Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.17 of 2012

Dated: 20th Sept, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Ajmer Vidyut Viteran Nigam Limited
Hathibhata Power House,
AJMER-305 001
Rajasthan

Appellant

Versus

1. **Rajasthan State Electricity Regulatory Commission**
   Vidyut Bhawan, Jyoti Nagar,
   Jaipur-302 005

2. **Rajasthan State Mines & Minerals Limited**
   4, Meera Marg,
   Udaipur-313004

Respondents

Counsel for the Appellant (s): **Mr. Shyam Moorjani**
Mr. Shantanu Bhardwaj

Counsel for the Respondents (s): **Mr. C K Rai for R-1**
Mr. P N Bhandari for R-2

J U D G M E N T

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

1. Ajmer Vidyut Vitran Nigam Limited is the Appellant herein. This Appeal has been filed by the Appellant challenging the impugned order dated 29.11.2011 passed by the Rajasthan State Electricity Regulatory Commission (R-1) (State Commission) allowing the Review Petition filed by the Rajasthan State Mines and Minerals Limited (R-2).

2. The short facts are as follows:-

   (a) The Appellant, Ajmer Vidyut Vitran Nigam Limited (Ajmer Vidyut) is the Distribution Licensee in the State of Rajasthan. Rajasthan State Mines and Minerals Limited, the second Respondent is involved in mining of rock phosphate located in Udaipur District of Rajasthan.

   (b) Both the Appellant and Rajasthan State Mines and Minerals Limited (R-2) are the public Sector undertakings of the State of Rajasthan.

   (c) Rajasthan State Mines and Minerals Limited (R-2), had set-up various Wind Energy Power Plants in

Jaisalmer District of Rajasthan. A Wheeling and Banking Agreement was entered into between the Appellant and the 2nd Respondent in respect of adjustment of the energy of captive generation.

(d) Rajasthan State Mines and Minerals Limited (R-2) filed a Petition in Petition No.100 of 2006 before the Rajasthan State Commission for recovery of the amount wrongly adjusted by change of accounting methodology from the Appellant.

(e) After inquiry, the Petition filed by the Rajasthan State Mines and Minerals Limited (R-2), was allowed by the State Commission by the order dated 4.11.2006 by setting aside the billing procedure adopted by the Appellant.

(f) Being aggrieved by the said order, the Appellant filed a Petition for review of the order dated 4.11.2006 before the State Commission, but the same was dismissed. In the said order, the State Commission directed the Appellant to make compliance of the Commission's order dated 4.11.2006 and to settle the dispute at its corporate level.

(g) Being aggrieved by both the said orders, the Appellant filed an Appeal before this Tribunal in Appeal No.74 of 2007. Ultimately, by a majority judgment, this Tribunal by the judgment dated 5.8.2009 dismissed the Appeal directing the Appellant to comply with the order dated 4.11.2006 passed by the State Commission.

(h) Since the said order was not complied with, State Mines and Minerals Limited (R-2) filed a Petition No.227 of 2010 before the State Commission under Section 142 read with Section 86 (1) (f) of the Electricity Act, 2003 to take action against the Appellant for non-compliance of the order dated 4.11.2006 and for directions for compliance of the said order. This Petition No.227 of 2010 was disposed of by the State Commission through the order dated 6.1.2011 dismissing the said Petition since there was no consequential direction regarding the refund of the adjusted amount in the order dated 4.11.2006.

(i) Aggrieved by this order dated 6.1.2011, the Respondent -2, the Rajasthan State Mines and Minerals Limited field a Review No.247 of 2011 before the State Commission mainly on the

ground that the majority judgment of the Tribunal on 5.8.2009 was not given effect to in the order dated 6.1.2011 which is apparent error on the face of the record.

(j) Having realised the mistake of having not taken into account the judgment of this Tribunal, the State Commission reviewed the order dated 6.1.2011 and passed the consequential orders on 29.11.2011.

(k) As against this order, the Appellant has filed this Appeal mainly on the ground that the State Commission allowed the said review petition by sitting in the Appeal over its own order and reversed the said order dated 6.1.2011 which is not permissible under the law.

3. The learned Counsel for the Appellant would make the following submissions to assail the impugned order dated 29.11.2011:

(a) While setting aside the billing procedure, the State Commission, in its order dated 4.11.2006 neither set-aside the recovery made in the past nor ordered for the refund. On that basis, the State Commission by the order dated 6.1.2011

dismissed the Petition No.227 of 2010 filed by the State Mines and Minerals Limited (R-2) under Section 142 of the Electricity Act, 2003 holding that action US 142 of the Electricity Act, 2003 is not warranted. Having held so, the State Commission entertained the Review Petition filed by the State Mines and Minerals Limited (R-2) for review of the order dated 6.1.2011, in Petition No.247 of 2011 and allowed the said Review Petition through the order dated 29.11.2011 by setting aside its own order dated 6.1.2011 by taking a total turn around.

(b) In the Review, the State Commission cannot sit in the Appeal over its own order reconsidering and reinterpreting all the materials already available on record by brushing aside its own earlier categorical findings in the order dated 6.1.2011.

