Kerala State Electricity Regulatory Commission
Thiruvananthapuram

Present : **Shri. PremanDinaraj, Chairman**

Adv. A.J. Wilson, Member (Law)

RP.No. 05/2021

In the matter of: Petition filed under Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 for reviewing the Order dated 06.07.2021 of the Kerala State Electricity Regulatory Commission in OP No.44/2020 filed by M/s INDSIL Hydro Power and Manganese Ltd.

Petitioner: **M/s Kerala State Electricity Board Limited,**
Vyduthi Bhavanam, Pattom,
Thiruvananthapuram

Petitioner
Represented by: Shri. Raju Joseph, Sr. Advocate

Respondent: **M/s. INDSIL Hydro Power and Manganese Ltd.**,
Indsil House, T.V Swamy Road (West), R.S Puram, Coimbatore.

Respondent
Represented by**:** Shri. Joseph Kodianthara, Sr. Advocate

Date of Hearing: **23.02.2022**

Order dated 28 .04.2022

1. M/s Kerala State Electricity Board Ltd. (KSEB Ltd.) filed this petition on 27.10.2021 seeking review of the Order passed by the Commission in OP No.44 of 2020 dated 06.07.2021 under Regulation 67 of the KSERC (Conduct of Business) Regulations 2003. This petition included the prayer to review and reconsider the Order in OP 44/2020 dated 06.07.2021 for the

reasons submitted in this petition and that may be submitted during hearing by allowing this Review Petition.

2. The Commission accepted the petition as RP No. 05 of 2021 and scheduled for hearing on 23.02.2022 at 11 A.M through Video Conference mode.

3. Background of the Case

3.1 The respondent herein INDSIL Hydro Power and Manganese Ltd., pursuant to the Order passed by the Govt. of Kerala, had set up a small hydro-electric project at Kuthungal in Idukki district with a capacity of 21MW. After obtaining all necessary approvals, the petitioner executed the project at a cost of Rs.55 crore and the generation of electri city started on 15-05-2000.

3.2 On 30.12.1994, the respondent herein (previously IndsilElectrosmelts Ltd.) entered into an Agreement with the erstwhile Kerala State Electricity Board. By this Agreement, the respondent was allowed to set up Kuthungal Phase I and Phase II Hydro Electric Project at their own cost, the construction, operation and maintenance being managed by themsubject to stipulations contained in the said Agreement and also the policy guidelines stipulated in GO(MS) No. 28/90/PD dated 07.12.1990 and GO(MS) No. 5/92/PD dated 12.03.1992 under CPP mode.

3.3 As per Clause 1 of the Agreement, the operations of the project shall be governed by the provision of the said Agreement and the cost of the project is to be entirely funded by the petitioner. Clause 2 of the Agreement required the project implementation to be done strictly in accordance with the Project Report, Designs and specifications as approved by KSE Board.

3.4 INDSIL Hydro Power & Manganese Ltd. filed the OP No. 44/2020 before the KSERC in connection with the denial of payment in respect of invoice raised by them on 13.07.2020 together with interest. While filing the said Petition, the respondent herein contended that the KSEB Ltd. had violated Clause 11 of the Agreement executed on 30.12.1994. They submitted that the KSEB Ltd. was not paying the invoice amount of Rs.639.63 lakh raised by them. This invoice was raised by the respondent herein on account of the energy generated and banked by the them from their hydro-generating plant at Kuthungal for the accounting period from 01.07.2019 to 30.06.2020. The petitioner contended that as per Clause 11 of the Agreement dated 30-12-1994, the KSEB Ltd. is liable to pay for the energy banked with them at the rate at which the KSEB Ltd. sells the energy to the EHT consumers.

3.5 KSEB Ltd. denied the payment for the bill which was communicated vide letter dated 16-09-2020 citing their inability to absorb the excess energy due to low demand during the lockdown period and also the high storage in the reservoirs and also pointing out that no intimation whatsoever was passed on to KSEB Ltd. on the lack of demand at the factory of the respondent herein to facilitate KSEB Ltd. to restrict the generation from the Kuthungal Small Hydro-Electric Plant (SHEP)

3.6 Aggrieved by the action of the KSEB Ltd., the INDSIL Hydro Power and Manganese Ltd. filed OP No. 44/2020 before the Commission with a prayer to direct the KSEB Ltd. to settle the bill raised in full along with interest.

3.7 The Commission conducted hearing on this matter through video conference on 25.01.2021 at 11.00 AM. Shri. Joseph Kodianthara, Sr. Advocate who appeared for M/s INDSIL, explained the circumstances under which the banking of 1,16,29,665 units of energy took place. He also explained the petitioner's right to claim the amount raised in the invoice citing Clause 11 of the Agreement signed between M/s INDSIL and the KSEB in connection with the setting up and operation of the 21 MW Hydro Electric Project at Kuthungal, Idukki. He further submitted that as per the provisions of the Agreement the petitioner was left with no option but to sell all the energy produced in excess of their requirement to the KSEB Ltd only.

