

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 08th Jan,2014

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

Appeal No. 9 of 2013

**Jamshedpur Utilities and Services Company Ltd
Sakchi Boulevard Road,
Northern Town,
Bistupur,
Jamshedpur-831 001**

... Appellant

Versus

**Jharkhand Electricity Regulatory Commission
2nd Floor,
Rajendra Jawan Bhawan
Cum-Sainik Bazar, Main Road,
Ranchi-834 001**

Respondent

**Counsel for the Appellant : Mr. Parag Mohanty
Ms. Leenashwari Makhijani
Mr. S R Patnaik
Mr. Vikas Srivastava
Ms. Tejinder Khanna**

**Counsel for the Respondent : Mr. C K Rai
Mr. Arvind Dubey
Mr. Mahipal**

J U D G M E N T

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

1. Jamshedpur Utilities and Services Company Limited (JUSCO), is the Appellant herein.
2. The Appellant has filed this Appeal challenging the Impugned Order dated 6.11.2012 passed by the Jharkhand State Commission in the Review Petition filed by the Appellant.
3. The short facts leading to the filing of this Appeal are as follows:
 - (a) The Appellant is a wholly owned subsidiary of Tata Steel Limited. It has been incorporated primarily to cater to the infrastructural and power distribution services in the city of Jamshedpur.
 - (b) The Appellant has a separate power business division which is engaged in distribution of electricity in Jamshedpur as a power distribution franchisee of Tata Steel Limited.
 - (c) The Appellant filed a Petition before the State Commission on 10.11.2011 praying for the true-up for the Financial Year 2010-11, Revised Estimation for the Financial Year 2011-12 and Determination of ARR

and Distribution Tariff for the Financial Year 2012-13. In this Petition, the State Commission passed the Tariff Order on 15.6.2012.

(d) The Appellant filed a Review Petition in case No.15 of 2012 seeking for the review of the Original Tariff Order dated 15.6.2012 in respect of two issues which were not allowed in favour of the Appellant. Those two issues are as follows:

- (i) Non-inclusion of Surcharge on Electricity Duty;
- (j) Issue of Assessable Income for Computation of Income Tax for the Financial Year 2010-11.

(e) The State Commission after hearing the parties passed the Impugned Review Order on 6.11.2012. In this Order, the State Commission has allowed the Review in respect of the first issue namely “Non-inclusion of surcharge on electricity dues” but rejected the Review in respect of the second issue namely “the issue of Assessable Income Tax for the Financial Year 2010-11”.

(f) As against this Review Order dated 6.11.2012 rejecting the Review in respect of the issue of

Assessable income for computation of income tax, the Appellant has presented this Appeal.

4. After the Appeal was admitted, the notice was issued to the State Commission, the Respondent. The State Commission has appeared and raised the preliminary objection with regard to the maintainability of the Appeal contending that the Appellant is not entitled to file the Appeal as against the Review Order by which the issue in question had already been decided by the State Commission in the Original Tariff Order dated 15.6.2012 itself and as such in the absence of filing the Appeal as against the main order dated 15.6.2012 in respect of this issue, the present Appeal with regard to the said issue is not maintainable as provided under Order 47 Rule 7 CPC.
5. On the other hand, the learned Counsel for the Appellant would contend that the Appeal as against the order dated 6.11.2012 with regard to the issue in question is maintainable since the original order dated 15.6.2012 got merged with the order dated 6.11.2012 and since the original order dated 15.6.2012 was modified by the Review order dated 6.11.2012 in respect of another issue, the Appeal was maintainable.
6. In view of the rival contentions, with regard to the preliminary objections, we deem it fit to allow both the parties to argue

the question of maintainability of the Appeal first to decide the said question before hearing the submissions with regard to the merits of the Appeal.

7. Accordingly, the learned Counsel for both the parties have made elaborate submissions with regard to the maintainability of the Appeal and filed respective written submissions. They also cited several authorities of this Tribunal, various High Courts and Hon'ble Supreme Court to substantiate their respective pleas.
8. Having regard to the rival contentions, the following question has to be decided in the present Appeal as a preliminary issue. The same is as follows:

“Whether the Impugned Order dated 6.11.2012 passed by the State Commission in the Review Petition filed by the Appellant in the light of the Order 47 Rule 7 CPC is appealable before this Tribunal within the meaning of Section 111 of the Electricity Act, 2003 ?