(c) There was no error apparent on the face of the record since the order dated 6.1.2011 cannot be reviewed as the material namely the Tribunal's judgment was already placed on record before the State Commission as referred to in the Review Petition No.247 of 2011. In the Review, the material which was already made available before

the State Commission before passing the order dated 6.1.2011, cannot be reconsidered to take a different view on the basis of the said material in the impugned order dated 29.11.2011.

(d) The ground that relevant material has not been considered by the State Commission can be a ground of Appeal and certainly not the ground of Review. Therefore, the impugned order dated 29.11.2011 allowing the Review Petition by sitting in the Appeal over its own order is illegal.

4. In reply to the above submissions, the learned Counsel for the Commission as well as the learned Counsel for the second Respondent, in justification of the impugned order dated 29.11.2011, have made the following submissions:

(a) Since the State Commission in its order dated 4.11.2006 set aside the billing methodology adopted by the Appellant, the earlier methodology comes into operation. Therefore, the order of the State Commission has to apply retrospectively i.e. from the date when the billing methodology was changed by the Appellant. The said order dated 4.11.2006 passed by the State Commission was upheld by this Tribunal by the majority judgment. In the judgment, the applicability of the relief

retrospectively was emphasised in unequivocal words in the judgment rendered by this Tribunal. This aspect, namely the specific ratio and consequential directions given by the Tribunal has not been given effect to by the State Commission while passing the order dated 6.1.2011. The State Commission has committed an apparent error on the face of the record while passing the order dated 6.1.2011 without considering the findings given by the Tribunal which is a grave mistake.

(b) The State Commission while passing the impugned order dated 6.1.2011 has restricted the implication of the earlier order dated 4.11.2006 without taking into consideration of the findings and the directions given by the Tribunal in which the consequential directions have been given in pursuance of the State Commissions order dated 4.11.2006. Once this apparent error is pointed out, the said error was corrected by the State Commission by passing the consequential orders as directed by this Tribunal in the judgment dated 5.8.2009. If the same is not corrected the aforesaid error it will result in miscarriage of justice. As there is an apparent error on the face of the record, namely the judgment of this Tribunal

dated 5.8.2009 has not been given effect to in the order dated 6.1.2011, it has got to be corrected as the same was done purely by inadvertent mistake. Therefore, the impugned order is justified.

5. In the light of the contentions urged by the rival parties, the following question would arise for consideration in this Appeal:

> "Whether there was any error apparent on the face of the record in the impugned order dated 6.1.2011 passed by the State Commission and whether such an error can be rectified by way of a review jurisdiction under the order 47 and Rule-1 of Civil Procedure Code read with Section 94 (1) (f) of the Electricity Act, 2003 ?

6. Before dealing with this question it would be better to quote relevant discussion and finding of the State Commission in the impugned order which are as follows:

> "***Commission's Analysis and Decision:***
>
> *"10. Having heard the parties and after considering the material placed on record, the Commission has noted that the two petitions seek review of the same impugned order dated 06.01.2011 in respect of findings arrived therein by the Commission.*

11. As the petitions have been filed before the Commission for review of the Commission's order dated 6.1.2011under section 94(1)(f) of the Act, the conditions prescribed under order XLVII of Civil Procedure Code are to be satisfied for review. Review under the CPC is permissible under order XLVII, Rule 1 on the following grounds:

a) Discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed.

b) Some mistake or error apparent on the face of the record and

c) For any other sufficient reason

12. It is well settled that there are definitive limits to the exercise of the power of review; Order XLVII, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important matter or evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

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15. It is obvious that there cannot be re-hearing of the matter during review and an error, which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying exercise of review power.

An erroneous decision cannot be „reheard and corrected".

16. The object behind review has been well explained by Supreme Court in "S. Nagaraj v. State of Karnataka", 1993 Suppl. (4) SCC 595, wherein their Lordships held as follows: "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to any one……. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice."

17. In the light of the said legal position, it would now be appropriate to examine as to whether any error or mistake has crept in the impugned order dated 06.01.2011 and if yes, whether the error has led to miscarriage of justice and whether a review is warranted.

18. It may be recalled that in case of RSMML, the billing methodology by respondent AVVNL was modified in November, 2005 as a consequence of audit objection. On this issue, the Commission vide its order dated 04.11.2006 decided as under:

> *"27. Thus, the billing procedure, as per the audit para, adopted by AVVNL is not based on harmonious interpretation of provisions of WBA & GoR policy and is not only against the policy of banking but also*

against natural justice to the generator. The procedure adopted in consequence of the audit para is, therefore, set aside." (emphasis supplied)

19. The respondent AVVNL, aggrieved by this order dated 4.11.2006 of the Commission filed an appeal in APTEL. While deciding the appeal there wasdisagreement in the views of two members i.e. Hon"ble Ms. Justice Manju Goel, Judicial Member and Hon"ble Mr. A.A.Khan, Technical Member and, therefore, the matter was referred to another Member i.e. Hon"ble Member Shri H.L. Bajaj. On the issue of billing methodology, he agreed with the judgment of Hon"ble Mrs. Justice Manju Goel.

