BEFORE THE HON'BLE BIHAR ELECTRICITY REGULATORY COMMISSION, PATNA

REVIEW PETITION NO. OF 2018
IN
CASE NO. 40 OF 2017

IN THE MATTER OF:

Tariff Order dated 21.3.2018 passed by the Hon'ble Commission for truing up of financials for FY 2016-17, Annual Performance Review (APR) for FY 2017-18, Aggregate Revenue Requirements and Determination of Tariff for FY 2018-19 of North Bihar Power Distribution Company Limited, the Review Petitioner.

AND

IN THE MATTER OF:

North Bihar Power Distribution Company Limited
Third Floor, Vidyut Bhawan,
Bailey Road, Patna – 800 001
Acting through
The Chief Engineer (Commercial) - **Review Petitioner**

PETITION UNDER SECTION 94 (1) (f) OF THE ELECTRICITY ACT, 2003 READ WITH REGULATIONS 31 AND 6 (3) OF THE BIHAR ELECTRICITY REGULATORY COMMISSION (CONDUCT OF BUSINESS) REGULATIONS, 2005 AND ORDER 47 RULE 1 OF THE CODE OF CIVIL PROCEDURE, 1908

MOST RESPECTFULLY SHOWETH:

1. The present petition is being filed by the Petitioner, North Bihar Power Distribution Company Limited for review of the Order dated 21.3.2018 passed by the Hon'ble Commission under sections 62 and 64 of the Electricity Act, 2003 read with Bihar Electricity Regulatory Commission (Multiyear Distribution Tariff) Regulations, 2015 undertaking the truing

up of the financials of FY 2016-17 and uAnnual Performance Review (**APR)** for FY 2017-18, and determining the Aggregate Revenue Requirements (**ARR)** and Determination of Tariff for FY 2018-19 for the distribution and retail supply functions of the Review Petitioner.

2. It is respectfully submitted that the Order dated 21.3.2018 passed by the Hon'ble Commission in Case No. 40 of 2017 suffers from retain error apparent on the face of the record. There are also otherwise sufficient cause for reviewing and modifying the Order dated 21.3.2018 on certain specific aspects as detailed herein.

3. The Petitioner states that primarily the review petition is being filed on the following aspects:

A. Abolition of Unmetered Categories for NDS-I and IAS-II for FY 2018-19:

B. Apportionment of the recovery of ARR between Fixed Charges and Variable/Energy Charges relating to FY 2018-19;

C. Errors in the adjustment for Transmission Losses and UI Charges for FY 2016-17;

D. Non-recognition of the purchase of power from Adani Energy Limited (AEL) related to the period 1.4.2016 to 31.3.2017 forming part of FY 2016-17;

E. Rectification of the inadvertent error while approving the tariff rate applicable to the projects of the Solar Project Developers

(namely Sunmark Energy Project Limited, Glatt Solutions Private Limited and Responce Renewable Energy Limited);

F. Computation of Non-tariff Income for FY 2016-17;

G. Depreciation, Interest on Loan, Disallowance of Late Payment Surcharge, Return on Equity, Prior Period Expense, Interest on Working Capital, For FY 2016-17;

H. Deposit for Renewable Power Purchase Obligation

I. Depreciation, Interest on Loan, Disallowance of Late Payment Surcharge, Return on Equity, Non-Tariff Income, Interest on Working Capital, For FY 2017-18;

J. Depreciation, Interest on Loan, Disallowance of Late Payment Surcharge, Return on Equity, Non-Tariff Income, Interest on Working Capital, For FY 2018-19; and

K. Deciding various aspects of the claims of the Petitioner as one in earlier orders without considering the merits afresh

4. The reasons and grounds for review of the Order dated 21.3.2018 in regard to specific aspects are detailed hereunder:

A. Unmetered Tariff Category:

5. In the Order dated 21.3.2018, the Hon'ble Commission has proceeded to decide as under in regard to NDS I and IAS II categories which has been in existence in the past years.

6.5.4 Non-Domestic Service - I (NDS-I)

(i) Consumers : *NBPDCL has submitted that the number of consumers is projected considering a growth rate of 10% on the number of consumers projected for FY 2017-18 and also submitted that there are not many significant consumers left un-electrified in this sub-category.*

The Commissions approves the number of consumer for NDS-I category as 101339 for FY 2018-19 as projected in view of the explanation given by the Petitioner.

***(ii) Connected Load**: NBPDCL has submitted that a nominal growth rate of 2.5% on average load per consumer in FY 2017-18, which comes to 1.116 KW is considered for projecting the connected load.*

It is noted that the Petitioner has considered a growth rate of 5%, while computing the average load per consumer. The average connected load per consumer in FY 2017-18 is 1.116 KW and it works out to 1.17 KW with escalation of 5%. The Commission approves the connected load of NDS-I category as 118717 KW for FY 2018-19 as projected by the Petitioner.

***(iii) Sales**: NBPDCL has submitted that the sales have been projected by considering 5% growth on the average consumption per consumer per month of FY 2016-17 and multiplying with total number of consumers.*

It is noted that NBPDCL has projected 1.31 MU for NDS-I unmetered which works out to 32.33 units/month/consumer. The approved norms is 50 units per month per consumer. As the projection of unmetered sales is with in the norms, the Commission approves the sales of NDS-I category at 85.64MU for FY 2018-19 as projected by the petitioner.

The number of consumers, connected load and energy sales for FY 2018-19 projected by the Petitioner and approved by the Commission are as given in the Table below:

Table 6.9: Approved number of consumers, connected load and sale of NDS-I category for FY 2018-19.

Particular	*No. of consumers*	*Connected Load (KW)*	*Sales (MU)*
Projected	*101339*	*118717*	*85.64*
Approved			
Unmetered	*3377*	*2117*	*1.31*

Metered	*97962*	*116600*	*84.33*
Total	*101339*	*118717*	*85.64*

……. …….

6.5.9 IAS-II

***(i) Consumers** : NBPDCL has submitted that there is a constant growth of around 30% every year in this category; considered a nominal growth rate of 10%.*

It is noted that there is increasing trend in growth of consumers of this category varying 31.02% to 68.83% during FY 2013-14 to FY 2016-17. Since this is a category of state tube wells, considering a nominal growth rate of 10% as proposed by the Petitioner on the number of consumers estimated for FY 2017-18, the Commission approves the number of consumers of IAS-II category as 6063 for FY 2018-19 as projected by the Petitioner.

***(ii) Connected Load**: NBPDCL has submitted that for projecting the connected load a growth rate of 0.39% (1 Year CAGR) on average load per consumer for FY 2017-18 is considered.*

The average connected load, per consumer during FY 206-17 is 10.66 KW and in FY 2017-18 (RE) is 10.70 i.e., there is a growth of 0.38% in FY 2017-18 (RE).

The Commission considering a growth of 0.38% on average load per consumer in FY 2017-18, approves the connected load of IAS-II category as 65130 KW for FY 2018-19.

***(iii) Sales**: NBPDCL has submitted that the energy sales are projected considering the same average consumption per consumer per month as in FY 2016-17.*

It is noted that the Petitioner has projected the energy sales at 99.91 MU for IAS-II unmetered which works out 2838.67 kWh per KW per annum. The norm for the category approved by the Commission is 3620 kWh per KW per annum. As the projected consumption is within the limit of approved norm the Commission approves the sales for IAS-II category at 184.88 MU for FY 2018-19, as projected by the Petitioner.

The number of consumers, connected load and energy sales for FY 2018-19 projected by the Petitioner and approved by the Commission are as given in the Table below:

Table 6.14: Approved number of consumers, connected load and sale of IAS-II category for FY 2018-19.

Particular	*No. of consumers*	*Connected Load (KW)*	*Sales (MU)*
Projected	*6063*	*65130*	*184.88*
Approved			
Unmetered	*2854*	*35196*	*99.91*
Metered	*3209*	*29934*	*84.97*
Total	*6063*	*65130*	*184.88*

The Hon'ble Commission has however subsequently, proceeded to hold as under:-

12.2.2 Cent percent consumer metering
Commission has noted that 100% metering has been done for all HT and LTIS categories, whereas in the other categories, the target of 100% metering has not yet been achieved. The UDAY MoU envisages target of achievement of 100% metering by March 2018. DISCOMs shall put forth more efforts to achieve the target of achievement of 100% metering as agreed in the UDAY MoU and shall ensure 100% metering to DS-II, NDS-I, NDS-II, IAS-II, PWW and SS-I categories which are less in numbers done on priority. The Commission has decided to gradually remove unmetered tariff category. To begin with, Commission has abolished the unmetered category for NDS-I and IAS-II (Govt tube wells) w.e.f 01.04.2018 through this tariff order. Commission directs the DISCOM to take effective steps to provide meter to remaining unmetered consumers by December 2018 so that by next financial year there will be no unmetered categories. DISCOMs are directed to submit the quarterly report on status of consumer metering and consumer billing in the ***Format-1(A) & Format 1(B)****, along with action being taken to achieve 100% metering. The report should reach the Commission on or before 15th July 2018, 15th October, 2018, 15th January, 2019 and 15th April, 2019.*

6. In terms of the above the Hon'ble Commission has proceeded to approve the number of unmetered consumers for NDS I Category for FY 2018-19 as 3377 and IAS II consumers as 2854. The Hon'ble Commission has also approved the quantum of power estimated to be consumed by the said categories of NDS I and IAS II. However, in terms of para 12.2.2 the

Hon'ble Commission has been pleased to decide to gradually revoke the unmetered tariff category and has stated that to begin with, the unmetered category of NDS I and IAS II (Government Tube Wells) to be abolished with effect from 1.4.2018. The Hon'ble Commission has further directed the Petitioner to take effective steps to provide the meter to the remaining unmetered consumers by December 2018 so as to ensure that there are no unmetered consumers during FY 2019-20.