9. On this question, elaborate arguments were advanced by both the parties.
10. Let us refer to the gist of the arguments made by each of the parties on the question of Maintainability of Appeal:

(a) The learned Counsel for the State Commission has raised a preliminary objection questioning the maintainability of this Appeal on the ground that this Appeal is barred by virtue of Order 47 Rule 7 of the Civil Procedure Code. The crux of the submissions made by the learned Counsel for the State Commission is given below:

“It is settled law that the Appeal against the Review Order dismissing the Review Petition is not maintainable. The present Appeal as against the Review Order is not maintainable as it is barred by the provision of Order 47 Rule -7 of the Civil Procedure Code. The contention of the Appellant that since the Review Petition filed by the Appellant was not dismissed in entirety of the present Appeal is maintainable against such Review Order date 6.11.2012 is legally not sustainable. The Review Petition in case No.15 of 2012 was dismissed by the State Commission in respect of the issue in question. Even assuming that it is liable to be set-aside by this Tribunal in this Appeal, even then the Original Tariff Order dated 15.6.2012 deciding the issue of income tax would still survive without being disturbed. As the Appellant has not challenged

the main Original Order dated 15.6.2012 rejecting the claim on the issue of income tax, the present Appeal as against the Review Order dated 6.11.2012 on this issue is not maintainable and so, it is liable to be dismissed.

11. In support of this argument, the learned Counsel for the State Commission has cited the following authorities:

(i) Order in IA No.64 of 2013 dated 17.4.2013 issued by this Tribunal in the case of Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Limited vs Madhya Pradesh Electricity Regulatory Commission;

(ii) (1975) 1 SCC 774 in the case of Sushil Kumar Sen vs The State of Bihar;

(iii) (2006) 6 SCC 359 in the case of Kunhayammed and Ors Vs State of Kerala;

(iv) (2005) 3 SCC 427 in the case of Rekha Mukherjee Vs Ashish Kumar Das and Anr;

12. Questioning this preliminary objection regarding maintainability, the learned Counsel for the Appellant has made the following submissions:

(a) The Tribunal is not entirely bound by the provisions of the CPC. In the appropriate cases, the

Tribunal can frame its own procedure to be followed at the time of hearing the Appeals. Therefore, the bar projected by the State Commission under CPC would not apply to this Tribunal;

(b) Even otherwise, the Appeal against the Impugned Review Order is maintainable under the provisions of the Civil Procedure Code. Under Order 47 Rule-7, an Appeal against the dismissal of Review Petition alone is not maintainable. Thus, the Appeal against the outright dismissal of Review Petition alone is barred. But, in the present case, the Review Petition is allowed in respect of one issue and disallowed in respect of the other issue raised by the Appellant without any valid ground.

(c) The State Commission while rejecting the Review Petition on one issue, allowed the Review Petition on the another issue. Since Review Petition by the Appellant was not dismissed in entirety, the Appeal against the Review is maintainable. Order 47 Rule-7 would apply only when the Review Petition has been outrightly rejected in entirety and not to the case like the present case.

(d) The State Commission in Review Order modified its Original Order by allowing the relief to the Appellant

on one of the two grounds claimed by it in its Review. Thus, when the Original Order has been modified by the Review Order passed by the State Commission in the Review Petition, the Original Order merges into the final Review Order and as such the Review order alone would survive for the purpose of filing Appeal.

(e) If the Review Petition is allowed partly through modification, the order becomes a composite order whereby the State Commission not only vacates the earlier order but simultaneously pass an order modifying the original order earlier passed.

(f) In the present case, the Review Order dated 6.11.2012 in fact has modified the Tariff Order dated 15.6.2012 since it allowed the issue of surcharge on electricity dues. Therefore, the Appealable order in this case would be the Review Order dated 6.11.2012 and not the earlier Original order dated 15.6.2012.

13. In order to substantiate his plea, the learned Counsel for the Appellant has cited the following authorities:

(a) Judgment in Appeal No.51 of 2008 passed by this Tribunal in the case of Tamil Nadu Electricity Board vs Tamil Nadu Electricity Regulatory Commission;

(b) AIR 1967 Raj 264 in the case of Maji Mohan Kanwar and Others Vs State of Rajasthan and Another;

(c) 2012 (6) SCC 782 in the case of M/S. DSR Steel (P) Limited Vs State of Rajasthan and Others

(d) 2013 (5) Scale 447 Municipal Corporation of Delhi v Yashwant Singh Negi;

(e) 1975 (1) SCC 774 in the case of Sushil Kumar Sen Vs State of Bihar;