20. Accordingly, the majority judgment of APTEL, vide order dated 5th August, 2008 signed by Technical Member Shri A. A. Khan and Judicial member Mrs. Justice Manju Goel, says as under:

"3. We have observed that on the substantive point of divergence whether the billing pattern practiced prior to November, 2005 was to be followed or not, Hon"ble Mr. H.L.Bajaj endorses the judgment of Hon"ble Mrs. Justice Manju Goel. The judgment delivered by the Hon"ble Justice Mrs. Manju Goel to that extent is a majority judgment although the points of divergence viz. applicability of Principles of Estoppels and Conduct of Parties deciding the future operations have not been answered. The appeal stands dismissed." (emphasis supplied)

21. It is obvious that the said judgment makes it clear that the judgment delivered by Hon"ble Justice Mrs. Manju Goel, on the issue of billing methodology,becomes the majority judgment.

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23. The Commission in its order dated 4.11.2006 has clearly observed that the procedure adopted in consequence of audit para is being set aside. Since the revised methodology, as a consequence of audit, has been set aside the earlier methodology comes into operation. Obviously, therefore, the implication is that the order of the Commission has to apply retrospectively i.e.from the date when the billing methodology was changed as far as RSMML "s case is concerned.

24. The order of the Commission has not only been upheld by APTEL but applicability of relief retrospectively has been emphasized in unequivocal words in the judgment of Hon"ble Justice Mrs. Manju Goel saying that "During the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified by the parties, the appellant will bill the respondent No. 2 in the method applied before November, 2005". As has been mentioned earlier, the judgment of Hon"ble Justice Mrs. Manju Goel on the applicability of billing pattern practiced prior to November, 2005 has been the majority judgment of the APTEL.

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26. On account of various observations on different occasions, the Commission in its impugned order dated 06.01.2011 interpreted the order dated 04.11.2006 in harmony with other orders instead of limiting to non-compliance of the order and under misconception as regards „set aside" based on examination of material on

record, including pleadings of petitioners and respondents, came to the conclusion, as under:

> *"23. In the light of the above discussed position, it does not emerge from order dated 4.11.2006 that the said order is to be applied retrospectively and excess recovery is to be refunded, which is the main contention of both the petitioners i.e. M/s Balkrishna and M/s RSMML."*

27. Accordingly, Commission in the impugned order concluded that from the earlier orders dated 25.7.2006 and 4.11.2006, it could not find or infer any specific decision/order for refund of amount claimed by the petitioner RSMML.On reading of the Commission's order in case of RSMML as well as that of APTEL in the same matter, it is obvious that billing methodology followed prior to audit objection has to be applied in RSMML's case. It may be noted that entitlement for such refund is automatic once billing methodology set aside by the Commission is replaced by the methodology adopted earlier.

28. It is, therefore, obvious in the matter that impugned order dated 06.01.11 has virtually re-interpreted and diluted the earlier order dated 04.11.2006. The Commission finds merit in the contention of the learned counsel of the petitioner that RSMML"s order has to stand on its own legs and if language of the order is clear the intent behind order is not required to be seen. The RSMML order has become final and absolute and has not only been upheld but clear emphasis has been given by APTEL on the issue of billing methodology saying that AVVNL will bill RSMML in the manner followed before November, 2005.

29. It may be mentioned that the impugned order dated 06.01.2011 was passed in the context of alleged non-compliance of earlier orders. Therefore, the matter before the Commission was limited to ensuring compliance of the earlier orders and was not for a fresh decision or adjudication. The earlier order, whose compliance is being sought, is beyond re-consideration or review or reinterpretation by the Commission. It has to be enforced as it is without diluting the same in any manner.

30. In the light of the position discussed above, Commission is of the view that the impugned order dated 06.01.2011 suffers from apparent error to the extent it has restricted the implication of the earlier order dated 04.11.2006 and which would result in miscarriage of justice if the same is not corrected.

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32. In the facts and circumstances of the case, we are, therefore, inclined to review the impugned order to the extent it has resulted in restricting the implication of the order dated 04.11.2006.

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34. In the light of position as discussed earlier in this order, the Commission has come to the conclusion that the billing methodology as per order dated 04.11.2006 has to be applied retrospectively in case of RSMML i.e. from the date when the billing methodology was changed as a consequence of audit observations and excess recovery be refunded".

7. In order to decide as to whether the above finding is correct or not and to understand the core issue, it would be appropriate to reiterate the relevant facts and background of the case.

8. The Ajmer Vidyut Vitran Nigam Limited, the Appellant and the State Mines and Minerals Limited (2nd Respondent) are the public sector undertakings of the State of Rajasthan. The Appellant is the distribution licensee in the State of Rajasthan. The State Mines and Minerals Limited had been the consumer of the Appellant.