7. In regard to the above, the Petitioner submits the following:

(a) Admittedly, as on 1.4.2018, there are unmetered consumers in the categories of NDS I and IAS II. They continue to receive electricity from the Petitioner effective 1.4.2018 also. The Hon'ble Commission has approved the total quantum of sale and total number of consumers in the said two categories in terms of paras 6.5.4 and 6.5.9 of the Tariff Order. There cannot, therefore, be a vacuum in the recovery of the amounts from the said categories of consumers, namely, NDS I and IAS II which have unmetered connection nosey that they will not be subject to payment of tariff on the ground that the tariff category stands abolished in terms of the Para 12.2.2 of the Order dated 21.3.2018.

(b) It is, therefore, required to be clarified that the said unmetered categories of consumers will continue to be liable to pay tariff at the rate to be determined by the Hon'ble Commission in future and pending the above, they should continue to pay tariff as prevalent on

31.3.2018 under the pre-existing Tariff Order. If otherwise, the unmetered category of consumers will have premium of denying the liability to pay the tariff for the consumption of electricity drawn from the Petitioner but with no liability to pay any tariff as no tariff has been determined by the Hon'ble Commission. The Order dated 21.3.2018 is, therefore, required to be clarified that the Petitioner is entitled to claim tariff for the unmetered consumers under NDS I and IAS II as before till the metering is undertaken in terms of the directions given by the Hon'ble Commission. This is without prejudice to the submissions of the Petitioner on the aspect of the timeline for metering the consumers falling in the categories of NDS I, IAS II and other categories.

8. The Petitioner has metered substantial number of NDS I consumers. The Petitioner has progressively undertaken the metering of the remaining number of consumers. The Petitioner envisages the total metering of NDS I consumers by 30th June 2018. As against 101339 number of consumers falling under NDS I Category, the Petitioner has already metered 97962 consumers leaving a balance of 3377 consumers only;

9. As regards unmetered category of consumers under IAS II, the Petitioner states that it has been found practically impossible for the Petitioner and the other distribution licensee South Bihar Power Distribution Company Limited {SBPDCL} to meter all the unmetered consumers within a short span of time. The metering of unmetered consumers falling within the IAS II Category along with some of the other categories such as IAS I and SS II has been found to be very difficult.

10. For the IAS-II agricultural consumers for instance, there are typically no houses, structures or habitations around these locations. However, in some places, pump houses built years back, are lying unattended in a dilapidated condition, whose maintenance rests with Minor Irrigation / Lift Irrigation department of Govt. of Bihar. As such there is no access point at which the connection can be metered properly and safely. The Petitioner had placed photographs of such sites to before the Hon'ble Commission. The same is placed again with this review petition for ready reference. Therefore metering these connections in the near future seems unfeasible.

11. Similar is the situation in regard to the other unmetered category of consumers such as IAS I and SS II.

12. The Petitioner respectfully submits that in regard to the metering of such categories of consumers, it is also necessary to consider the cost benefit analysis of metering vis a vis supplying them as before, taking into account the cost of metering and ensuring that the meters installed are continuously available without being tampered with. The operational cost and the involvement in ensuring that such meters function without any defect will be very high. At the same time the quantum of supply of electricity to such categories of un-metered consumers can be ascertained with reasonable certainty through energy accounting done at the input level. The average specific consumption of consumers in the metered sub-category within the respective category can be and is considered for booking for sale and accounting for losses.

13. In the circumstances mentioned above, the Petitioner submits that the Hon'ble Commission should grant realistically much longer time to the Petitioner to meter all such unmetered consumers in IAS II, IAS I and SS II. The timeline specified in Para 12.2.2 of the order is grossly inadequate and it is not possible at all for the Petitioner to meter all such unmetered category of consumers in IAS I, IAS II and SS II within the time frame specified.

14. Further the Petitioner will also undertake a detailed study of the cost benefit analysis of metering the unmetered category of consumers in IAS I, IAS II and SS II viz-a-viz the quantum of energy that could be estimated without metering and crave leave to file an appropriate application before the Hon'ble Commission for an informed view to be taken on the merits of requiring all such consumers to be metered.

15. In the meanwhile, it is submitted that the Hon'ble Commission may be pleased to clarify and hold that the unmetered category of consumers in NDS I and IAS II will continue to pay the tariff as was in existence as on 31.3.2018 and other unmetered category of consumers, namely, IAS I and SS II shall continue to pay the tariff as determined in the Order dated 21.3.2018.

B. Apportionment of recovery of ARR between the Fixed Charges and variable/Energy Charges relating to FY 2018-19:

16. In the petition filed by the Petitioner and SBPDCL for approval of the ARR and determination of tariff for FY 2018-19, it was proposed that the two part tariff be decided with a split of the total tariff of around 57% as Fixed Cost and 43% as Variable Cost. This was consistent with the aspect that the Petitioner incurs a substantial quantum of fixed cost irrespective of the quantum of energy actually supplied to the consumers as per their

requirement. The fixed cost component for the Petitioner includes not merely the establishment and network cost but also the fixed charges payable by the Petitioner to the Generators irrespective of whether the Petitioner actually draws the quantum of electricity contracted by the Petitioner with the Generator;

17. In the Order dated 21.3.2018 in Para 9.5 the Hon'ble Commission has considered the recovery of the fixed charges as under:

> ***"Commission's View***
> *The Commission opines that the fixed cost of the DISCOMs are only its network cost required to create & maintain it for smooth running of the distribution business of the DISCOMs. The following tables shows how the fixed cost of ARR are getting recovered through expected revenue billing at existing tariff for FY 2018-19.*

ARR for FY 2018-19	***NBPDCL***		***SBPDCL***		***Total***	
	(Rs. Crore)	***(%)***	***(Rs. Crore)***	***(%)***	***(Rs. Crore)***	***(%)***
Fixed charges (O&M, Depreciation, RoE Etc)	*567.06*	*8.05%*	*1133.40*	*12.32%*	*1700.46*	*10.47%*
Power Purchase (Incl Tr Charges)	*6480.33*	*91.95%*	*8068.16*	*87.68%*	*14548.49*	*89.53%*
Total	***7047.39***		***9201.56***		***16248.95***	
Revenue with Existing Tariff	***NBPDCL***		***SBPDCL***		***Total***	
Fixed charges with existing tariff (Rs. Crore)	*1229.89*		*1740.28*		*2970.17*	
Total ARR (Rs. Crore)	***7047.39***		***9201.56***		***16248.95***	

% of Fixed charges Vs ARR	*17.45%*	*18.91%*	*18.28%*

As is clear from the above table, against the requirement of 10.47% of fixed charges of ARR to be recovered, about 18.28% cost of ARR (excluding power purchase cost) are already being recovered through fixed charge / Demand charge. Further, for every unit of energy sold and billed, the fixed cost and variable cost component of the power purchase cost are getting recovered. Hence the Commission finds no justification to increase the fixed / demand charges as suggested by DISCOMs."

18. The Hon'ble Commission has not, however, provided any break up for the fixed and variable charges to be recovered as revenue from the sale of power under the revised tariff for FY 2018-19. The Hon'ble Commission has proceeded on a fundamentally wrong premise that the entire Power purchase cost of the Petitioner should be treated as variable charges when the Petitioner has to necessarily substantial quantum of deemed fixed charges in the Power purchase agreement and procurement arrangement. The Petitioner as a Distribution licensee need to arrange the requirement of power based on the peak season and peak hours requirement and not merely on the basis of demand from season to season or peak hours and non peak hours.

19. It is respectfully submitted that the Hon'ble Commission has not considered the following salient aspects while deciding the issue of recovery of fixed charges in the two part tariff for supply of electricity by the Petitioner to the consumers:

(i) Fixed Charge payable to the Power Generators:

20. The Petitioner is liable to pay the fixed charge to the power generators irrespective of its consumption as per the terms agreed in the Power Purchase Agreements. Therefore, the fixed charge payable is obligatory in nature for the Petitioner.

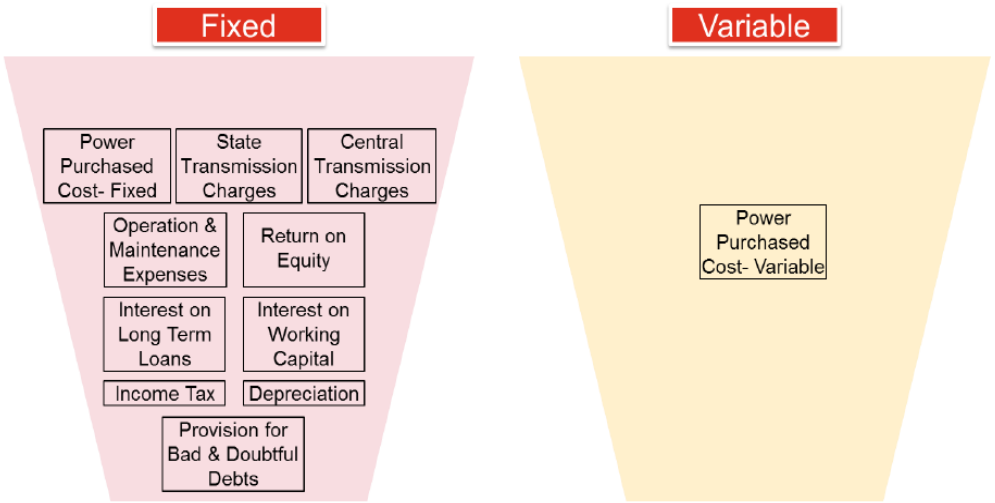
21. The Hon'ble Commission has not considered the report published on the above issue at the instance of the Government of India. In order to proactively implement a solution towards rationalizing electricity tariffs in India, a committee was constituted under the Ministry of Power, Government of India, for developing a design framework for a uniform, progressive tariff structure and setting optimum tariff levels. PwC was hired as a knowledge partner to assist the committee on this study in carrying out a review of the existing scenario of electricity tariffs in the country and develop a framework as well as roadmap for implementation of tariff rationalization by various states. In the said report, under the methodology for tariff rationalization the expense of the Distribution licensee has been broadly classified into two categories. The fixed cost category includes power procurement cost, operating expenses, return on equity depreciation of assets, etc. and the variable cost comprises of variable component of the power procurement cost. The relevant extract from the said report is provided below for reference:

> ***"6.1.2 Determination of cost components***
> *The total expenses for a Discom can broadly be classified into two types viz. fixed and variable.* ***The fixed costs may include fixed component of the power procurement cost, operating expenses, return on equity depreciation of assets, etc. The variable costs on the other hand may include only the variable component of the power procurement***

cost. *Tariff structures should be designed in a manner to commensurate the corresponding cost components thereby having fixed/demand charges and variable/ energy charges. However, the recovery of fixed cost from fixed/demand charges is inadequate with most of cost recovered from energy charges. This, as a result hampers the revenue certainty for a Discom as significant portion of the fixed component is realised from energy/ variable charges which are dependent on consumption. Majority of the states follow a two part tariff structure excluding Punjab and Haryana which follow a single part structure, realizing tariffs based only on energy/variable charge. State like Maharashtra has a three part tariff structure.*

To identify the cost components it is first important to analyze the various costs associated with a Discom and then arranging them into two different buckets of fixed and variable components. Subsequently, the proportion calculated of the cost can then be considered to estimate the fixed and variable components of the cost of supply. This will further help in evaluating the corresponding revenue to be realised from the consumers and thereby designing cost reflective tariffs. The following diagram analyses the various components of the annual revenue

Figure 11: Classification of costs



requirement (cost) of a Discom and the cost components of which they may likely be part of:

22. In the report it has been emphasized on setting of tariff levels in such a manner so that they reflect the prudent cost of supply. Therefore, after simplification, next step would be designing a dynamic and robust tariff structure based on a scientific approach fulfilling the objectives like realizing sufficient revenue from fixed/ demand tariffs to commensurate the incurred fixed costs has to be followed.

23. It has also been noted by the Ministry of Power in the consultation paper on issues pertaining to open access that the fixed charge/demand charge is designed to recover the costs of the Distribution licensee which are fixed in nature which also includes capacity charges payable to power generators. The relevant extract of the consultation paper is provided below:

> *"6.3 In the two-part tariff mechanism, the retail supply tariffs are divided into two components viz. fixed charge/demand charge and energy charge.* ***Fixed charge/demand charge is designed to recover the costs of the DISCOM which are fixed in nature such as the capacity charges payable to power generators, transmission charges, operation & maintenance expenses, depreciation, Interest on loans, return on equity etc****. This is generally recovered on the basis of connected load / contract demand or maximum demand of the consumer. Energy charge is designed to recover the costs of the DISCOMs which are variable in nature such as variable cost component of power purchase etc. These costs are recoverable on the basis of the actual consumption of the consumers during the billing period (per kWh or per kVAh basis)." [Emphasis Supplied]*

24. Also, in the approach paper on tariff rationalization issued by the Hon'ble Delhi Electricity Regulatory Commission issued in February 2018, fixed charges of generating stations has been considered as a part of fixed charge recoverable from the consumers. Non consideration of fixed charge payable to the power generators shall be a gross violation in this regard. Therefore, the fixed charge payable by the Distribution licensees should be allowed as a part of fixed charge to be recovered from the consumers.

(ii). Transmission, SLDC Charges:

25. The Hon'ble Commission in the Tariff Order for FY 2018-19 for Bihar State Power Transmission Company Limited (BSPTCL) approved the intra State transmission charges as fixed cost to be recovered from the Petitioner. The relevant extract of the said Tariff Order is provided below:

> ***"6.17 Approved Transmission Charges for FY 2018-19***
>
> *The Commission has approved Net Transmission charges of BSPTCL at Rs.1194.38 crore for FY 2018-19. BSPTCL shall recover its Transmission charges on monthly basis at Rs.99.53 crore from both Discoms – NBPDCL and SBPDCL in their power sharing ratio."*

26. In contrary to this the Hon'ble Commission has considered the above charges to be recovered as a part of the energy charge from the consumers which is an error apparent on the face of the record.

27. The Hon'ble Commission has not appreciated that on one hand wherein the cost structure of the petitioner is heavily tilted towards fixed

charges, the recovery of revenue through the existing tariff schedule approved by the Hon'ble Commission is tilted more towards energy tariffs. Due to this skewed nature of tariff recovery, the Discoms have limited revenue assurance and therefore face uncertainty. Further for some categories, the ratio of fixed and variable tariff is very low and only for those categories, the increase in fixed cost has been proposed. It is also to be noted that to avoid sudden surge in terms of increase in fixed cost the petitioner had proposed a ratio of 27:73 for fixed: variable revenue recovery, in place of the 57:43 proportion. Finally it is to be noted that this entire arrangement has been done keeping in mind that the average rate of billing from each consumer category is not impacted, thereby offsetting any increase in fixed charges with a corresponding reduction in variable charges. This is a progressive step and would benefit the consumers in the long run.

28. In view of the above, the Hon'ble Commission should consider a higher proportion of recovery of the fixed charges consistent with the need to rationalise the tariff in an appropriate manner.

C. Errors in adjustment for Transmission Losses and UI Charges for FY 2016-17:

29. In regard to the true up of the financials for FY 2016-17, the Hon'ble Commission has proceeded to decide on the inter state transmission losses by computing the total power purchase by the distribution companies (SBPDCL and NBPDCL), the scheduled energy and then determined the difference as the Inter State Transmission Losses against the quantum claimed as under:

Distribution Licensee	Claimed in True-Up Petition		Transmission Loss considered from ERPC Website (Ref: Energy Balance)		Difference	
	%	MU	%	MU	%	MU
SBPDCL	2.52%	363.51	2.432%	347.73	0.088%	15.78
NBPDCL	2.66%	261.84	2.432%	250.67	0.228%	11.17

Particulars	As claimed by Petitioner & SBPDCL (MUs)	As approved in the True-Up Order (MUs)	Difference (MUs)
	A	B	C=A-B
Total Power Purchase by both Discoms	23514.36	23515.78	(-)1.42
Scheduled Energy	22889.00	22917.38	(-)28.38
Inter State Transmission Loss	625.36	598.40	26.96

30. In this regard Para 4.6 and Para 4.8 of the order dated 21.3.2018 provides as under:

> *"However, as a prudence check, the Commission has noted the billed energy from the central stations (23515.78 MU) from Regional Energy Accounting (REA) and scheduled energy (22917.38 MU) from UI accounts for the period FY 2016-17 for Bihar from the ERPC website and has arrived at the regional transmission system loss of 598.40 MU (2.54%) for FY 2016-17.*

Accordingly, the Commission has considered central transmission loss at 2.54% in truing up for FY 2016-17."

……

"The Commission has arrived at the CTU loss at 250.67MU (i.e at 41.89% of 598.40 MU) considering CTU loss at 2.54% on power purchased from Central Stations, IPPs etc. from outside the State.

*For estimating the additional power purchase to be disallowed due to excess distribution loss, the total power purchase from various sources has been worked out considering the impact of average regional transmission loss [2.432% = (250.67/10306.93)*100] applicable on the total power purchase. The reason for applying the average regional transmission loss is that the power purchase quantum also includes sources of power on which the regional transmission losses are not applicable i.e. KBUNL, BSHPC, Sugar Mills etc. Accordingly, the gross power purchase required to be done in FY 2016-17 is 8909.97 MU with regional transmission loss of 216.69 MU as shown in the Table 4.15 below:.."*

31. Thus, the Hon'ble Commission had considered the quantum of power purchase by the Petitioner from the Central Power Sector Utilities which is transmitted through the Inter State Transmission Line. The Petitioner had filed before the Hon'ble Commission, the bills received from the Central Power Sector Utilities in regard to the quantum of energy decided by the Eastern Regional Power Committee {ERPC} . The documents of ERPC clearly indicates the quantum of Scheduled Energy at the Bihar periphery and the Energy accounting and settlement as per the Regulations are settled based on such Scheduled energy. The deviation

from Scheduled energy is accounted in the Unscheduled Interchange mechanism.

32. The authenticity of the invoices raised by the Central Power Sector utilities and the Energy Accounting by ERPC as submitted by the SBPDCL and NBPDCL are and cannot be in dispute. These invoices are based on the energy account given by the ERPC. Accordingly, the quantum of energy scheduled by the Petitioner at 22889 Mus as against 23514.36 Mus cannot in any manner be disputed. The same are verifiable from the records of the agencies such as the Central Power Sector Utilities, RLDC, ERPC etc and there is no reason whatsoever to consider a differential quantum of billed energy from the central stations and scheduled energy. The Hon'ble Commission has referred to the quantum of scheduled energy by the distribution licensees, namely, SBPDCL and NBPDCL as 22917.38 MUs with reference to the observation that the said quantum has been taken from the website of the ERPC. Whereas the bills produced by the Petitioner and NBPDCL based on the energy accounting of ERPC are most authentic.