14. We have carefully considered the submissions made by both the parties.

15. At the outset, it shall be stated that the contention of the Appellant that the Appellate Tribunal is not entirely bound by the provisions of the CPC as it has got powers to frame its own procedures while hearing the Appeals on the basis of the judgment in Appeal No.51 of 2008 of this Tribunal has to be rejected in view of our recent judgment in IA No.64 of 2013 dated 17.4.2013 in the case of Madhya Pradesh Poorv Kshetra Vidyut Vitran Company Limited Vs Madhya Pradesh Electricity Regulatory Commission in which we have given a finding holding that the relevant provisions of CPC relating to Review Order prohibiting the Appeal would apply to Tribunal as well.

16. The above judgment has been rendered after considering a number of judgments of this Tribunal as well as the judgments of the Hon'ble Supreme Court. The relevant findings are given as under:

“.....(d) Under the Civil Procedure Code (CPC), the Appeal is provided as against the orders mentioned below:

(i) Order 41, Rule 1 read with Section 96 provides the Appeal arising out of original decree.

(ii) Order 43, Rule 1 provides for an Appeal arising out of the orders passed under CPC

(iii) Section 100 of CPC provides for the Second Appeal.

These provisions do not provide for any prohibition for the Appeal against the orders referred to above. But the prohibition of an Appeal as against the order rejecting the Review Petition has been specifically provided in Order 47 Rule 7.

(e) Therefore, restrictions contained in Order 47 Rule 7 will have application to the orders passed by the Commission dismissing the Review petition concerning the main order:

(g) The reading of Section 94 of the Act, 2003 would indicate that it incorporates the provisions of the CPC not only in respect of Rule 1 but also in respect of Rule-7 of the Order 47. If the intention of the Parliament was to restrict the incorporation of the Review only to the extent that the Appropriate Commission exercise powers and not to deal with any other incident of Review such Rule 7 of Order 47, the same would have been incorporated for separately”.

17. The above finding to the effect that order 47 Rule 7 would apply to Tribunal has been given by this Tribunal in the above judgment on the basis of the ratio laid down in a number of judgments rendered by this Tribunal as well as by the Hon'ble Supreme Court. The said ratio decided in those judgments are quoted in the judgment in IA No.64 of 2013 dated 17.4.2013. The relevant portion is as follows:

“10. The perusal of the above judgments would reveal that the ratio and principles have been laid down by this Tribunal following the dictums decided by the Hon'ble Supreme Court with reference to maintainability of the Appeal as against the order passed by the State Commission dismissing the Review Petition. They are as follows:-

(a) The order of the court rejecting the Application for Review shall not be Appealable under Order 47, Rule 7 of the Code of Civil Procedure.

(b) The main order alone can be Appealed before the Tribunal and the Appeal has not been provided as against the order of dismissal of Review petition by the Commission which confirmed the main order earlier passed.

(c) The course open to the Appellant whose application for the Review of the main order has been dismissed is to file an Appeal as against the main order along with an application to condone the delay which occurred due to the pendency of the Review petition before the Commission. The

Appellate Tribunal, in such an event, would decide the condoning delay application taking into consideration the pendency of the Review petition before the Commission during that period. The Tribunal after condoning the delay would then entertain the Appeal. Without doing so, the Appellant cannot straightaway file an Appeal as against the dismissal order passed by the Review petition alone.

(d) Under the Civil Procedure Code(CPC) , the Appeal is provided as against the orders mentioned below:

(i) Order 41, Rule 1 read with section 96 provides for the Appeal arising out of original decree.

(ii) Order 43, Rule 1 provides for an Appeal arising out of the orders passed under CPC

(iii) Section 100 of CPC provides for the second Appeal.

These provisions do not provide for any prohibition for the Appeal against the orders referred to above. But the prohibition of an Appeal as against the order rejecting the Review petition has been specifically provided in Order 47 Rule 7.

(e) Therefore, restriction contained in Order 47, Rule 7 will have application to the orders passed by the Commission dismissing the Review petition concerning the main order.

(f) Section 94(1)(f) incorporates by reference to the provisions of the Code of Civil Procedure in regard to exercise of power over

the Review of its own decision, directions and orders. Accordingly, the relevant provisions of CPC 114 and Order 47 Rule 7 deal with Review as if it has been provided for in Section 94 of the Electricity Act,2003 including the provision of Order 47 Rule 7.