9. In pursuance of the policy for promoting generation of power from the Non-Conventional Energy Source, issued by the Government of Rajasthan, the State Mines and Minerals Limited (R-2) set up various Wind Energy Power Plants in Jaisalmer District of Rajasthan. The Wheeling and Banking Agreements dated 29.8.2001 and 19.2.2004 were entered into between the Appellant and the Second Respondent. The Second Respondent was entitled to banking in the event anything was left unutilised after adjustment of the wheeled energy against the captive consumption.

10. A dispute arose between the Appellant and the State Mines and Minerals Limited (R-2) in respect of wrong adjustments of the wheeled energy of the wind generator for captive consumption by starting a new accounting system.

11. Questioning this, the State Mines and Minerals Limited (R-2), filed a Petition before the State Commission on 10.4.2006 in Application No.100 of 2006 under Section 86 (1) (e) and 84(4) of the Electricity Act, 2003 against the Appellant contending that the change of accounting system is not valid as the Appellant cannot act unilaterally and retrospectively. In that Petition, the State Mines and Minerals Limited (R-2) sought for the directions for the recovery of the amount arising out of the change of the accounting methodology and also for staying the said account system till further orders.

12. After hearing the parties, the State Commission allowed the said Petition by the order dated 4.11.2006. The relevant operative portion of the order dated 4.11.2006 is quoted below:

> "*Thus, the billing procedure as per the audit Para, adopted by AVVNL is not based on harmonious interpretation of the provisions of WBA & GOR Policy and is not only against the Policy of banking but also against natural justice to the generator. The procedure adopted in consequence of the audit Paras therefore is set-aside....".*

13. Thus, the State Commission having held that the billing procedure adopted by the Appellant was wrong, by the order dated 4.11.2006, set-aside the said billing procedure.

14. Being aggrieved by the said order, the Appellant filed a Petition before the State Commission for review of the order in Petition No.124 of 2007. However, the State Commission dismissed the said Review Petition by the order dated 13.4.2007 directing the Appellant to make the compliance of the Commission's order dated 4.11.2006.

15. Challenging the above said order dated 13.4.2007, the Appellant filed an Appeal before the Appellate Tribunal in Appeal No.74 of 2007. After hearing the parties, the two Members of the Bench passed their separate orders on 9.5.2008. While Hon'ble Mr. A A Khan allowed the Appeal filed by the Appellant, Hon'ble Justice Mrs. Manju Goel dismissed the Appeal. Then, it was referred to third member Hon'ble Mr. H L Bajaj. After hearing the parties, Hon'ble Mr. H L Bajaj by the order dated 24.7.2009, concurred with Justice Mrs. Manju Goel. Thereafter, the final majority judgment was rendered on 5.8.2009. The final verdict is as follows:

> *"54. In view of the above analysis the Appeal is dismissed. The Petition filed by RSMML before the Commission is allowed. During the continuance of the Wheeling and Banking Agreement and the HT*

Agreement, unless the same are expressly modified by the parties, the Appellant will bill the Respondent No.2 in the method applied before November, 2005".

16. Thus, this Tribunal confirmed the impugned order dated 4.11.2006 and directed that the Appellant shall bill the Respondent-2 only in the old method applied before November,2005.

17. Despite the majority judgment, the Appellant did not execute the said judgment. Therefore, the State Mines and Minerals Limited (R-2) filed a Petition in Petition No.227/2010 before the State Commission under Section 142 read with Section 86 (1) (f) of the Electricity Act praying for immediate compliance of the orders of the State Commission dated 4.11.2006 confirmed by the Appellate Tribunal. However, the State Commission, after hearing the parties, dismissed the said Petition through the order dated 6.1.2011 on the ground that from the order dated 4.11.2006 the Commission could not find any specific direction for the refund of the amount wrongly adjusted and therefore, no action could be taken under 142 of the Act as there was no violation of the directions.

18. Aggrieved by the order dated 6.1.2011, the State Mines and Minerals Limited (R-2) filed the Review before the State Commission in Petition No.247 of 2011 seeking the review

of the order dated 6.1.2011. The main ground urged in the review is as follows:

> *"In the Majority Judgment dated 5.8.2009 passed by the Hon'ble Appellate Tribunal for Electricity, the Hon'ble Tribunal has categorically held that during the continuance of the wheeling and banking agreement and the HT agreement, unless the same are expressly modified by the parties, the Appellant will bill the Respondent No.2 in the method applied before November, 2005 and therefore, it was apparent error on the record that the majority judgment of the Hon'ble Appellate Tribunal was not given effect to in the order dated 6.1.2011 passed by the Commission....".*

19. On hearing the parties in the Review Petition, the State Commission, having realised its mistake that the judgment of the Tribunal giving specific directions had not been followed while the order was passed on 06.1.2011, corrected its mistake in the Review Order dated 29.11.2011 by allowing the Review Petition and directing the amount to be refunded on the strength of the Tribunal's judgment. The relevant direction is as follows:

> *"34. In the light of position as discussed earlier in this order, the Commission has come to the conclusion that the billing methodology as per order dated 04.11.2006 has to be applied retrospectively in case of RSMML i.e. from the date when the billing methodology was changed as a consequence of audit observations and excess recovery be refunded".*

20. As against this order, the Appellant filed this Appeal mainly contending that the impugned order suffers from illegality as the Commission could not sit in the Appeal over its own order dated 6.1.2011 by reconsidering all the materials, which were already available on record by brushing aside its own findings in the order dated 6.1.2011.