33. The two distribution companies have paid the amount to the Central Power Sector Generating Units as well as to the CTU based on the above. The entire accounting of Energy has been settled by ERP based on the quantum referred to by the Petitioner. The Inter State Transmission Losses ought to have been determined with reference to the difference between 23514.36 Mus and 22889 MUs which works out to 625.36 and not with reference to 22917.38 Mus as scheduled energy taken by the Hon'ble Commission. In such an event, the transmission losses to be allowed would work out to the percentages as claimed by the two

distribution licensees, namely, 2.66% and 2.52% for the Petitioner and SBPDCL respectively and not 2.432% as decided by the Hon'ble Commission.

34. As a consequence thereof, the quantum the UI charges accounting considered by the Hon'ble Commission need to be adjusted appropriately.

D. Non-recognition of the purchase of power from Adani Energy Limited related to 1.4.2016 to 31.3.2017 forming part of FY 2016-17:

35. In the Order dated 21.3.2018 dealing with the true up of the financials of FY 2016-17, the Hon'ble Commission has disallowed the procurement of power by SBPDCL from Adani Energy Limited. In Para 4.9 the Hon'ble Commission has considered the matter as under:

> *The Commission has noted that the power purchase from Adani during FY 2016-17 is as below:*

Table 4.16: As per Power Purchase bills of Adani for FY 2016-17

Month	*Energy (MU)*	*Fixed charges (Rs. Crore)*	*Energy charges (Rs. Crore)*	*Other charges (Rs. Crore)*	*Total charges (Rs. Crore)*
April 2016	*5.57*	*6.09*	*2.06*	*1.09*	*9.24*
May 2016	*1.92*	*6.17*	*0.71*	*0.32*	*7.19*
June 2016	*0.00*	*6.09*	*0.00*	*0.22*	*6.30*
Total	***7.49***	***18.34***	***2.76***	***1.63***	***22.74***

> *On a query from the Commission regarding high power purchase cost per unit i.e. for purchase of 7.49 MU from Adani (M/s AEL) an*

amount of Rs. 22.74 Crore (fixed charges of Rs. 18.34 Crore, Energy charges of Rs. 2.76 Crore and other charges of Rs. 1.63 Crore) from Adani M/s AEL. The Petitioner has replied vide letter no 42 dated 12.01.2018 that during FY 2016-17, power from Adani was procured for three months in which scheduling of power was done for only five days and for the rest of period as per PPA, capacity charge was paid

The Petitioner again vide its letter no 165 dated 28.02.2018 has submitted as below:

"BSPHCL had sought an extension for the Adani Enterprises Limited (AEL) contracted capacity of 200 MW power for 6 months, which was duly approved by the Hon'ble Commission. It was projected that the AEL power would be utilised to meet the peak power deficit during evening hours (18:00 – 24:00) and will remain the cheaper source of power than the other available options for short term power at the point however, during the scheduled period, the DISCOMs could not utilize the complete quantum of the scheduled energy from AEL power due to relatively lesser demand as projected, and therefore saved on the power procurement costs from AEL.

..... Energy exchange prices during the months of April-16, May-16 and June-16 became viable during the peak hours due to technical issues in the transmission system of the western region grid. Energy prices were falling during the peak hours and was even lesser than the AEL energy charges, therefore it as decided to purchase the peak hours power from energy exchange on Day Ahead Market (DAM) basis. Given the priority for the DISCOMs, it was imperative to secure a reliable power supply so as to meet any imminent surge in demand."

The Commission find the above submission in contrast of what the petitioner had submitted in the petition in case no 40/2015 for extension of PPA dated 23.02.2012 with Adani Enterprises Limited for further 2 years beyond 31.12.2015.

The background of this issue is that M/s BSPHCL approached the Commission (Case no 40/2015) for extension of PPA dated 23.02.2012 with Adani for further 2 years beyond 31.12.2015 for purchase of 200 MW power from AEL on same terms and conditions

of PPA. The PPA was for supply of power on RTC basis. The petitioner had neither submitted in the petition nor had he shown during hearing its inclination to purchase such power during peak hours only. The Commission was not inclined to extend the PPA since the rate of Adani was the highest amongst the power suppliers in BIHAR as per Tariff Order of FY 2015-16. Further, many consumer association such as BIA, chamber of Commerce, etc had also objected. However, in view of the various explanations given by BSPHCL, the Commission had accepted to extend the PPA for further six months i.e. upto 30.06.2016 on same terms and conditions of PPA which was for supply of 200 MW power on RTC basis.

From the above table, it is noted that in spite of pursuing the Commission with various submission explaining the need for extension of PPA, the DISCOM has failed to fully procure the energy from Adani and paid the fixed charges resulting into very high power purchase cost which works out Rs. 30.36 per unit which is entirely due to negligence of the DISCOM. Had there been no requirement of such power, DISCOM should not have filed for such extension of PPA of AEL. The forecasting of demand by a DISCOM is totally under its control and therefore, is a controllable parameter and any unprudent power purchase expenses on account of such a wrong forecasting cannot be burdened to the end consumers. Regulation 20 (2)(5) of BERC (Multi Year Distribution Tariff) Regulations 2015 specify that any cost increase by the licensee by way of penalty, interest due to delayed payments and due to operation inefficiencies shall not be allowed. Hence in view of above, the Commission does not find it reasonable to allow all the claimed expenses of AEL. The approved levelised tariff for the period 01.03.2012 to 31.12.2015 was Rs. 4.41/kWh. Hence, the Commission considers the power purchase cost from Adani at Rs. 3.30 Crore only (i.e. 7.49 MU X 4.41/10).

36. While deciding the above the Hon'ble Commission has not considered the following salient aspects which clearly establishes that there has been no such deficiency in the estimation on the part of the Bihar Utilities as suggested by the Hon'ble Commission:

(a) The Medium Term PPA dated 23.2.2012 entered into between AEL and the Bihar Discoms was for a period of three years expiring on 31.12.2015. The agreement was extended for a period of six months i.e. from 1.1.2016 to 30.6.2016. It was estimated that the power would be required during the said six months;

(b) During the period from 1.1.2016 to 31.3.2016 namely the first quarter of the extended 6 months period the quantum of power purchased by the SBPDCL and NBPDCL was to the extent of 101.32 MUs and 78.33 MUs respectively and the same has been allowed by the Hon'ble Commission in FY 2015-16. Such substantial quantum in the first three months establishes that the estimation made by the Bihar Utilities for the continued need for purchase of power from AEL was bona fide;

(c) However, during the period from 1.3.2016 to 30.6.2016 the demand for power reduced. The Bihar utilities did not require the power from AEL.

37. In the circumstances mentioned above, there was no deliberate attempt to wrongly forecast the demand for the power during the period from 1.1.2016 to 31.3.2016 or otherwise any deficiency in the Bihar Utilities entering into an agreement with AEL for extending the supply for a period of six months. The Bihar Utilities bona fide considered that the power from AEL Plant would be required for a period of six months.

38. In the circumstances the denial of the actual cost incurred by SBPDCL and NBPDCL under the agreement with AEL during the period 1.4.2016 to 30.6.2016 is erroneous. It is reiterated that the Hon'ble Commission has duly approved the power purchase quantum of 78.33 MUs made by NBPDCL during the period 1.1.2016 to 31.3.2016 and therefore the claim made for the subsequent three months ought not to be denied.

E. Rectification of the inadvertent error while approving the tariff rate applicable to the projects of the Solar Project Developers:

39. It is humbly submitted on behalf of the petitioner that due to inadvertent error in the power purchase cost of the solar developers namely (Sunmark Energy Project Ltd., Glatt Solutions Private and Response Renewable Energy Ltd.) the bills of the same were admitted at different rates than approved PPA during certain period. This has been now corrected and to this effect a rectification petition has already been filed before Hon'ble commission. The petitioner NBPDCL submits that the consequential error on accounts of erroneous power purchase cost of these developers may kindly be noted. In this regard it's also prayed that NBPDCL will file the tariff petition in subsequent Financial year after incorporating the effect of correction in the power purchase cost of these solar developers.

F. Computation of Non-tariff Income for FY 2016-17:

40. In the Order dated 21.3.2018 while dealing with the non-tariff income, the Hon'ble Commission has considered the deemed rebate of 1% on the total power purchase cost as being available to the Petitioner and the revenue requirements of the Petitioner to the said extent has been reduced. Further, the 1% deemed rebate has been considered even on

the quantum of disallowed power purchase cost. In this regard Table 4.54 under para 4.29 of the order provides as under:

Table 4.54: Non-tariff income approved for FY 2016-17 (Rs. Crore)

Sl No.	*Particulars*	*Approved for FY 2016-17 I MYT Order dated 21.03.2016*	*Revised and approved for FY 2016-17 (RE) in Tariff Order dated 24.03.2017*	*Claimed by SBPDCL for FY 2016-17 in truing up*	*Now approved for FY 2016-17 in Truing up*
1	*Non-tariff income*	*152.66*	*159.29*	*216.01*	*216.01*
2	*Rate of increase*	*10.00%*	*10.00%*	*--*	*--*
3	*Increase in non-tariff income*	*15.27*	*--*	*--*	*--*
4	*Less Financing cost of DPS*	*--*	*--*	*41.59*	*41.59*
5	*Less: Rebate as per audited accounts for FY 2016-17*	*--*	*--*	*--*	*10.18*
6	*Add: Rebate @1% on total power purchase (incl. transmission charges) for FY 2016-17*	*--*	*--*	*--*	*41.54*
7	***Total Non-tariff income (1-4-5+6)***	***167.93***	***175.22***	***174.43***	***205.78***

The Commission, accordingly, approves non-tariff income at Rs. 205.78 Crore for FY 2016-17 in true up.

