed before the Appellate Forum, at that point of time, it is competent for the court hearing the petition for review to dispose of the same on the merits notwithstanding the pendency of the Appeal.
  - (c) The judgment in Dharma Prathishtanam V Madhok Construction (P) Ltd., (2005) 9 SCC 686 in which it has been held that the Arbitrators shall derive their jurisdiction from the consent of the parties and when there is no such consent, there is no jurisdiction which cannot be cured by mere acquiescence.

7. On the other hand, the Respondent has cited the following decisions which would show that the doctrine of “Extra Cursum Curiae” applies when the Court or authorities have no jurisdiction.

They are as under:

- (a) Henri Peter Pisani v. Her Majesty’s Attorney General for Gibraltar (1873-74) L.R. 5 P.C. 516
  - (b) Ledgard V Bull (1886) L.R. 11 App.Cas. 648
  - (c) Sankaranarayana Pillai V Ramaswami Pillai, AIR 1923
  - (d) Badal Chandra Prohel V Srikrishna Dey Nag, AIR 1929 Cal 354
  - (e) Rasu V Special Deputy Collector (Revenue Court) and Anr (1985) ILR 3 Mad 67
  - (f) Arati Paul V Registrar, Original Side, High Court (1969) 2 SCC 756
  - (g) Burgess V Morton (1896) A.C 136
  - (h) Bickett V Morris (1866-69) LR 1 SC 47
  - (i) White V Buccleuch (Duke) (1866-69) LR 1 SC 70
8. He has also cited the following decisions to show that the judgement cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Tribunal and that while exercising the power of review, the Tribunal cannot sit in Appeal over its judgment:

- (a) State of West Bengal V Kamal Sengupta (2008) 8 SCC 612

(b) *Arbam Tuleshwar Sharma V Aibak Pishak Sharma* (12979) 4 SCC 389

(c) *Thungabhadra Industries Ltd V Govt of AP* AIR 1964 SC 1372

(d) *Parsion Devi V Sumitra Devi* (1997) 8 SCC 715

9. In order to substantiate his plea that review petition against the judgment filed after the Appeal is filed before the Appellate Forum against the said judgment would not be maintainable, he has cited following judgments:

(a) *Kunhayammed v State of Kerala* (2000) 6 SCC 359

(b) *Thungabhadra Industries Ltd V Govt of A.P* AIR 1964 SC 1372

10. We have carefully considered the lengthy arguments made by both the parties on the points referred to above. On going through the entire records and on considering the submissions made by both the parties and the authorities cited by both of them, we find that there is no error apparent on the face of record so as to interfere in the judgment of this Tribunal as the points urged assailing our judgment could be raised only in the Appeal before the Appellate Forum and not before this Tribunal. Therefore, the Review Petition is liable to be dismissed. The detailed reasons for our above conclusion are as follows:

- (I) (a) According to the Review Petitioner, this Review Petition has been filed seeking for the Review of the judgment dated 6.12.2012 rendered by this Tribunal in Appeal No.82 of 2008 in so far as it invoked the principles of “Extra Cursum Curiae” to the proceedings before the Commission and gave a finding that the tariff order passed by the State Commission be treated as an award and this approach of the Tribunal having not considered the key issue, raised by the Appellant relating to the principles of “Extra Cursum Curiae” would amount to apparent error on the face of the record.

This contention of the Review Petitioner that this Tribunal did not consider the submissions of the Review Petitioner regarding the inapplicability of the doctrine of “Extra Cursum Curiae” in this case, is factually incorrect. As a matter of fact, in the judgment rendered by this Tribunal dated 6.12.2012, on the basis of the submission of the Appellant, the relevant issues were framed. They are as follows:

**“(i) Whether the State Commission has got the jurisdiction to fix the tariff with respect to sale of power generated by the**

**Respondent generator to the Appellant, the exclusive consumer of the Power supplied through their own dedicated line?**

**(ii) If it is held that the Commission has no jurisdiction to decide the dispute between the generating Company and the Consumer, whether the tariff order passed by the State Commission could be construed to be an arbitral award by adopting the principle of “Extra Cursum Curiae”?”**