(g) The reading of section 94 of the Act,2003 would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. If the intention of Parliament was to restrict the incorporation of the Review only to the extent that the Appropriate Commission exercises powers and not to deal with any other incident of Review such as Rule 7 of Order 47, the same would have been incorporated for separately.

(h) Section 94(2) of the Act, 2003 deals with the powers of the Appropriate Commission to pass interim orders. In this section, the Parliament has chosen to say specifically that provisions of the CPC would not apply but has recognized the power to pass interim orders under section (2) of 94 of the Act. Hence, there is no bar provided for Appeal in those cases. But, in the case of Review, the Parliament had decided that the application must be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim orders under Section 94(2) of the Act as stated above”.

- 18.** On the basis of this ratio decided in various judgments the same has been reiterated by this Tribunal in IA No.64 of 2013 to the effect that the Appeal as against the Review Order dismissing the Review Petition confirming the main

order was not maintainable in view of the prohibition contained in Order 47 Rule-7.

- 19.** In the above case, it was contended by the learned Counsel for the Appellant like in the present case that the Appellate Tribunal is not bound by the provisions of CPC as the Act does not envisage any restrictions on this Tribunal in the light of the Section 120 of the Act, 2003 and that therefore, the Appeal against the Review Order is maintainable.
- 20.** This contention had been elaborately dealt with, in the above judgment by this Tribunal which ultimately rejected the said contention.
- 21.** This Tribunal in the above case took note of Section 120 (2) of the Electricity Act, 2003 which provides that the Appellate Tribunal shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure while trying a suit in respect of reviewing its own decisions. Similar powers have been conferred to the Commissions also u/s 94 (1) which provides that the appropriate Commission shall have the same powers as are vested in the Civil Procedure Code under the Code of Civil Procedure for reviewing its decisions, directions and orders. On that basis, this Tribunal came to the conclusion that since the Tribunal has been conferred with the CPC powers for review, the order 47

Rule-7 by which a prohibition has been provided would apply to this Tribunal also.

- 22.** This Tribunal further held in the said judgment that even assuming that the Tribunal has got the powers to entertain the Appeal as against the Review Order on the ground that it was not legally valid, only that Review Order alone can be set aside and not the finding in the main order and in that event, the main order would be intact without being disturbed, thereby no purpose would be achieved.
- 23.** The above proposition held in the above judgment would apply in all fours to the present case also.
- 24.** Apart from relying upon this proposition laid down by this Tribunal in the above judgment, the learned Counsel for the State Commission would also refer to Section 96 and 104 of the Civil Procedure Code to substantiate his plea that the Appeal is not maintainable.
- 25.** This Section 96 of the CPC provides that an Appeal would lie from the decree passed by any court exercising Original jurisdiction to the court authorised to hear the Appeals from the decisions of such courts.
- 26.** Section 96 of the Code of Civil Procedure is reproduced below:

“96. Appeal from original decree – (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear Appeals from the decisions of such Court...”.

27. The above Section would relate to the Appeal from the decree.

28. Let us see the definition of the ‘decree’ provided in Section 2 (2) of the Code of Civil Procedure:

*“**decree**” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final....”.*

29. From the perusal of Section 96 relating to the Appeals from the Original Decree and Section 2 (2) relating to the definition of the decree provided in the CPC, it is clear that it is a decree passed in original jurisdiction which alone is appealable.

30. In order to construe a particular order to be a decree, it must satisfy that there is adjudication in the original proceedings determining the rights of the parties and such a declaration must be a formal declaration of the adjudication.

31. In order-43 Rule-1 CPC, categorisation has been made as to from which classes of orders, Appeal is maintainable apart from the Appeal emanating from the original decree.

32. Order 43 Rule 1 CPC, is reproduced below:

“Appeals from Orders: An Appeal shall lie from the following orders under the provisions of Section 104 namely:-

(a).....(b).....

(w) an Order under Rule 4 of Order 47 granting an application for review”.

33. Section 104 of the CPC deals with the provisions relating to orders from which the Appeal lies.

34. Let us quote Section 104 of the CPC which reads as under:

“104. Orders from which Appeal lies:- (1) An Appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

.....

.....

(i) Any order made under Rules from which an Appeal is expressly allowed by rules”.

35. Order 43 Rule-1 does not provide any berth to Order 47 Code of Civil Procedure Code except Order 47 Rule 4 where

application for review is granted. Thus, as per order 43, Rule-1, it is only that party who is aggrieved by the order of granting review can challenge that order in the higher forum in Appeal.