21. Now let us discuss the issue.

22. The impugned order was passed by the State Commission on 29.11.2011 in the Review Petition filed by the State Mines and Minerals Limited(R-2) in Petition No.247 of 2011 under Section 94 (f) of the Electricity Act, 2003. The provisions of the Section 94 (f) of the Electricity Act, 2003 are reproduced below:

> *"Section 94 (Powers of Appropriate Commission)*
>
> *(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 in respect of the following matters, namely:-*
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> *(a).....*
>
> *(b).....*
>
> *(f) Reviewing its decisions, directions and Order".*

23. Since Section 94 (f) deals with the powers to the Commission to invoke the powers vested in a Civil Court

under the Code of Civil Procedure, let us now refer to the relevant provisions in the Code of Civil Procedure pertaining to the Review:

> "*Order 47 Rule-1 of the Code of Civil Procedure deals with the provisions pertaining to Review. It provides as under:*
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> *(1) Application for review of judgment (1) Any person considering himself aggrieved-*
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> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
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> *(b) By a decree or order from which no appeal is allowed, or*
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> *(c) By a decision on a reference from a court of Small causes,*
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> *(d) And who from the (1) discovery of new and important matter of evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or (2) the order made or on account of some mistake or error apparent on the face of the record or (3) for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order....".*

24. The reading of the above provisions would make it clear that review is permissible on the following grounds:

(a) The discovery of a new and important matter of evidence which, after exercise of due diligence could not be produced by the party at the time when the decree was passed.

or

(b) The impugned order was passed on account of some mistake.

or

(c) Where error in the impugned order is apparent on the face of the record which is palpably wrong

(d) For any other sufficient reason.

25. If any of the conditions satisfy, the party considering itself aggrieved may apply for review of the original order passed by the Court. This provision, further also makes it clear that a Petition for review would be permissible not only upon discovery of a new and important piece of evidence, which could not be produced earlier but also when there exists an error apparent on the face of the record which was committed on account of any mistake or for any other sufficient reason.

26. In the light of these grounds for review, we shall see which are the grounds which are applicable to the present case.

27. Before finding out the applicable grounds, it would be worthwhile at this stage to quote various decisions cited by the authorities with regard to the powers of the Court to entertain the Review of the orders earlier passed by the Court:

(a) *Natesa Naicker v Sambanda Chettiar, AIR 1941 MADRAS 918,*

"*The Appeal against the Review Order deserves more serious consideration. It was held in 46 Mad 955 that an error apparent on the face of the record under Order No.47, Rule-1, Civil Procedure Code., might be an error of law and in that particular case, the error of law which was the ground for review was the failure to take notice of an established authority reported in the Indian law Reports finally deciding a matter of succession. That is to say, the bench recognised the power of the Court in an appropriate case to review its order because it had overlooked a leading authority on a clear matter of law. So far as I am aware, this decision is still good law. I have followed it myself in a case, though it has been criticized by a single Judge of this Court in a Case, AIR 1927 Mad 998, it has not, so far as I am aware, been dissented from by any subsequent Bench. Certainly the decision in 46 Mad 955 should not be taken any further than it goes. It is not authority for the view that whenever a Judge has overlooked a ruling he has a power to review his decision; nor is it authority for the view that whenever, after a judgment has been pronounced, a subsequent ruling changes the accepted view of the law, that subsequent ruling can be a ground for review. But when there is a legal position clearly established by a well known*

authority and by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in proper case, in the light of 46 Mad 955, be a ground coming within the category of an error apparent on the face of the record..".

(b) Rameswaraswami Varu V Ramalinga, AIR 1960 AP 17 ,

.....

"It is conceded that an error justifying a review may either be an error of fact or error of law. But is it urged that a review is inadmissible merely on the ground that upon fuller arguments and a fresh consideration of the issues involved, a judge changes his mind. The Respondents would maintain however (1) that the question as to whether there is an error apparent on the face of the record is one primary for the Court or Tribunal called upon to review its decision and (2) that in the present case, there was a failure by the Tribunal on the former occasion to consider the decisions of the higher courts as authorities binding upon it if not as judgments constituting res judicata.

If failure to notice and give effect to binding authority because of failure of counsel to draw the attention of a Judge to such an authority can be said to constitute an error apparent on the face of the record, vide Murari Rao V. Balvant Dikshit, I.L.R 46 Mad 955: (AIR 1924 Mad 98) and Natesa Naicker V Sambanda Chaettiar, AIR 1941, Mad 918".

(c) Medical & Dental College V Nagaraj reported in AIR 1972 Mysore 44,

".....Where there is an error apparent on the face of the record, the question as to how that error

occurred, is of no relevance for the purpose of review, and that it is immaterial whether such effort occurred by reason of the counsel's mistake or had crept in by reason of oversight on the part of the court".