(b) While considering the issue relating to “Extra Cursum Curiae” this Tribunal has considered the same in detail and in the Para-43 to 53 of the judgment dated 6.2.2012 in Appeal No.82 of 2008. The first paragraph in para 43 of the judgment is as follows:

*“Let us now come to the next issue relating to the question of construing the tariff order as an Arbitral Award applying the principles of **Extra Cursum Curiae**”.*

(c) We have made discussion in Para 44 to 52 about this point urged by the Appellant as well as the Respondent and come to the conclusion in paragraph

53 of the judgment dated 6.2.2012 in Appeal No.82 of 2008 that the Tariff order shall be construed to be an arbitral award by applying the doctrine of “Extra Cursum Curiae”. The relevant conclusion is as follows:

*“In view of the conclusion arrived at by the Tribunal in Appeal No.166 of 2005 with which we agree and also the decisions referred to above relating to the Extra Cursum Curiae, we hold that the tariff determination order has to be construed to be an arbitral award which is final and binding on the parties and not the tariff order under the Act, 2003. The second question is answered accordingly”.*

(d) While discussing this issue, we have quoted the following decisions:

(i) *Burges V Morton* (1896) A.C. 136 at pp.141 & 145

(ii) *DLF Power Ltd.& Rasu and Ors. V. The Special Deputy Collector* (1984) 2 MLJ 1, Para 6

(iii) The Hon’ble Supreme Court in the case of *Arati Paul V Registrar, Original Side, High Court*, (1969) 2 SCC 756 has endorsed the view which was referred to in the “Law of Arbitration”. The relevant portion of “Law of Arbitration” is as under:

*“The subject matter of an action may be referred to a judge as a arbitrator. The Judge in such a case will, if such is the intention of*

*the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a judge, and his award will not be subject to Appeal”.*

(iv) In the said decision, the Hon’ble Supreme Court referred to the settled principle which has been laid down in the Bickett V Morris (1866) LR 1 HLSc 47 and White V Buccleuch (Duke) (1866) LR 1 HLSc 70 wherein the following principles have been laid down:

*“ When, with the consent of both the parties, a Judge deviates from the regular course of procedure of the court, he ceases to act judicially and becomes an arbitrator, whose decision is subject to no Appeal”.*

(e) In these decisions, the principle of “Extra Cursum Curiae” has been dealt with in detail. We have discussed the principle decided in these decisions and then come to the conclusion that the principle of “Extra Cursum Curiae” would apply to the present case and held that the tariff order has to be construed as Arbitral Award which is final and binding on the parties.

(f) Therefore, the contention of the Review Petitioner that this Tribunal has not considered the arguments made by the Learned Counsel for the Appellant or

Review Petitioner, relating to the inapplicability of the doctrine of “Extra Cursum Curiae” to the Electricity Regulatory Commission is factually incorrect.

(g) As a matter of fact, as indicated above, this Tribunal in the judgment has categorically held that the doctrine of “Extra Cursum Curiae” would apply when the Judge or Statutory Body does not have a jurisdiction. The question as to whether our reasonings and the conclusion are correct or not cannot be considered in this Review Petition. In short, the Review Petitioner cannot be permitted to make an attempt to lay the ground work for raising additional grounds in the Appeal filed before the Hon’ble Supreme Court. Therefore, it has to be held that the plea set out in the present Review Petition is beyond the scope of the review. Accordingly, we reject this ground.

**(II)** (a) The Review Petitioner has claimed that this Tribunal has incorrectly recorded that both the parties approached the State Commission for fixation of tariff as per the PPA entered into between the parties. This claim is also baseless. In fact, we have mentioned while narrating the facts in the judgment

that on 12.6.2005, the Eastern India Power Tech Limited (DLF Power Limited) approached the Commission for fixation of tariff payable by the Bharat Coking Coal Limited and the Bharat Coking Coal Limited also approached the Chairman of the Commission through letter dated 16.9.2005 with a prayer that "*Hon'ble Chairman of the JERC may kindly fix the tariff considering the following elements*".

(b) These facts which cannot be disputed would indicate that it was only at the instance of both the parties that, the Chairman of the Commission decided to go into the issue of tariff fixation. Therefore, it is not correct to contend that both the parties have not approached the State Commission for fixation of the tariff.