41. An amount of Rs 41.54 crores has been considered as non-tariff income under Deemed Rebate at the rate of 1%. The basis for considering the Deemed Rebate of 1% as set out in the Hon'ble Commission's Order, inter alia, reads as under:

The Non-Tariff income as per the audited annual accounts of NBPDCL for FY 2016-17 is at Rs.216.01 Crore.
According to the audited accounts for FY 2016-17 of NBPDCL, the rebate received for timely payment of power purchase bills is Rs.10.18 crore. The total power purchases (including transmission charges) is at Rs.4173.14 crore for FY 2016-17 and the rebate @ 1% works out to Rs.41.73 crore.

Regulations specify that for payment of bills of generation/transmission charges through letter of credit (LC) on presentation, a rebate of 2% shall be allowed. Where payments are made subsequently, through opening of LC or otherwise, but within a period of one month of presentation of bills by the suppliers of power/licensee, a rebate of 1% shall be allowed.

Further, Regulation 44 of CERC regulations 2014 specify;

"44. Rebate
(1) For payment of bills of the generating company and the transmission licensee through letter of credit on presentation or through NEFT/RTGS within a period of 2 days of presentation of bills by the generating company or the transmission licensee, a rebate of 2% shall be allowed.

(2) Where payments are made on any day after 2 days and within a period of 30 days of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed".

The APTEL in Appeal no.153 of 2009 between North Delhi Power Ltd. Vs Delhi Electricity Regulatory Commission has adjudged that rebate only to the extent of 1% is to be considered as non-tariff income. The relevant excerpts are reproduced hereunder:

"34. ..... the rebate is a part of non-tariff income as per the MYT Regulations which is an essential part of the power purchase cost and …… the distribution company would earn a rebate of 1% even if it pays the power purchase bills within 30 days of the due date …… The Working Capital includes Power Purchase Cost for only one month. The generation company offers rebate of 2% on payment of presentation which takes place immediately after completion of the month. ……., we hold that rebate over and above 1% cannot be considered non-tariff income for reducing the ARR. In view of the same, it has to be concluded that the rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost and rebate earned only up to 1% alone can be treated as part of non-tariff income. ……. On the one hand, the State Commission has reduced one month power purchase payment from the working capital requirement and on the other hand it has been observed that if the Appellant is making the payment earlier, the benefit of entire rebate is used for reducing the power purchase cost. …….. Rebate only to the extent of 1% is to be considered as non-tariff income. As such, the issue is answered accordingly".

In view of the above, the Commission has considered rebate @1% of the total power purchases (including transmission charges) of Rs.4153.73 crore for FY 2016-17 which works out to Rs.41.54 crore. The Commission

accordingly has considered rebate at Rs.41.54 crore for FY 2016-17 in true up.

42. It is not disputed that in case of prompt payment of the money becoming due by the Petitioner to the Generating Companies and transmission utilities, a rebate of 2% is admissible. However, such rebate is admissible only if the payment is actually made immediately upon the raising of the bills. In that case the Petitioner will not be availing the credit period allowed for the payment of bills of the Central Power Sector Units.

43. In the decision of the Hon'ble Appellate Tribunal and in Regulation 44 of the CERC Regulations referred to in the order dated 21.03.2018 Hon'ble Commission, there was no concept of deemed rebate. The concept decided for actual Rebate availed cannot be applied on deemed Rebate basis when Rebate is not availed. If the Petitioner does not avail the rebate and makes the payment of the money becoming due to the Central Power Sector Undertakings on the due date, there is no concept of deeming that if the Petitioner had paid the money in time it would have been entitled to a rebate.

44. It is submitted that the financial condition of the Petitioner is not of the extent that it could arrange for the payment of month immediately upon the bills being raised and avail the rebate. In fact, the Petitioner was not in a position to discharge the payment due to the central power Sector Undertakings even on the due date resulting in the Late Payment Surcharge. The Hon'ble Commission has disallowed the Late Payment Surcharge. To the extent it was possible for the Petitioner to avail the rebate i.e. by arranging the finances for prompt payment, namely,

rebate of Rs 10.19 crores was availed, the same could be a subject matter of adjustment to the extent of 1% but not the amount of Rs 41.54 crores based on the deemed rebate availed by the petitioner.

45. Independent of the above, the deemed rebate has been considered in the order dated 21.03.2018 even on the quantum of disallowed power purchase cost. The Hon'ble Commission has proceeded to disallow an amount of Rs 550.02 crores towards power purchase cost and thereby the entire quantum of such power purchase expenditure has been not been allowed. In such an event, there is no question of considering any deemed rebate on the basis that the power purchase cost ought to have been paid promptly and the rebate of 1% should have been allowed. In other words, when 100% of the cost has not been allowed, there cannot be a possibility of the Petitioner availing the rebate of 1% by making payment of 99% of the cost. The rebate can arise only when the power purchase cost is allowed and not otherwise.

46. The consideration of deemed rebate is therefore patently erroneous and contrary to any settled principles of tariff determination. The decision of the Hon'ble Appellate tribunal in Appeal Nos. 153, 142 and 147 of 2009 is not on the aspect of deemed rebate but on the aspect of actual rebate claimed and availed by the Utility.

G. Depreciation:

47. In the Order dated 21.3.2018 the Hon'ble Commission dealing with the truing up of the FY 2016-17 on the computation of depreciation has held as under with reference to the opening grant:

> *The Commission has approved the closing grants at Rs.3757.79 Crore in true up for FY 2015-16 in Tariff*

Order dated 24.03.2017, accordingly the same is considered as opening grants for FY 2016-17. The addition to grants (Rs.240.53 crore) during FY 2016-17 is considered based on the capitalisation considered in Table 4.24. Further, The Petitioner vide letter no.42 dated 12.02.2018 has intimated that the State Government has granted Rs.961.89 crore towards grant under UDAY scheme for repayment of loans under FRP.

The grant is utilised for repayment of loans of Rs.649.01 crore obtained for liquidation of power purchase liability and balance Rs.312.88 crore was utilised for repayment of project loan from REC (Principal). The Commission, accordingly, has considered Rs.312.88 crore as grant for assets capitalised and adjusted for computation of depreciation, interest on loan, RoE for FY 2016-17. Thus total grants of Rs.553.41 crore (Rs.240.53 crore + Rs.312.88 crore) is considered utilised for capitalisation during FY 2016-17.

48. In terms of the above, the Hon'ble Commission had considered Rs. 553.41 crores as grant for the assets capitalised and adjusted for computation of depreciation. The opening grant for FY 2016-17 has been taken as Rs 3757.79 crores as against the claim by NBPDCL of Rs 1802.61 crores.

49. The Hon'ble Commission has proceeded on the same basis in computing large sums of money towards the grant and not being qualified for servicing through Tariff, despite specific submissions of the petitioner that substantial part of the amount that has been treated as a grant from the Government of Bihar is a loan and should, therefore, be treated as a debt in the actual cost. In this regard, the Petitioner had provided the Letter dated 30.1.2017 from the Government of Bihar confirming the status of the amount given by the Government of Bihar to the Petitioner.

The Hon'ble Commission ought to have considered the implications of the above.

50. The decision of the Hon'ble Commission in regard to the consideration of the amount to the Petitioner by the Government of Bihar as Grant ignores the following salient aspects:

(i) In the True-Up Order for FY 2013-14 the Hon'ble Commission has not considered the opening balance for capital reserve as per the Audited Accounts.

(ii) In the True-up Order for FY 2013-14, the Hon'ble Commission considered the additions to grants during the FY 2013-14 based on the audited accounts for FY 2013-14 at Rs.1665.06 Crore (Consumers contributions of Rs.24.51 Crore and Capital Reserve of Rs.1640.56 Crore) for calculation of depreciation in place of approved addition of Rs. 529.60 Crore of grant as capitalization of asset during the year.

(iii) The Hon'ble Commission has not taken into consideration above factors while calculating net depreciation for FY 2016-17.

51. The Petitioner submits that in addition to the above, there are certain other disallowances made by the Hon'ble Commission in the order dated 21.3.2018 based on the similar disallowances made in the previous years. These relate to Interest on Loan, Disallowance of Late Payment Surcharge, Return on Equity, Prior Period Expenses and Interest on Working capital etc. In making such disallowances, the Hon'ble Commission has proceeded entirely on the basis of the previous decision

given by the Hon'ble Commission. In the proceedings before the Hon'ble Commission in Case No. 40 of 2017, the Petitioner had placed material to justify the claim under the above heads. The Hon'ble Commission ought to have examined the issues on the above aspect raised by the Petitioner on merits instead of following the decision in the earlier Orders. Though the Petitioner has filed an appeal against such decision in the earlier orders, the Petitioner is being subjected to irreparable prejudice on account of disallowance of such claims under the heads mentioned herein above.

52. In the facts and circumstances mentioned herein above, the Petitioner submits that the Hon'ble Commission may examine the claim of the Petitioner under such heads afresh without being influenced by the decision taken in the earlier orders. In this regard it is well settled that there is no res judicata applicable in tariff matters and each tariff period need to be independently assessed and decided.

53. In view of the above, the Petitioner submits that there are errors apparent on the face of the record in the Order dated 21.3.2018. There are otherwise sufficient cause for review and reconsideration of the Order dated 21.3.2018 passed in Case no. 40 of 2017.

54. The Petitioner respectfully submits that the review of the order dated 21.3.2018 is maintainable as per the principles settled by the decision of the Hon'ble Supreme Court in the following cases:

A. <u>Board of Control for Cricket in India</u> v <u>Netaji Cricket Club</u> (2005) 4 SCC 741:

"19. It was urged that the High Court wrongly exercised its jurisdiction in entertaining the review application. Reliance in this regard has been placed on Parsion Devi –v- Sumitri Devi and Lily Thomas v. Union of India.