As started by Wadsworth J.. in Vantatarayulu Naidu v. Rattamma Garu, AIR 1939 Mad 293, Where there is an error apparent on the face of the record, it should be corrected at the earliest possible time without driving the parties to the expense of an Appeal or Revision Petition to which there would be no answer".

(d) Board of Control for Cricket, India and Anr Vs. Netaji Cricket Club & Ors reported in 2005 4 SCC 741:,

". ....An application for review would also be maintainable if there exists sufficient reason therefore, what would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason in Order 47, Rule-1 of the Code is wide enough to include a misconception of fact or law by a court or even an Advocate, An application for review may be necessitated by way of invoking the doctrine äctus curiae neminem gravabit".

(e) S Bhagirathi Ammal Vs. Palani Roman Catholic Miss 2008 SC 719/MANU/SC/8177/2007,

"....An error contemplated under the Rule must be such which is apparent on the face of the record and not an error which as to be fished out and searched. In other words, it must be an error of inadvertence. It should be something more than a mere error and it must be one which must be

manifest on the face of the record. When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials placed before the Court. If the error is so apparent that without further investigation or enquiry, only one conclusion can be drawn in favour of the Appellant, in such circumstances, the review will lie...".

28. The crux of the ratio decided in the authorities referred to above are as follows:

(a) An error contemplated under the Rule must be such which is apparent on the face of the record. It cannot be an error which has to be fished out and searched. In other words, it must be an error due to inadvertence or mistake.

(b) Order 47 Rule-1 of the code provides for filing an application for Review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some inadvertent mistake or for any other sufficient reason. What would constitute sufficient reason would depend on the facts and circumstances of each case. The words "sufficient reason" in order 47 Rule-1 of the

Code are wide enough to include a misconception of fact or law by a court or even by an Advocate.

(c) When does an error cease to be mere error and becomes an error apparent on the face of the record depends upon the materials available on record. If the error is so apparent, then without further investigation or enquiry, only one conclusion can be drawn in favour of the Appellant, in such circumstances, the review will lie.

(d) When there is a legal position clearly established by a well settled authority and when by some unfortunate oversight the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the said binding authority, then the Judge can consider it as a ground coming within the category of an error apparent on the face of the record.

(e) Failure to notice and to give effect to the binding authority because of failure of counsel to draw the attention of a Judge to such an authority can be said to constitute an error apparent on the face of the record.

(f) Where there is an error apparent on the face of the record, it should be corrected at the earliest possible time without driving the parties to approach the Appellate Forum, which may incurve expenditure.

(g) When there is an error apparent on the face of record, the question as to how that error occurred, is of no relevance for the purpose of review. Similarly it is immaterial whether such error occurred by reason of the counsel's mistake or had crept in by reason of oversight on the part of the court.

29. Keeping this ratio in our mind, let us now discuss the issue in the light of the facts and background of the case.

30. As indicated above, there are four grounds which would make the review permissible:

(a) The first ground is relating to the discovery of new and important matter or evidence which after the exercise of due diligence could not be produced by the parties at the time when the decree was passed. This ground is not applicable to the present case since the judgment of the Tribunal which has confirmed the order passed by the State Commission dated 4.11.2006 was

very much available during the pendency of the instant review proceedings before the Commission. Therefore, the question of discovery of new evidence which cannot produced during the pendency of the proceedings does not arise in this case.

(b) The second ground is that the order was made on account of some mistake.

(c) The third ground is an error apparent on the face of the record

(d) The fourth ground is for any other sufficient reason,

31. According to the learned Counsel for the Respondents, all above three grounds (b), (c) and (d) except ground number (a), would apply to the present case.

32. As indicated above, it is a settled law that when there is a legal position clearly established by a well known binding authority and the same had been overlooked by the Court either by the omission of the Counsel, to explain the legal position or due to the unfortunate over sight of the Court, then it would become an apparent on the face of the record. This cannot be said to be a mere error which has been fished out and searched.

33. According to the learned Counsel for the State Commission as well as the Learned Counsel for the 2nd Respondent, it was an error apparently committed due to inadvertent mistake of the Commission who has by oversight failed to consider the said judgment of the Tribunal and by the failure of the Learned Counsel to elaborate the impact of the Tribunal's findings confirming the order passed by the Commission on 4.11.2006.

34. There is no dispute in the fact that the State Commission specifically held in the order dated 4.11.2006 that the billing procedure adopted by the Appellant is not based upon the harmonious interpretation of the provisions under the Government of Rajasthan policy and it was against the policy of binding as well as against the policy of natural justice to the generators and as such, the procedure adopted through the new accounting system was wrong. On that ground, billing procedure was set-aside. Having held so, and having set-aside the billing procedure as prayed for by the 2nd Respondent in the order dated 04.11.2006, the State Commission while passing an order while disposing of the petition under Section 142 of the Act by the order dated 6.1.2011 wrongly interpreted the order dated 4.11.2006 in harmony with the earlier order passed by the Commission dated 25.7.2006 in its own way without taking note of the

findings and directions given by the Tribunal which rendered the majority judgment on 5.8.2009 in the very same matter.