3.8 On the other hand, the KSEB Ltd. argued that M/s INDSIL had intimated them regarding the excess generation only on 16.05.2020 and neither KSEB Ltd. nor the SLDC was aware of the excess generation of energy by M/s INDSIL.

3.9 The Commission examined in detail the petition submitted by M/s INDSIL, the additional submissions filed by the parties, the arguments made during the hearing, the provisions of the Agreement dated 30-12-1994 in question, the Orders of the Commission dated 02- 06-2017 (in OP No.2/2017), Judgment of the Hon. APTEL dated 20-07-2019 (in Appeal No.293 of 2017) and the relevant Regulations and the details on record, framed the following issues in the matter:

> *(1) Whether the Commission has the jurisdiction to adjudicate on the matter.*
>
> *(2). Whether the generation from Kuthungal SHEP is to be based on the petitioner's power consumption at their Palakkad units and whether such consumption is the prime factor taken by SLDC while deciding the scheduling and generation from Kuthungal SHEP?*

(3). Whether the petitioner is required to issue advance notice to KSEB Ltd for restriction of generation from Kuthungal SHEP by KSEB Ltd?

(4). Whether the petitioner has the obligation to sell the excess banked energy and whether KSEB Ltd. has the obligation to purchase the excess banked energy at the end of the accounting year?

(5). Whether the energy purchased through open access by the petitioner has resulted/contributed to the excess banked energy?

(6). Whether the banked energy at the end of the accounting year is required to be sold to KSEB Ltd.?

(7). Whether KSEB Ltd's purchase of banked energy would tantamount to violation of merit order schedule?

(8). Which rate should be applicable for the purchase of banked energy by KSEB Ltd.?

3.10. The Commission after carefully examining each of the above said issues separately with reference to the Agreement in question, submissions of both the parties, Orders of the Commission dated 02.06.2017(in OP No. 2/2017), Judgment of the Hon'ble APTEL dated 20.07.2019(in Appeal No. 293 of 2017) and the relevant Regulations and the details on record and arrived at the following findings:

(i)Issue No.1: The Commission is of the considered view that it has the necessary jurisdiction to adjudicate on this petition and accordingly the matter has been taken up by the Commission.

(ii)Issue No.2: The power consumption at the petitioner's Palakkad units and the scheduling of power by SLDC and its generation from the petitioner's Kuthungal SHEP are not co-related, but independent of each other.

(iii)Issue No.3: The Commission is of the firm view that restriction if any, has to be imposed by KSEB Ltd. for the reasons mentioned in the Agreement and no obligation as per the agreement is cast upon the petitioner to inform KSEB Ltd. to enable restrictions on the generation from the plant.

(iv)Issue No.4: The Commission is of the firm view that KSEB Ltd. having availed the banked energy from the petitioner and sold it to its consumers cannot at the same time deny payment to the petitioner.

(v)Issue No.5: The KSEB Ltd.'s argument regarding the contribution of Open Access energy in the excess banked energy is incorrect and there was no open acces energy involved in the banked energy account at the end of the accounting period. Instead, the entire banked energy was on account of generation during April 2020 to June 2020.

(vi)Issue No.6: There is no constraint as per the provisions of the Agreement, on the generation from the plant, even if the petitioner's factories.

(vii)Issue No.7: The argument that the purchase of banked energy will tantamount to the violation of the Merit Order purchase cannot be accepted.

(viii)Issue No.8: Since KSERC (Renewable Energy and Net Metering) Regulations, 2020 is effective from 5th June, 2020, the Commission is of the view that for the energy banked from this date, the rate applicable shall be the APPC as per the provisions of the Regulations. For the energy banked prior to the said period, ie. between 01.04.2020 to 04.06.2020, the rate as per Clause 11 of the Agreement shall be applicable ie. at the rate at which KSEB Ltd. sells energy to the EHT consumers in the same voltage(110kV) at which KSEB Ltd. receives the energy from the company.

3.11. Based on the discussion and the findings, the Commission disposed of the OP No. 44/2020 vide the Order dated 06.07.2021. The directions in the said Order are as follows:

(1) KSEB Ltd. is obliged to purchase the excess banked energy from Kuthungal SHEP of the petitioner as on 30-06-2020 as per the Agreement dated 30-12- 1994.

(2) Considering the Order of the Commission dated 02-06-2017, the rate applicable for the sale of energy banked by the petitioner till 04-06-2020 shall be as per Clause 11 of the Agreement, that is at the EHT rate at 110kV level of Rs.5.40/kWh.

(3) For the energy banked by the petitioner between 05-06-2020 and 30-06- 2020, the rate applicable shall be as per the provisions of the KSERC (Renewable Energy and Net Metering) Regulations, 2020 that is the

Average Power Purchase Cost applicable for the relevant financial year i.e., 2020-21.

(4) The Commission further directs KSEB Ltd. to file the details of power purchase cost for the financial year 2020-21, by 30-07-2021, so that the Commission is able to notify the APPC for the financial year 2020-21.