.....

88. We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. Section 114 of the Code empowers a court to review its order if the conditions precedent laid down therein are satisfied. ***The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in Section 114 of the Code in terms whereof it is empowered to make such order as it thinks fit.***

89. 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 mistake or for any other sufficient reason.

90. ***Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order.*** *An application for review would also be maintainable if there exists sufficient reason therefor.* ***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 are 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 "actus curiae neminemgravabit".*

91. It is true that in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [(1955) 1 SCR 520 : AIR 1954 SC 526] this Court made observations as regards limitations in the application of review of its order stating: (SCR p. 529)

"Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words 'any other sufficient reason' must mean 'a reason sufficient on grounds, at least analogous to those specified in the rule'. "but the said rule is not universal.

92. Yet again in Lily Thomas [(2000) 6 SCC 224: 2000 SCC (Cri) 1056] this Court has laid down the law in the following terms: (SCC pp. 247-48, Para 52)

"52. The dictionary meaning of the word 'review' is 'the act of looking, offer something again with a view to correction or improvement'. It cannot be denied that the review is the creation of a statute. ***This Court in Patel NarshiThakershi v. PradyumansinghjiArjunsinghji [(1971) 3 SCC 844 : AIR 1970 SC 1273] , held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary***

implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in a miscarriage of justice nothing would preclude the Court from rectifying the error."*(emphasis supplied)*

B. **<u>Dhanani Shoes Limited</u> v <u>State of Assam and Others</u> [2008] 16 VST 228 (Gau):**

"21. While considering the scope of the power of review, what needs to be noted is that u/s. 114 of the Code, any person, considering himself aggrieved, by a decree or order of a court from which appeal is allowed, but no appeal is preferred, or where there is no provision for appeal against the order or decree, may apply for review of the decree or order, as the case may be, in the court, which made the order or passed the decree. Broadly speaking, thus, u/s. 114 of the Code, review of a decree or order is possible if no appeal is provided against such a decree or order or where provisions for appeal exist, but no appeal has been preferred. This is really the substantive power of review. This substantive power of review u/s. 114 has not laid down any condition as a condition precedent for exercise of the power of review nor has s. 114 imposed any fetters on the court's power to review its decision. No wonder, therefore, that the apex court, in Board of Control for Cricket, India [2005] 4 SCC 741 observed :

"We are, furthermore, of the opinion that the jurisdiction of the High Court in entertaining a review application cannot be said to be ex facie bad in law. S. 114 of the Code empowers a court to review its order if the conditions precedents laid down therein are

satisfied. The substantive provision of law does not prescribe any limitation on the power of the court except those which are expressly provided in s. 114 of the Code in terms whereof it is empowered to make such order as it thinks fit."

22. Lest the subtle but real distinction existing between the power of review, on the one hand, and the power of an appellate court, on the other, disappears completely, order 47, rule 1 circumscribes a court's power of review by specifying the three grounds on which review is possible, the specific grounds being, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed, (ii) mistake or error apparent on the face of the record and (iii) for "any other sufficient reason".

23. Having taken into account the said three grounds, which order 47, rule 1 embodies as the grounds for review, the Supreme Court, in Moran Mar Basselios Cathlicos AIR 1954 SC 526, held that power of review is circumscribed by the three grounds, which have been specified in order 47, rule 1. Explaining the scope of the third ground of review mentioned in order 47, rule 1, namely, "any other sufficient reason", *the Supreme Court, in Moran Mar Basselios Cathlicos AIR 1954 SC 526, held that "any other sufficient reason" cannot be "any sufficient reason", but a reason, which is "sufficient" and, at the same time, at least, "analogous" to one of the two reasons as indicated hereinbefore, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree or order was passed and (ii) mistake or error apparent on the face of the record. In short, thus, what Moran Mar Basselios Cathlicos AIR 1954 SC 526 laid down was that the expression, "any other sufficient reason", cannot be construed as "any sufficient reason" and that "any sufficient reason" cannot*

become a ground for review unless even such "sufficient reason" is "analogous" to one of the other two grounds mentioned in order 47, rule 1, namely, (i) discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time, when the decree was passed or (ii) mistake or error apparent on the face of the record.

24. Board of Control for Cricket, India [2005] 4 SCC 741 is one of those cases, which has elaborately dealt with the scope of the power of review, particularly, of the High Courts and, having considered the case of Moran Mar Basselios Cathlicos AIR 1954 SC 526, the Supreme Court has clarified, in no uncertain words, in Board of Control for Cricket, India [2005] 4 SCC 741, that the rule that "any other sufficient ground" must be "analogous" to the other two grounds, as mentioned in order 47, rule 1, is not a rule of universal application. The relevant observations, made, at para 91, in Board of Control for Cricket, India [2005] 4 SCC 741, in this regard, read :

"91. It is true that in Moran Mar Basselios Cathlicos v. Most Rev. Mar Poulose Athanasius [1955] 1 SCR 520 ; AIR 1954 SC 526 this court made observations as regards limitations in the application of review of its order stating : (SCR page 529)

'Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needles to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil procedure which is similar in terms of order 47, rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified

grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule".' but the said rule is not universal."

25. I may pause here to point out that when a judgment of the Supreme Court is explained by a subsequent Bench of the Supreme Court, such an explanation of its own judgment by the Supreme Court carries the same authority as does the decision, which has been explained by it. Hence, in the face of the decision, rendered in Board of Control for Cricket, India [2005] 4 SCC 741, it cannot, now, be contended (as has been sought to be done by the respondents) that no ground, other than the grounds mentioned in Moran Mar Basselios Cathlicos AIR 1954 SC 526, can ever become a ground for review of an order or decision by a High Court. In fact, there is plethora of judicial pronouncements of the Supreme Court, which show that there can be exceptional cases, where a deviation from the grounds of review, as propounded in Moran Mar Basselios Cathlicos AIR 1954 SC 526, is possible and one of such cases is the case of Lily Thomas [2000] 6 SCC 224, wherein, having taken into account the facts that (a) the power of review is a creation of statute and not an inherent power, that (b) no power of review can be exercised if not given to a court or Tribunal either specifically or by necessary implication ; and that (c) under the guise of review jurisdiction, merit of a decision cannot really be examined, the Supreme Court has, in unequivocal terms, pointed out that justice is, after all, a virtue, which must prevail over all barriers and that the rules, procedures or technicalities of law must, if necessary, bend before justice and that such a situation may arise, when a court finds that it has rendered a decision, which it would not have rendered, but for an assumption

of fact, which, in fact, did not exist and its adherence to such a faulty decision would result in miscarriage of justice. In such cases, rules Lily Thomas [2000] 6 SCC 224, nothing can prevent a court from rectifying its own error, because the doctrine of "actus curiae neminem gravabit", (i.e., an act of court shall prejudice none), can be invoked, in such a case, for correcting the error committed by the court.

26. The real theme of the Supreme Court's decision, in Lily Thomas [2000] 6 SCC 224, is that though the power of review cannot be exercised by a court unless the statute confers such a power and that a statutory power of review can be exercised subject to such limitations as the statute may impose, yet a court is not powerless, in an appropriate and exceptional case, to rectify its error, because "an act of court shall prejudice none" and, hence, in exceptional cases, a court can invoke the doctrine of "actus curiae neminem gravabit" for correcting ***an error committed by it****. The case of Lily Thomas [2000] 6 SCC 224 shows that when a court discovers that a decision, rendered by it, was actually based on assumption of a fact, which was non-existent, and that the court's adherence to such a decision, which was based on non-existent fact, would result in miscarriage of justice, the court cannot be prevented from rectifying its own error, because an act of court, it is trite, shall prejudice none. The decision, so rendered and the law so laid down in Lily Thomas [2000] 6 SCC 224, have been agreed to in Board of Control for Cricket, India [2005] 4 SCC 741.1 may quote, on this aspect, the observations of the apex court, in Board of Control for Cricket, India [2005] 4 SCC 741, at para 92, which read as under :*

> *"92. Yet again in Lily Thomas [2000] 6 SCC 224 this court has laid down the law in the following terms : (SCC pages 247-48, para 52)*

52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement". It cannot be denied that the review is the creation of a statute. This court in Patel Narshi Thakershi v. Pradyumansinghji Arjunsing-hji [1970] 1 SCC 386, held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the court from rectifying the error ..." (emphasis supplied)

27. While pointing out, in Board of Control for Cricket, India [2005] 4 SCC 741, that in exercising the power of review, the court can take into account any subsequent event, the Supreme Court has pointed out that when a court, in the light of the subsequent event, finds that it had committed a mistake in understanding the nature and purport of an undertaking given by a counsel appearing on behalf of a party, the court may rectify its own mistake. One can profitably refer, in this regard, to the following observations made, at paras 87, 89, 90 and 93, in Board of Control for Cricket, India [2005] 4 SCC 741.

"87. Indisputably, an undertaking had been given by a learned Senior Counsel appearing on behalf of the Board. In the impugned order, the Division Bench before whom such undertaking had been given was of the opinion that it was misled. This court having regard to the understanding of

such undertaking by the Division Bench does not intend to deal with the effect and purport thereof and as we are of the opinion that the Division Bench of the Madras High Court itself is competent therefor. If para 14 of the order of the learned single judge is to be taken into consideration, it is possible to contend that the learned judges of the High Court were correct.

89. 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 mistake or for any other sufficient reason.

90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. 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 'actus curiae neminem gravabit'.

93. It is also not correct to contend that the court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of

the Board and its correlation with as to what transpired in the AGM of the Board held on September 29, 2004, the subsequent event may be taken into consideration by the court for the purpose of rectifying its own mistake."