35. In short, it can be concluded that the State Commission has committed an error apparent on the face of the record while passing the order dated 6.1.2011 by not giving effect to the judgment of the Appellate Tribunal dated 5.8.2009 by which the specific direction was given with regard to the refund, which was binding on the State Commission.

36. In other words, if the findings and consequential directions given in the majority judgment of the Tribunal dated 5.8.2009 had been taken note of by the Commission and if the legal position has been clarified by the learned Counsel for the 2nd Respondent, the State Commission would not have passed dismissing the petition by order dated 6.1.2011, which is completely in conflict with the findings of the Tribunal.

37. As a matter of fact, as pointed out by the learned Counsel for the State Commission, the order passed by the Commission on 4.11.2006 got merged with the Appellate Tribunal's judgment dated 5.8.2009 wherein the Tribunal not only confirmed the order of the State Commission dated 4.11.2006 but also upheld the retrospective applicability of relief by holding that "***During the continuance of the wheeling and banking agreement and the HT agreement,***

unless the same are expressly modified by the parties, the Appellant will bill the Respondent No.2 in the method applied before November, 2005".

38. In view of the fact that already the State Commission by the order dated 4.11.2006 set aside the billing procedure adopted by the Appellant and also of the fact that the Tribunal up-held the retrospective applicability of the relief and accordingly gave the consequential directions, the State Commission ought to have considered the findings given in its order dated 4.11.2006 as well as the findings and directions given by this Tribunal on 5.8.2009 and on that basis it ought to have granted the appropriate relief on 6.1.2011 itself but unfortunately as confessed to by the learned Counsel for the Rajasthan State Mines and Minerals Limited(R2), the real impact of the Tribunal's judgment dated 5.8.2009 was not explained and brought to the notice of the State Commission while arguing the matter and that the State Commission also had out of over sight made a mistake inadvertently, by not following findings and direction given in the judgment of this Tribunal.

39. In view of the above, it has to be held that the above error of not having considered the Appellate authority judgment which is binding on the State Commission on the very same issue relating to same parties has actually been committed.

It cannot be disputed that it is a settled law as held by the various authorities that when the orders of an inferior court is confirmed or modified by the Appellant Court, the order of inferior court gets merged with the Appellate Court. This principle has been laid down in the following authorities:

(a) Gojer Bros (Pvt) Ltd. Vs Shri Ratan Lal Singh reported in (1974) 2 SCC 453/MANU /SC/ 0390/ 1974

"Therefore, the judgment of an inferior court, if subject to examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity bit its merger with the judgment of the superior court".

(b) Kunhayammed & Ors Vs State of Kerala & Anr reported in AIR 2000 SC 2587, MANU/SC /0432/2000

"Once the superior court has disposed of the lis before it either way- Whether or order under Appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, Tribunal or the authority of law...".

40. In view of the above well laid down principles, the impugned order dated 4.11.2006 passed by the Commission got merged with the judgment rendered by the majority

judgment of this Tribunal on 5.8.2009, while, such being the legal position, the State Commission ought to have taken note of the Tribunal judgment and given consequential directions in the light of the findings and directions given by this Tribunal. The failure to do this was a grave mistake on the part of the State Commission. When such an apparent mistake was brought to the notice of the State Commission, it correctly realised their mistake and immediately corrected the error apparent on the face of the record by passing the impugned order without giving a room to blame the State Commission that the State Commission has committed the blunder or contempt by not following the judgment of this Tribunal. Thus timely correction by the State Commission through the impugned order is quite correct and justified.

41. <u>Summary of Our Findings</u>

i) The State Commission committed an error apparent on the face of record while passing the order dated 06.01.2011 by not giving effect to the judgement of the Appellate Tribunal dated 05.8.2009 giving a specific direction with regard to the refund on the basis of the order dated 04.11.2006, which was binding on the State Commission.

ii) It is a settled law that when the orders of an inferior court is confirmed or modified by the Appellate Court, the order of the inferior court gets merged with the Appellate Court's order. In view of this principle, the impugned order dated 04.11.2006 passed by the State Commission got merged with the judgment rendered by the majority judgment of this Tribunal dated 05.8.2009. The State Commission ought to have taken note of the findings and directions given by this Tribunal in its order dated 06.01.2011. The failure to do so was a mistake on the part of the Commission. When such mistake was brought to the notice of the Commission, it correctly realised its mistake and corrected the error apparent on the face of the record by passing the impugned order, which in our view is correct and justified.

42. In view of the above summary of our findings, we do not find any infirmity in the impugned order passed by the State Commission. Therefore, the Appeal is liable to be dismissed as not sustainable both on law and facts.