(c) Even in the order passed by the State Commission dated 28.2.2006, it is clearly stated that both the parties approached the State Commission for determination of the tariff. The following is the observation:

*"M/s. DPCL, the Petitioner, through its Petition have pleaded before the Commission for the determination of the tariff at which the power is to be sold to the Respondent from the second year onwards. The*

*Respondent has also requested the Commission for the said purpose...*

*....there is a need to determine the tariff as per the request of both parties...in order to meet the request of both the parties, the Commission will work out the capital cost for which both the parties will assist the Commission with the required documents”.*

In view of the above, the reference made by the Tribunal that both the parties approached the Commission for determination of tariff is a correct statement. As such, the contention urged on this point by the Review Petitioner lacks substance. Hence, the same is rejected.

**(III).** (a) The Review Petitioner has raised another ground that no opportunity was given to the Appellant Petitioner to object to the Commission's jurisdiction and therefore, the principle of natural justice has not been followed. This contention also is baseless. The sequence of the events and proceedings before the Commission and before this Tribunal as pointed out by the Learned Senior Counsel for the Respondent would clearly demonstrate that this contention of the Review Petitioner is misconceived.

(b) As a matter of fact, on 3.9.2005, the Commission wrote a letter to the Review Petitioner asking it to file its written statements on answering the Respondent's application for fixation of tariff. Then on 16.9.2005, the Review Petitioner through its Chairman/Managing Director wrote back to the Chairman requesting that "the Hon'ble Chairman, JERC may kindly fix the tariff". At that time, the Review Petitioner did not raise any objection to the jurisdiction of the State Commission to do so in the said letter. Moreover, the proceedings of the Commission dated 21.1.2006 would show that it was recorded there in that both the parties were represented at the hearing and on that date, both the parties requested the Commission to deal with the case and decide the issue.

(c) Initially, the Member (Technical) recorded that the Commission does not have jurisdiction to adjudicate upon the dispute between the generating company and the consumer. Despite that, both the parties wanted the Chairman of the Commission to fix the tariff. Thereafter, for more than two years, the matter remained pending before the Commission. During

that time, Review Petitioner did not raise any objection to the question of jurisdiction.

(d) The contention of the Review Petitioner that the Appeal No.166 of 2005 is an Appeal by another Company (Central Coal Fields Limited) and that the facts of these cases have been mixed-up with the present case is again untenable. It was pointed out by the Respondent that the Review Petitioner and Central Coal Fields are both subsidiaries of Coal India Limited. The agreement dated 11.1.1995 out of which the present dispute has arisen was between the Coal India Limited and the Respondent DLF Power Limited. Likewise, the Appeal No.166 of 2005 also arose out of the Commission's order fixing the tariff under the PPA between the Coal India Limited and the DLF Power India Limited.

(e) As a matter of fact, this Tribunal has held in the other Appeal that though the Commission has no jurisdiction, the order determining the tariff can be construed to be an award. This judgment was rendered by this Tribunal in Appeal No.166 of 2005 as early as on 11.5.2006. Despite knowing the ratio decided by this Tribunal in the said decision, the

Review Petitioner, who is a subsidiary Company of Coal India Limited neither objected to the jurisdiction of the Commission nor withdrew its consent to the Chairman of the Commission who was requested by the Petitioner to determine the tariff.

(f) Further, this Tribunal has relied upon the legal issue which was decided by this Tribunal in Appeal No.166 of 2005 dated 11.5.2006 and came to the conclusion that this Tariff order shall be construed to be an Arbitral Award. This cannot be considered to be an error apparent on the face of record. The Hon'ble Supreme Court in its decision in the State of West Bengal Bengal V. Kamal Sengupta, (2008) 8 SCC 612 has clearly held that:

*“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. **To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in***

**law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.**

(g) The above principle has been laid down by the Hon'ble Supreme Court in the other decisions also i.e. Aribam Tuleshwar Sharma V Aibak Pishak Sharma (1979) 4 SCC 389 and Thungabhadra Industries V. Govt of AP , AIR 1964 SC 1372 and Parsion Devi V. Sumitra Devi (1997) 8 SCC 715.