28. In Board of Control for Cricket, India [2005] 4 SCC 741, the apex court has laid down that an application for review would be maintainable if "sufficient reasons" exist therefor. What, in a given case, shall constitute "sufficient reason" would be a question of fact and would, therefore, depend on the facts and circumstances of a given case. What the Supreme Court has pointed out, very clearly, in Board of Control for Cricket, India [2005] 4 SCC 741, is that the words "sufficient reason", which appear in order 47, rule 1, are wide enough to include misconception of fact or law by a court and that even when a mistake of fact or law has crept into a judicial decision due to court's misunderstanding of the nature of an undertaking given by an advocate, an application for review may be necessary and by invoking the doctrine of "actus curiae neminem gravabit", the court can correct such an error. This, in turn, shows that if, as a result of misunderstanding of fact or law by a court, a mistake has crept in, which the court finds would cause or has caused miscarriage of justice, such an error can, and must, be corrected by exercising the power of review and, for this purpose, the doctrine of "actus curiae neminem gravabit" can also be invoked. A mistake, on the part of the court, would include, according to the decision in Board of Control for Cricket, India [2005] 4 SCC 741, a mistake in the nature of the undertaking, which may have been given by a counsel meaning thereby that when a counsel, on a mistaken belief or on an erroneous or incorrect instruction, makes a statement and the court acts on such a statement, but, on a review application having been subsequently filed, the court finds that it had misunderstood the counsel's submission or had got misled by a counsel's submission or when the court finds that it (court), had proceeded on an assumption of fact, which did not really exist, or when it (court) finds that it had misinterpreted a

provision of law or had acted on a misconception of law and that the error, so crept in, was, as a result of subsequent event or otherwise, apparent on the face of the record, and that such error had caused, or would cause, miscarriage of justice, such a reason would be a "sufficient reason" calling for exercise of the power of review.

29. In the light of the decision in Board of Control for Cricket, India [2005] 4 SCC 741, it can no longer be in doubt that it is possible for a court to review its order if it discovers that it had passed an order by misunderstanding the nature of an undertaking given by an advocate or when it finds that a mistake, in the order, has crept in due to incorrect undertaking given by an advocate appearing in a case or when it discovers that its order suffers from misinterpretation of law or from misconception of fact, which may arise due to an incorrect submission made by a counsel as a result of wrong or incorrect instructions received by him from his client or otherwise. In short, in order to do complete justice, it is possible for a court to review its order by invoking the doctrine of "actus curiae neminem gravabit" and thereby rectify the mistake, which the court might have committed, while interpreting a fact or interpreting a position of law, particularly, when it finds that its judgment has caused, or would cause, miscarriage of justice.

30. In Rajesh D. Darbar [2003] 7 SCC 219, the Supreme Court has pointed out that while exercising the power of review, subsequent events can be taken note of and that in exceptional cases, the court may have to rectify the error committed by it by invoking the doctrine of "actus curiae neminem gravabit", for, an act of a court shall prejudice none. The Supreme Court has, however, pointed out, in Rajesh D. Darbar [2003] 7 SCC 219, that invoking of the doctrine of "actus curiae neminem gravabit" can be in exceptional cases and that every error cannot be rectified on the basis of the principle that an act of the court shall prejudice none.

31. In fact from the decision in Municipal Board, Pratabgarh [1982] 3 SCC 331, what clearly emerges is that when a High Court acknowledges its error and rectifies its error, which has crept in, what the High Court really does is restore the rule of law and not defeat it. Points out the apex court, ^ in Municipal Board, Pratabgarh [1982] 3 SCC 331, that laws cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Further observed the Supreme Court, in Municipal Board, Pratabgarh [1982] 3 SCC 331, on this aspect of law, thus, "... Undoubtedly, rule of law must prevail but as is often said, 'rule of law must run akin to rule of life. And life of law is not logic but experience'. By pointing out the error which according to us crept into the High Court's judgment the legal position is restored and the rule of law has been ensured its pristine glory . . .".

32. From the decisions in Municipal Board, Pratabgarh [1982] 3 SCC 331, Rajesh D. Darbar [2003] 7 SCC 219, Lily Thomas [2000] 6 SCC 224 and Board of Control for Cricket, India [2005] 4 SCC 741, what clearly transpires is that whenever a mistake is committed by a court, because of wrong interpretation of law or because of incorrect assumption of fact or because of misrepresentation of fact by the counsel or when a decision is based on a submission, which might have been made by a counsel on a wrong or incorrect instruction, or when a decision is based on a wrong understanding of a counsel's submissions or on assumption of existence of a fact, which was actually non-existent, the court shall, if the error is such, which would cause, or has caused, grave miscarriage of justice, review its own order.

C. <u>Mt. Jamna Kuer</u> v <u>Lal Bahadur and Others</u> AIR 1950 FC 131

*"8. There can be no doubt that this appeal must be allowed. The mistake as to the items of property regarding which Mt. **Jamna Kuer** had laid claim is apparent on the face of the record. The trial Judge had clearly stated in his judgment that **Jamna Kuer**'s claim related to properties 8 to 37 of the gazette notification. In para. 15 of her amended objection petition, she had laid claims to all the properties left by Kunj Behari. On 29th April 1942, it was admitted by the pleader of the applicants that all these properties related to the estate of Kunj Behari and that so far as the debtors were concerned, they were owners of only two properties mentioned in the gazette notification. In this situation it would have been appropriate if the High Court had corrected this error on the review petition and saved the appellant the trouble and expense of an appeal to the Privy Council or to this Court. Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court was not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision. We have no doubt that the error was apparent on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry. A mere look at the trial Court's decision indicates the error apart from anything else."*

D. Moran Mar BasseliosCatholicos and Anr.Vs.The Most Rev. Mar Poulose Athanasius and Ors., (1955) 1 SCR 520

"6. Before going into the merits of the case it is as well to bear in mind the scope of the application for review which has given rise to the present appeal. It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms of Order XLVII, rule 1 of our Code of Civil Procedure, 1908, the Court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three

specified grounds, namely (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule." See Chhajju Ram v. Neki L.R. 49 I.A. 144. This conclusion was reiterated by the Judicial Committee in BisheshwarPratapSahi v. ParathNath L.R. 61 I.A. 378 and was adopted by our Federal Court in Hari Shankar Pal v. AnathNathMitter[1949] F.C.R. 36 at pp. 47-48). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto. As already observed, out of the 99 objections taken in the grounds of review to the judgment of the majority of the High Court only 15 objections were urged before the High Court on the hearing of the application for review. Although most of those points have been referred to by learned counsel for the appellants, he mainly stressed three of them before us. Wenow proceed to examine these objections.

22. These points are said to be covered by issue 11(b), (c), (g) and (h), and also by issues 10(b), 14, 15 and 16. Assuming it is so, it is clear that the learned Judges also founded themselves on the three points hereinbefore mentioned which do not appear to fall within any of the issues in the case except issue 11(a) which was given up. To decide against a party on matters which do not come within the issues on which the parties went to trial clearly amounts to an error apparent on the face of the record. It is futile to speculate as to the effect these matters had on the minds of the Judges in comparison with the effect of the other points.

23. The above discussion, in our opinion, is quite sufficient for the purpose of disposing of this appeal and it is not necessary to go into the several other minor points raised before us. In our opinion the appellants have made out a valid ground for allowing

their application for review. We accordingly allow this appeal, set aside the judgment of the High Court and admit the review. As the different points involved in this appeal are intimately interconnected we direct the entire appeal to be reheard on all points unless both parties accept any of the findings of the High Court. The costs must follow the even and we order that the appellants must get the costs of this appeal before us and of the application for review before the High Court."

E. Thungabhadra Industries Ltd.V. The Government of Andhra Pradesh, (1964) 5 SCR 174

"8. The question that arises for consideration in these appeals is primarily whether this order dated September 4, 1959, is vitiated by error apparent on the face of the record. How that matter becomes relevant is because the appellant filed three applications for review of this order under O. XLVII r. 1 of the Civil Procedure Code specifying this as the ground for relief. These applications for review were filed on November 23, 1959, and apparently notice was issued to the respondent-State Government and the petition for review came on for hearing on January 6, 1961. On that date the learned Judges dismissed the said applications and assigned the following as the reasons for their order :

"The only ground argued in support of these review petitions is that leave to appeal to the Supreme Court was granted in similar circumstances in regard to previous year and there was no reason why leave should have been refused in these cases. We do not think that that would furnish a sufficient ground for reviewing the order dismissing the petitions for leave to file an appeal to the Supreme Court. That apart, the Supreme Court was moved under Article 136 of the Constitution for special leave and that was dismissed may be on the ground that it was not filed in time. In the circumstances, we think that our order dated 4.9.1959 dismissing S.C.C.M. Ps No. 4823, 4825 and 4827 of 1959 cannot be reviewed."

……

17. What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record". The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record", for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is regard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. No questions of fact were involved in the decision of the High Court in T.R.Cs. 75 to 77 of 1956. The entire controversy turned on the proper interpretation of r. 18(1) of the Turnover & Assessment Rules and the other pieces of legislation which are referred to by the High Court in its order of February 1956; nor could it be doubted or disputed that these were substantial questions of law. In the circumstances therefore, the submission of the appellant that the order of September 1959 was vitiated by "error apparent" of the kind envisaged by O. XLVII r. 1, Civil Procedure Code when it stated that "no substantial question of law arose" appears to us to be clearly well-founded. Indeed, learned Counsel for the respondent did not seek to argue that the earlier order of September 1959 was not vitiated by such error.