43. Before parting with this case, we are constrained to refer to the conduct of the Appellant for driving the State

Commission as well as the Second Respondent from pillar to post. On 10.4.2006, the State Mines and Minerals Limited filed a Petition before the State Commission praying for the relief for declaration that the change of procedure by way of new accounting system adopted by the Appellant was wrong. Accordingly, the State Commission allowed the petition by the order dated 4.11.2006 holding that the change of billing procedure adopted by the Appellant was wrong and accordingly set aside the said billing procedure.

44. Having aggrieved by the said order, the Appellant filed a Petition for review before the State Commission in Petition No.124 of 2007 and ultimately the said review petition was dismissed by the State Commission by the order dated 13.4.2007. Then Appeal was filed by the Appellant in Appeal No.74 of 2007. The said Appeal was dismissed by the majority judgment dated 5.8.2009 confirming the State Commission's order dated 4.11.2006 and directing the Appellant to comply with the orders. Since the judgment dated 5.8.2009 rendered by this Tribunal was not given effect to by the Appellant by complying with the same, the Second Respondent filed a Petition before the State Commission under Section 142 read with Section 86(1)(f) of the Act praying for compliance of the order of the State Commission dated 4.11.2006. However, the State Commission without considering the majority judgment of

this Tribunal dated 5.8.2009 simply dismissed the said petition on 06.01.2011 on the ground that no directions were given by the State Commission on 4.11.2006 with regard to refund of the amount adjusted. On noticing that this Tribunal's judgment had not been followed by the State Commission, in the order dated 6.1.2011, the Second Respondent filed the petition for review of the order and sought a relief in pursuance of the order dated 4.11.2006 as well as the judgment rendered by this Tribunal dated 5.8.2009.

45. Having realised the mistake committed by it, the State Commission, corrected the mistake and granted the relief to the 2nd Respondent as prayed for through the impugned order dated 29.11.2011.

46. As against this, the Appellant has filed this Appeal and obtained the interim order staying the operation of the review order dated 29.11.2011. It is now noticed that as against the majority judgment rendered by this Tribunal dated 5.8.2009, the Appellant instead of filing an Appeal under Section 125 of the Electricity Act, 2003 before the Hon'ble Supreme Court has rushed to Rajasthan High Court and filed a Writ petition seeking to set aside the judgment of this Tribunal. It is now pointed out that the Writ Petition is still pending.

47. From the above facts, the following aspects are evident.

i) Despite the order passed by the Tribunal on 04.11.2006, in favour of the 2nd Respondent, the Appellant did not allow the R-2 to obtain/ receive the fruits of the said order. In order to prevent the 2nd Respondent to get the relief, the Appellant adopted all methods to drag on the matter.

ii) The Appellant instead of filing an Appeal against the order dated 4.11.2006 had filed a Review before the State Commission and it was pending for some time. Ultimately, the same was dismissed on 13.4.2007. Thereupon, the Appellant filed the Appeal No.74 of 2007 before this Tribunal. This Appeal also was dismissed with the consequential direction on 5.8.2009.

iii) Instead of filing the Appeal before the Hon'ble Supreme Court under section 125 of the Act, the Appellant chose to rush to High Court and filed a Writ Petition as against the Tribunal's judgment. There are no circumstances shown as to why he had bypassed the jurisdiction of Hon'ble Supreme Court. Admittedly, there was no stay in the Writ Petition. Even then, the Appellant did not comply with the

findings and directions given by the majority judgment of the Tribunal dated 5.8.2009.

iv) Ultimately, the Respondent-2 had to file a Petition under Section 142 of the Act on 23.7.2010 which was dismissed on 6.1.2011. Again the Respondent filed a Review petition on 2.2.2011 which has been ultimately allowed by the order dated 29.11.2011 in favour of the 2nd Respondent.

48. Thus, it is clear that the R-2 is dragged and driven from pillar to post without allowing him to get the fruits of the orders passed by State Commission and Tribunal. The unfortunate aspect is as indicated above, that the Appellant instead of filing an Appeal under Section 125 of the Cr.PC under which the Supreme Court alone is entitled to set-aside the Tribunal's judgement, had filed a writ petition in the High Court seeking for setting aside the Tribunal judgment and both the State Commission as well as the 2nd Respondent were dragged to High Court.

49. From the above facts it is evident that the Appellant has adopted all sorts of dilly-dallying tactics to prevent the 2nd Respondent to get the fruits of the order passed by the State Commission and Tribunal. Thus, the Appellant has succeeded in dragging the matter till now though the order

was passed in favour of the 2nd Respondent on 4.11.2006 i.e. for the past 6 years.

50. This conduct of the Appellant, is highly reprehensible. Normally, this Tribunal does not impose cost on the parties but in this case, we feel that this is a fit case where exemplary cost should be imposed upon the Appellant who had dragged on the matter for six years and had driven the parties from the pillar to post.

51. In view of the condemnable conduct of the Appellant, as narrated above, the Appellant is directed to pay the cost of Rs.1 lakh each to the State Commission(R-1)as well as to Rajasthan State Mines and Minerals Ltd(R-2), within one month from the date of this order.

52. With these observations, the Appeal is dismissed.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 20th Sept, 2012

√REPORTABLE/~~NON-REPORTABALE~~