36. In the present case, the State Commission has passed the Original order on 15.6.2012 wherein a number of issues were decided. The Appellant herein initiated the original proceedings before the State Commission in relation to the tariff matters. In the said order, only two issues were not allowed by the state Commission. They are;

- (a) Non-inclusion of surcharge on electricity duty, and;
- (b) Assessable income for computation of income tax for the Financial Year 2011-12;

37. As indicated above, the Appellant filed a Review Petition before the State Commission praying for the review of these two issues. However, the State Commission passed an order on 6.11.2012 allowing the Review on the first issue while rejecting the review on the second issue. It is against this order of rejection passed in the Review Petition dated 6.11.2012 in respect of the assessable income for income tax, the Appellant has preferred this Appeal.

- 38.** As stated earlier, the State Commission's contention is that the instant Appeal is not maintainable as barred by the provisions of Order 47 Rule 7 of the Code of Civil procedure.
- 39.** Order 47 Rule 4 (2) has a co-relation with order 47 Rule 7 of the CPC to the extent where an order is passed granting application for review. This is not the situation in the instant Appeal.
- 40.** In this case, the Appeal is relating to the situation whereby the Commission partly rejected the Review Petition and such rejection in part is sought to be appealed in the present Appeal.
- 41.** In other words, this is not the situation where an Appeal is presented by an aggrieved person against the order passed in Review to the extent of allowance of such a Review Petition. This is an Appeal against the rejection in part of the Review Petition. Under Order 47 Rule-7 CPC it is only when the order is passed allowing the review alone is Appealable by the aggrieved party as provided in Order 43 Rule 1 CPC and not the rejection.
- 42.** On this basis, it is contended by the State Commission that the instant Appeal preferred against the order of the rejection passed in review is not maintainable.
- 43.** We find force in the above submission.

44. When the State Commission rejected the Review Petition on the second issue, it means such rejection of the said prayer made in the review petition is nothing but the reiteration of rejection already made in the original proceedings by the State Commission.
45. When this is the position, it is the main order dated 15.6.2012, wherein the rejection was first made and affirmed in the Review Petition alone is appealable under Section 96 of the Civil Procedure Code and under Order 47 Rule-1 CPC.
46. Therefore, the contention of the Appellant that this Tribunal is not bound by the provisions of the CPC is not tenable and the same is liable to be rejected especially when we have already decided this issue after an elaborate discussion in IA No.64 of 2013 dated 17.4.2013 rejecting the said contention.
47. Let us now refer to the other contention urged by the Appellant with regard to the **Doctrine of Merger**.
48. According to the learned Counsel for the Appellant, by applying the Doctrine of Merger, the Original Tariff Order dated 15.6.2012 was vacated and modified by the Review Order dated 6.11.2012 and therefore, the Review order dated 6.11.2012 alone is survived to enable the party to file the Appeal.

49. In other words, the contention of the Appellant is when the State Commission partly allowed the Review Petition, it means that the original order dated 15.6.2012 has come to be modified to that extent and therefore, the original tariff order dated 15.6.2012 got merged with the Review Order dated 6.11.2012 because of the application of the Doctrine of Merger and as a result of this, the Appeal would be maintainable only against the Review Order and not against the Main Order.
50. In support of this contention, the learned Counsel for the Appellant has cited the various judgments as quoted above.
51. Similarly, the learned Counsel for the State Commission also has relied upon various judgments. One of those judgments cited by the State Commission is the judgment of Hon'ble Supreme Court in the case of Kunhayammed and Ors Vs State of Kerala reported in 2006 (6) SCC 359.
52. In this judgment, it has been held that the logic underlined the Doctrine of Merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time.
53. Let us quote the relevant paragraph in the said judgment giving the definition of the Merger. The same is as follows:

“42. “To merge” means to sink or disappear in something else; to become absorbed or extinguished;

to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up as to involve a loss of identity and individuality”.

- 54.** The above observation of the Hon’ble Supreme Court would make it clear that the order passed in Review partly allowing and partly rejecting would merge in the main order and decree. For the purpose of Appeal, it is that decree or the main order with which the order passed in Review has merged with is Appealable.
- 55.** The learned Counsel for the Appellant has cited the judgment in 1975 SCC (1) 774 in the case of Sushil Kumar Sen vs The State of Bihar. This judgment has been referred to in the case of Kunhayammed and Ors Vs State of Kerala cited by the State Commission.
- 56.** In Paragraph -28 of the judgment in Kunhayammed case, the Hon’ble Supreme Court referred to this judgment of Sushil Kumar Sen vs the State of Bihar. The following is the observation:

“.....that the effect of allowing an application for review of a decree is to vacate a decree passed. The decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The distinction is clear. Entertaining an application for review does not vacate the decree sought to be

reviewed. It is only when the application for review has been allowed that the decree under review is vacated. Thereafter, the matter is heard afresh and the decree passed therein, whatever be the nature of the new decree, would be a decree superseding the earlier one....”.