18. He, however, submitted that this Court should have regard not to whether the earlier order was so vitiated to not but to the grounds which were urged by the appellant at the hearing of the application for review and that if at that stage the point in the

form in which we have just now expressed was not urged, this Court would not interfere with the order rejecting the application for review. He pointed out that at the stage of the arguments on the application for review the only ground which was urged before the Court, as shown by the judgment of the Court, was that the order of September, 1959 was erroneous for the reason that a certificate had been granted on a previous occasion. We have extracted the text of this order of January, 1961 in which this argument is noticed and it is stated that it was the only point urged before the Court. The question then arises as to what is meant by "in similar circumstances in regard to a previous year". Learned Counsel for the respondent submits that we should understand these words to mean that the appellant relied on the order dated February 21, 1956, granting the certificate of fitness in regard to the decision of the High Court in T.R.C. 120 of 1953 solely as some sort of precedent and no more. On that basis learned Counsel strenuously contended that the mere fact that in regard to an earlier year a certificate was granted would not by itself render an order refusing a certificate in a later year erroneous on the ground of patent error. We have already dealt with this aspect of the matter. We do not, however, agree that this is the proper construction of the argument that they rejected. The order dated February 21, 1956, in relation to the previous year was placed before the court and was relied on not as a binding precedent to be followed but as setting out the particular substantial questions of law that arose for decision in the appeals, and the attention of the Court was drawn to the terms of the previous order with a view to point out the failure to appreciate the existence of these questions and to made out that the statement in the order of September, 1959 that no substantial question of law was involved in the appeals was erroneous on the face of it. This is made perfectly clear by the contents of the petition for review where the aspect we have just now set out is enunciated. The earlier order being of the same Court and of a Bench composed in part of the same Judges, the earlier order was referred to as a convenient summary of the various points of law that arose for the purpose of bringing to the notice of the Court the error which it committed in stating that no substantial question of law arose in the appeals. If by the first sentence the

learned Judges meant that the contention which they were called upon to consider was directed to claim the previous order of 1956 as a binding precedent, they failed to appreciate the substance of the appellant's argument. If, however, they meant that the matters set out by them in their order granting a certificate in relation to their decision in T.R.C. 120 of 1953 were not also involved in their judgment in T.R.Cs. 75 to 77 they were in error, for it is the case of no one that the questions of law involved were not identical. If, besides, they meant to say that these were not substantial questions of law within Art. 133(1), they were again guilty of error. The reasoning, therefore, of the learned Judges in the order now under appeal, is no ground for rejecting the applications to review their orders of September, 1959. We therefore consider that the learned Judges were in error in rejecting the application for review and we hold that the petitions for review should have been allowed. We only desire to add that in so holding we have not in any manner taken into account or been influenced by the view expressed by this Court in Tungabhadra Industries Ltd. v. The Commercial Tax Officer, Kurnool: [1961]2SCR14 regarding the construction of Rule 18(2) of the Turnover & Assessment Rules, since that decision is wholly irrelevant for considering the correctness of the order rejecting the applications for review which is the only question for decision in these appeals."

F. Rajender Singh Vs. Lt. Governor, Andaman and Nicobar Islands and Ors., (2005) 13 SCC 289

"13. We are unable to countenance the argument advanced by learned Additional Solicitor General appearing for the respondents. A careful perusal of the impugned judgment does not deal with and decide many important issues as could be seen from the grounds of review and as raised in the grounds of special leave petition/appeal. The High Court, in our opinion, is not justified in ignoring the materials on record which on proper consideration may justify the claim of the appellant. Learned counsel for the appellant has also explained to this Court as to why the appellant could not place before the Division Bench some of these documents which were not in possession of the

appellant at the time of hearing of the case. The High Court in our opinion, is not correct in overlooking the documents relied on by the appellant and the respondents. In our opinion, review jurisdiction is available in the present case since the impugned judgment is a clear case of an error apparent on the face of the record and non-consideration of relevant documents. The appellant, in our opinion, has got a strong case in their favour and if the claim of the appellant in this appeal is not countenanced, the appellant will suffer immeasurable loss and injury. Law is well-settled that the power of judicial review of its own order by the High Court inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice.

14. The power, in our opinion, extends to correct all errors to prevent miscarriage of justice. The courts should not hesitate to review its own earlier order when there exists an error on the face of the record and the interest of the justice so demands in appropriate cases. The grievance of the appellant is that though several vital issues were raised and documents placed, the High Court has not considered the same in its review jurisdiction. In our opinion, the High Court's order in the review petition is not correct which really necessitates our interference."

G. Green View Tea and Industries Vs.Collector, Golaghat, Assam and Anr.(2004) 4 SCC 122

*"14. Turning to the merits of the matter, it appears to us that the High Court has declined the review application by taking the view that there was no error apparent on the face of the record and that the considerations enumerated in Order 47, Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') were absent in the case. The learned Addl. Solicitor General contends that, whatever the grievance of the appellant against the judgment of the High Court dated 24.6.1998, it could not have been brought before the High Court by way of a review. He urges that the court's power of reviewing a judgment, under Order 47 Rule 1 of the CPC is extremely limited. He referred to the observations of this Court in **Parsion Devi and Ors**. v. **Sumitri Devi and Ors**. , (1997) 8 SCC 715 , and has contended that an error which is not self-evident and has to*

be detected by a process of reasoning, can hardly be an 'error apparent on the face of the record' justifying the court's exercise of its power of review under Order 47 Rule 1 CPC. He urges that, in exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected" since a review petition has a limited purpose and cannot allowed to become "an appeal in disguise". After having perused the record, we are satisfied that there are mistakes apparent on the face of the record and it is a fit case for review for the reasons that follow.

15. Before we look at the facts of the case, we wish to emphasise the approach to be adopted by the court while administering justice. This Court in ***S. Nagaraj and Ors****. v. :* ***State of Karnataka and Ors.****, (1994) ILLJ 851 SC observed:*

"It is the duty of the court to rectify, revise and re-call its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. An act of Court should prejudice none. "Of all these things respecting which learned men dispute", said Cicero, "there is none more important than clearly to understand that we are born for justice and that right is founded not in opinion but in nature". This very idea was echoed by James Madison (The Federalist, No. 51 at p. 352). He said:

"Justice is the end of the government. It is the end of the civil society. It ever has been and ever will be pursued, until it be obtained or until liberty be lost in the pursuit."

24. Unfortunately, the High court while considering the question of initial compensation amount fixed by the State Government as Rs. 55,000/- perbigha , has treated it as an issue of promissory estoppel and has held against the appellant. Irrespective of whether it is a situation of promissory estoppel or not, the fact that the State Government itself had accepted Rs. 55,000/- per bigha of tea class land as appropriate compensation ought to have been a factor which would have influenced the fixing the compensation for the land. The letter written by the Deputy

Commissioner referring to an earlier order dated 20th June 1990, fixing category-wise valuation of different categories of land was just brushed aside on the ground that it did not amount to evidence under Section 3 of the Indian Evidence Act, 1872. Having lost sight of the material on record, the High Court concluded, "there is no material available on record to hold that the land in question falls within a rural area with paddy field and tea cultivation area", which is directly contrary to the Jamabandhi report, which classified the land as 'tea class land'.

25. The cumulative effect of all this evidence is that, we are satisfied that the High Court in fairness and in the interest of justice, ought to have given a second look to its own judgment dated 24.6.1998.

H. Deposit for Renewable Power Purchase Obligation:

55. The Hon'ble Commission in Page No. 221 while calculating the amount to be deposited against fulfilment of RPO obligation has erroneously considered 60.01 MU in place of 109.001 MU for NBPDCL. The relevant extract from the Tariff Order has been reproduced below:

"SBPDCL vide letter no.207 dated 14.03.2018 had submitted the copies of Non-solar RECs purchased, relating to NBPDCL, for 236.819 MU for Rs.35.52 crore (@Rs.1500/- per RE) during FY 2017-18 in fulfillment of RPO to end of FY 2016-17. Further, a RE certificate for purchase of 109.001 MU is also purchased by BSPHCL on behalf of Discoms i.e. SBPDCL and NBPDCL, however no breakup details were furnished. In the absence of details, the Commission has considered balance RPO (60.01 MU) to be fulfilled by NBPDCL and adjusted against this REC i.e. 109.001 MU and balance MUs of 48.991 MUs (109.001-60.01) adjusted for SBPDCL."

56. Therefore, the issue of calculation of deposit to be made against the shortfall in fulfilment of RPO obligation for FY 2017-18, was not decided on merits, but by taking recourse to absence of information. The Hon'ble Commission has not asked the Petitioner for confirming the details of the purchase of REC by BSPHCL during the tariff determination process. However, the Petitioner has attached the required supporting document for its claim against the purchase of REC of 109.001 MU as Annexure I. The Hon'ble Commission may revise the calculation of deposit to be made against the shortfall in fulfilment of RPO obligation in light of the considering the submissions made by the Petitioner. In view of the same, this issue may be revisited.

57. The Petitioner has not filed any appeal against the Order dated 21.3.2018 passed in Case No. 40 of 2017. The Petitioner has also not availed any other remedy or proceedings other than the present review petition as on date.

58. The Petitioner has paid the requisite court fees.

59. For the reasons mentioned herein above, the Hon'ble Commission may be pleased to review the order dated 21.3.2018.

60. It is, therefore, respectfully prayed that this Hon'ble Commission may be made to:

(a) admit the review petition;
(b) review and modify the Order dated 21.3.2018 passed in Case No. 40 of 2017 on the aspects mentioned herein above;

(c) pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case.

(Narendra Kumar)
CE (Commercial)
NBPDCL

Place:

Dated: 18th May 2018

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