(h) It is well settled that the review jurisdiction is not for correcting errors of law or fact that should be corrected in Appeal. Accordingly, the grounds raised here, cannot be the grounds for review. The principles laid down in the various authorities cited by both the parties are settled principles which cannot be disputed.

11. In view of the above, we conclude that there is no apparent error on the face of the record and consequently, the Review Petition which has no merit, is liable to be dismissed.

12. Before parting with this case, we are constrained to refer to the conduct of the Appellant/Review Petitioner, which is stated to be

unfair, as pointed out by the Respondent. The judgment was rendered by this Tribunal in Appeal No.82/2008 on 6.2.2012. As admitted by the Review Petitioner himself, the Petitioner filed an Appeal on 7.4.2012 before the Hon'ble Supreme Court, challenging the above judgment. However, it is contended by the learned Counsel for the Appellant that since the Review Petition was filed before this Tribunal as early as on 5.3.2012 itself i.e. even prior to the filing of the Appeal before the Hon'ble Supreme Court, this Review Petition is maintainable.

13. On the other hand, it is pointed out by the Respondent that even though this Review Petition had been filed before this Tribunal on 5.3.2012, on the first date of hearing review i.e. on 11.4.2012, the Appellant Petitioner, obtained permission from this Tribunal to file the revised Review Petition by modifying the original Review Petition and accordingly filed Revised Review Petition on 12.4.2012.

14. According to the Respondent, the perusal of the revised Review Petition dated 12.4.2012, reveals that it does contain not only the additional contentions but also contains revised contentions with new points, which makes it a fresh Review Petition. It is further submitted by the Respondent that this Revised Petition has been filed only on 12.4.2012 but, even prior to that, an Appeal had been filed before the Hon'ble Supreme Court on 7.4.2012 and that therefore, the Review Petition is not maintainable as held by the

Hon'ble Supreme Court in Kunhayammed V State of Kerala (2000) 6 SCC 359 and Thungabhadra Industries Ltd V. Govt of A.P, AIR 1964 SC 1372.

15. Even assuming it to be so, we are not inclined to dismiss the Review Petition merely on the said ground, since we have already discussed and dealt with the points urged by the learned Counsel for the Review Petitioner in the earlier paragraphs and concluded that there is no case made out for review. However, we are constrained to refer to the conduct of the Appellant raising the grounds in this Revised Petition which are the same grounds raised in the Appeal filed before the Hon'ble Supreme Court u/s 125 of the Act.

16. As a matter of fact, during the hearing of the present Review Petition when it was pointed out by the Respondent regarding the same, the Learned Counsel for the Petitioner himself conceded that in the Appeal filed before the Hon'ble Supreme Court U/S 125 of the Act against the judgment, all these substantive grounds raised in this Review Petition have been raised. If this is the admitted position, it has to be held that in the present revised review petition, the Petitioner has been attempting to get this Tribunal to sit in Appeal over the judgment under review.

17. Once it is admitted that all the grounds raised in the Review have been raised in the Appeal filed before the Hon'ble Supreme

Court, it is for the Appellant to pursue the Appeal before the Hon'ble Supreme Court to go into the question as to whether the conclusion arrived at by this Tribunal in the main judgment is correct or not. Even though it is admitted that the said Appeal was pending before the Hon'ble Supreme Court, the Learned Counsel for the Appellant has pursued the Review petition by arguing very same grounds at very great length on several dates of hearing, which were raised in the Appeal before the Hon'ble Supreme Court.

18. From the above conduct, we entertain a doubt with regard to the motive of the Appellant/Review Petitioner of attempting to lay the ground work for raising the additional grounds in the Appeal filed before the Hon'ble Supreme Court. This conduct of the Review Petitioner, in our view does not sound well. Therefore, we express our displeasure over the same. Though we feel that this is the matter where exemplary cost has to be imposed, we refrain from doing so.

19. Accordingly, the Review Petition is dismissed with no costs.

**(Justice P S Datta)**      **(Rakesh Nath )**      **(Justice M. Karpaga Vinayagam)**  
**Judicial Member**      **Technical Member**      **Chairperson**

Dated:27<sup>th</sup> Aug, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~