57. The dictum laid down in the case of Sushil Kumar Sen is that the decree that is subsequently passed on review whether it modifies, reverses or confirms the decree originally passed, is a new decree superseding the original one. The situation mentioned in the Sushil Kumar Sen case is not a situation covered in the present Appeal for the following reasons. Firstly, in the present case, it is not the situation where review has been allowed and the decree under review has been vacated. Secondly, in the above mentioned case, the original decree dated 18.8.1961 was not challenged and what was challenged was the decree dated 26.9.1961 which was passed in the review and therefore, in absence to any challenge of original decree despite the setting aside of the second order dated 26.9.1961 passed in the Review Petition in the original decree dated 18.8.1961 would remain intact.

58. The operative portion of the above judgment is as follows:

“Since no appeal was preferred by the Respondent against the decree passed on 18.8.1961 awarding compensation for the land at the rate of Rs.200/per katha, that decree became final. The respondent made no attempt to file an Appeal against the decree

when the High Court found that the review was wrongly allowed on the basis that the decree revived and came into life again. The High Court should have allowed the cross appeal; and dismissed the appeal, which was, and could only be against the decree passed on 26.9.1961 after the review. We, therefore, set aside the judgment and decree passed by the High Court and allow the Appeal. The effect of this judgment would be to restore the decree passed by the Additional District Judge on 18.8.1961. We make no order as to costs...”

- 59.** In the present case, it is not on the issue on which the review was allowed, the Appeal has been filed by any of the parties to the tariff proceedings. But, it is only against the order rejecting the review on the second issue that has been appealed against.
- 60.** Under those circumstances, it cannot be said that the order of rejection under Order 47 Rule-7 CPC is appealable as the said provision specifically speaks of being non-appealable.
- 61.** It is the contention of the Appellant that only when a Review Petition is out rightly rejected in entirety, the Appeal would not lie but when the Petition for Review is partly allowed and partly rejected, the Appeal would lie as against the order regarding the issue rejected. This contention is misconceived. Law does not at all provide that when a Petition for Review is partly allowed on the first issue and partly rejected on the second issue, then the Appeal would

be maintainable to the extent of rejection of the second issue.

- 62.** The Appellant has relied upon the decision in the judgment (2012) 6 SCC 782 DSR Steel Private Limited Vs State of Rajasthan. In this judgment, the Hon'ble Supreme Court has dealt with three situations. The second situation referred to in the judgment is a situation where review Petition is allowed and the order under review is reversed or modified. Such an order becomes composite order whereby the court not only vacates the earlier order but simultaneously pass another order or modifies the one made earlier. This second situation is not applicable to the present case as it is not a situation where the State Commission vacated entire original tariff order dated 15.6.2012.
- 63.** In the present Appeal, as indicated above, the order passed in review is appealed by the Appellant to the extent of rejection of one of its two issues and not both the issues.
- 64.** As stated above, such an order of rejection in the Review order is reaffirmation of the order of rejection made in the main order and therefore it is not appealable. This is clear from the last sentence in paragraph 25.2 of the judgment in the DSR Steel case.
- 65.** We will now refer to paragraph 25.2 of the above judgment which reads as under:

“....the decree so vacated reversed or modified is then the decree that is effective for the purposes of further Appeal if any maintainable under the law..”.

- 66.** The last sentence in the said paragraph would indicate only the decree which was vacated, reversed or modified would alone be Appealable.
- 67.** But, in the present Appeal, the Appellant is aggrieved by the reaffirmation of the order of rejection. Therefore, the second situation referred to in the above judgment would not apply to the Appellant. It is well established proposition of law that the law does not permit the Appellant, having chosen once to file a review against the main order, again to file the Appeal against the review order affirming the main order in as much as the order rejecting the review is ex-facie not Appealable as per Order 47 Rule-7 of the CPC. The same is quoted below:

“An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting and application or in an appeal from the decree or order finally passed or made in the suit..”.

- 68.** In this context, it would be appropriate to refer to the judgment of Hon'ble Supreme Court in Rekha Mukherjee Vs Ashisk Kumar Das & Anr reported in (2005) 3 SCC 427 cited by the State Commission.

69. In this decision the facts are more distinctly akin to the facts of the instant appeal. In this decision, the trial court passed an entire dismissal decree dated 20.12.2001. In other words, the trial court dismissed the suit in its entirety. The defendant before the Trial Court preferred a review Petition. The review was allowed in part and rejected in part. After such a review order rejecting the portion of the order, the defendant preferred an Appeal against the entire original dismissal decree dated 20.12.2001 even though one part was allowed in the review. In this context, the Hon'ble Supreme court has held that the Respondent could have preferred an appeal only against that part of the dismissal decree in respect of which the review was not granted. Thus, this judgment establishes the legal proposition that Appeal would lie only against that part of the decree passed in the main suit in Original Order.

70. The relevant paragraph of the said judgment is reproduced below:

“Having filed a review application on legal advice and having succeeded therein part, it was not open to it to prefer an appeal against the entire decree dated 10.12.2001 whereby the suit in its entirety was dismissed. The Respondents could have only preferred appeal only from that part of the decree in respect whereof review was not granted....”

71. The above dictum laid down by the Hon'ble Supreme Court would make it evident that the Appeal lies against that part

of the decree passed in the main suit in respect of which the review was not granted. Therefore it can be safely concluded that the Appeal should be preferred by the Appellant only in respect of the part of the decree passed in the main order which has not been granted in the Review.

- 72.** At this juncture, it has to be pointed out that the very same issue relating to the Doctrine of Merger has been decided by this Tribunal in the recent judgment in Appeal No.88 of 2013 dated 2.12.2013 in the case of NTPC vs Central Electricity Regulatory Commission.
- 73.** The facts of the above case are almost similar to the present case. In that case also, the Central Commission disallowed four of the claims made in the main order and with regard to those four claims, the Appellant in that case filed a Review and in that Review, the Central Commission allowed only two claims but rejected the other two claims confirming the findings in the main order.
- 74.** As against the disallowance of the said two claims, the Appellant filed an Appeal as against the Review order. In that Appeal, the learned Counsel for the Respondent took a similar preliminary objection with regard to maintainability of the Appeal against the order partly rejecting the Review Petition contending that it was not maintainable as per Order 47 Rule-7 of the Civil Procedure Code. After considering the

various judgments cited by both the parties, this Tribunal dismissed the said Appeal as not maintainable. The findings are follows:

“15. According to the Respondent, since the prayers in relation to issues at (i) and (ii) were rejected in the Review Order the Appeal against the said order in respect of those issues is not maintainable in view of the provisions of the Order 47 Rule-7 of the Civil Procedure Code.

16. There is no dispute in the fact that in respect of issue No. (i) and (ii), the Central Commission rejected the claim both in the main order dated 23.5.2012 as well as the Review Order dated 8.2.2013.

17. As observed by the Hon’ble Supreme Court in the case of Municipal Corporation of Delhi v Yashwant Singh Negi, 2013 (5) SCALE 447 once the Court has refused to entertain the Review Petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the Review Petition because on the dismissal of the Review petition, the principle of merger does not apply.

18. If this is the principle which has been laid down by the Hon’ble Supreme Court then we have to deal with situation whether Review Order was partly allowed in respect of some of the issues and partly disallowed in respect of other issues.

19. The question is whether the doctrine of merger would apply to the cases where the rejection of

particular issues in the main order has been confirmed in the Review Order.

20. In this context, it would be appropriate to refer to the principles laid down on this issue by the Karnataka High Court in the case of Kothari Industrial Corporation Ltd., V Agricultural Income Tax Officer, ILR 1998 Karnataka 1510.

21. As per this decision rendered by the Karnataka High Court, when the subject matter of the order of the lower court is the same, as of the subject matter of the order of the Appellate Court, the order of the lower Court gets merged with the order of the Appellate Court so that there is only one order holding the field. But, if the order of the subordinate authority related to the several distinct issues and the Appeals are reviewed, is filed only in regard to one or few matters, then there cannot be merger of the entire order of the lower court with the order of the Appellate Court. In that event what will merge in the order of the Appellate Court is not the entire order of the lower court but only that part of the order which relates to the subject matter of the Appeal.

22. On the basis of these observations, the High Court has laid down the principles with regard to doctrine of merger. They are as follows:

(a) Where any order of decree of a Court, authority or Tribunal is subjected to an appeal or revision and the appellate or revisional authority passes an order modifying, reversing or affirming the original order, the original order merges with the order of the superior authority on the principle that there cannot be more than one order operating at the same time.

(b) If the Appeal or Revision is restricted to a delinkable part or portion of the original order or one of the several matters or issues dealt by the original order, then, only that part of the original order which is the subject-matter of the appeal or revision will merge in the order of the superior authority and the remaining portion of the original order which is not subjected to appeal or revision will remain undisturbed.

(c) Where the Appellate authority has given plenary jurisdiction over the entire matter dealt with by the original order, irrespective of the fact whether Appeal is filed in regard to the entire matter or part of the matter, the entire original order will merge in the order of the Appellate Authority. However, where such appellate authority entrusted with plenary jurisdiction consciously restricts the scope of scrutiny to only a part of the original order, then, whether only that part of the original order which is subjected to scrutiny and not the entire order will get merged with the order of the appellate authority, is a matter on which there is divergence of views. The view of this Court in such cases has been that the merger will be in respect of the entire order.

(d) There will be no merger at all where the subsequent order is passed by the same authority, either by way of review or rectification. Where an order is passed on review, the original order gets wiped out as it is set aside by the order granting review and is superseded by the order made on review. There is thus no 'merger' where an order is

passed rectifying any mistake in the original order; there is neither 'merger' nor 'supersession'. The original order gets amended by the order of rectification by correcting the error."

23. These principles would make it clear that the purpose of doctrine of merger is to ensure that at one time, one order is operative. This means that part of the order which is not the subject matter of the Appeal cannot be said to have merged with the order passed by the Superior Court. The said principle would apply even in the case of Review. This is because while the Doctrine of Merger is applicable in case of an Appeal or Revision even if the same is dismissed by the Superior Court, the Doctrine of Merger will not be applicable in the event, the Review is rejected.

24. This principle has been quoted in the judgment of Hon'ble Supreme Court in the case of DSR Steel P Limited v State of Rajasthan (2012) 6 SCC 762. The following is the observation:

25.2. The Second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review Petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective

for the purpose of a further appeal, if any, maintainable under law.

The decision of this Court in Manohar v Jaipalsing in our view, correctly, settles the legal position. The view taken in Sushil Kumar Senv. State of Bihar and Kunhayammed V State of Kerala, wherein the former decision has been noted, shall also have to be understood in that lights only.

25. So, the above observation of Hon'ble Supreme Court, the Doctrine of Merger in the case of Review will be applicable only to the subject matter of the Review and the same will not be applicable if the Review is rejected in respect of the said subject matter.

26. In other words, if the Review Petition raises several distinct issues and the some are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. If this is applied to the present case, then we are constrained to hold that the present Appeal as against the Review order in respect of these issues is not maintainable in view of the fact that the issue has been decided in the main order itself.

27. So, it would be appropriate for the party only to file the Appeal as against the main order and not against the rejection of the order passed in the Review Petition.”

75. The above judgment was rendered in Appeal No.88 of 2013 by this Tribunal relying upon the judgment of Hon'ble Supreme Court 2013 (5) Scale 447 and the judgment of

Karnataka High Court ILR 1998 Karnataka 1510 and other judgments.

76. Thus, the above issue was already decided by this Tribunal in the above judgment after considering various judgments of this Tribunal, other High Courts and Hon'ble Supreme Court. In our considered view, this ratio would apply to the present case also.

77. Summary of Our Findings:

“It is the settled principle of law that when the Review Petition raises several distinct issues and the some of them are rejected, the Doctrine of Merger in so far as the issues which were rejected in the Review Order will not have any application. If this principle is applied to the present case, we are constrained to hold that the present Appeal as against the Review order in respect of the issue rejected is not maintainable in view of the fact that this issue had already been decided in the main order itself. The Appeal is maintainable only against main order and not the Review Order. Hence, we uphold the objection of the State Commission regarding the Maintainability of the Appeal.

78. In view of our above findings, we hold that the Appeal is not maintainable.

79. Accordingly, the Appeal is dismissed.

80. However, there is no order as to costs.

81. At the end, we record our appreciation for the effective presentation made by Mr. Parag Mohanty, the learned Counsel for the Appellant and Mr. C.K. Rai, the learned Counsel for the State Commission after thorough preparation on the basis of the number of authorities cited by them.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 08th Jan.2014.

√REPORTABLE/~~NON-REPORTABLE~~