4. Pursuant to the above Orders of the Commission, the KSEB Ltd. filed this petition dated 26.10.2021 under Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 seeking review of the said Order of the Commission on the following reasons:

4.1 The denial of all the bills was communicated by KSEB Ltd.as per letter dated 16.09.2020. In the said letter KSEB Ltd. had pointed out that *no intimation whosoever was passed on to KSEBL about the lack of demand at the respondent's factory so as to request the respondent to restrict generation from Kuthungal SHEP and that KSEB Ltd. had excess energy during the above period due to various reasons.* Admittedly the respondent had contacted them regarding the excess generation only on 16.05.2020 and that too in regard to energy generated previously. As per the Agreement, banking of excess energy was the only option given to the respondent and it is not mandatory that such option shall be exercised before generation.

4.2 It is significant to note that the respondent never intimated its intention to bank energy except by the letter dated 16.05.2020.

4.3 Another important fact is that the Supplementary Agreement dated 27.12.2012 is not meant to evacuate power from Kuthungal Power House. The sub-station was constructed to meet the increasing local demand as part of regular network expansion plan to adequately meet growing demand and location near Kuthungal Power House was found optimum. Since INDSIL offered land free of cost, the sub-station was established there.

4.4 The matter was considered by the KSERC and disposed of by Order dated 06.07.2021. The KSERC committed a mistake while understanding the scope and ambit of the various clauses in the Agreement.

4.5 At paragraph40 of the Order this Commission observed that "Admittedly, if there is generation from the station and no factory consumption, banking of

energy is bound to take place". Clause 9 of the Agreement shows that the energy generated in Kuthungal project is measured before it is fed into the grid of KSEB Ltd. Clause 10 is the other relevant clause in the Agreement. The above clause shall be read along with G.O. (MS) N0.28/90/PD dated 07.12.1990 and G.O. MSNo.5/52/PD dated 12.03.1992. The scheme of the Government was for setting up of small/mini Hydel Schemes by Private agencies both CPP mode and IPP mode as part of the promotion of private participation in setting up Small/Mini/Micro Hydel Schemes.M/s INDSIL opted for CPP mode indicating that the main purpose is for utilizing the power generated for the purpose of their factory at Kanjikode.

4.6 However, if excess energy is generated, the Company has the option to bank the energy with KSEB Ltd. if the Company so desires. This would show that an occasion for banking energy would arise only when energy becomes excess after consumption in their factory. Banking must therefore be a voluntary action on the part of the company. In other words, it is not automatic. Also, it is to be noted that there is no separate power purchase agreement other than what is emanating from Clauses 10 &11, enabling the Company to re-coup the price of energy generated in excess. Another important aspect is that at the time of entering into the Agreement, the Electricity Act 1910 and Electricity (Supply) Act 1948 were holding the field wherein there was no scope for electricity trading and open access. Therefore, the contemplation can only be that the Company would utilize the energy produced for their purpose and only in case there is excess energy after their use that the same can be banked or sold to KSEB Ltd.

4.7 Therefore, the observation in paragraph 40 that the energy generated if not consumed in the factory, banking will take placeautomatically is a conclusion which cannot be legitimately drawn from the Clauses relied on by the Commission. It is also to be noted that the scope and ambit of a Clause in the Agreement shall be decided by confiding the whole Agreement. In this context, the law declared by the Honourable Supreme Court in the decision South East Asia Marine Engineering and Constructions Ltd. (SEAMEC) Vs Oil India reported in (2020) 5 SCC 164 at paragraphs 25 and 28 is apposite. The Honourable Apex Court held that *a contract needs to be interpreted taking into consideration all the clauses in the contract and that the thumb rule of interpretation is that the document framing a written contract should be read*

as a whole and so far as possible as mutually explanatory. It is a well settled proposition.

4.8 The observations and findings in paragraphs 41 to 45 are not consistent with Clause 12 of the Agreement. Clause 12 shall be read with in the context of Clauses10 and11of the Agreement. As per Clause 11, the Company can sell the banked energy to KSEB. It may be noted that the sale of energy is also a voluntary action on the part of the Company.

4.9 It is stated in Clause 11 that 'the accounting and billing of the energy fed into the grid by the Company and/or supply by KSEB to the companies for operating its factories, if any, will be settled on a monthly basis'. It is further stated in the said Clause that 'if the energy banked is not utilized by the company and their associates during one accounting year, it shall not be carried forward to the next accounting year and shall be treated as lost'. However, there is an option for the Company to sell the excess energy to KSEB on the terms specified in the Agreement. When Clause 12 is read along with Clauses 10 and 11, the picture will become clear.

4.10 Clause 12 does not allow the Company to keep the energy banked until the last day of the water year and then on the last day sell the same to KSEB Ltd. If such is the intention, Clause 12 cannot operate because on the last day of the water year there cannot be any occasion for KSEB Ltd. to restrict the generation to the extent of captive consumption of the company. Therefore, cumulative effect of Clauses 10 to 12 is that the Company can bank the energy in case there is excess and the Company can also sell the energy before the end of the water year, but settlement shall be made on monthly basis. A reasonable meaning to the above provisions is that if there is excess banked energy during monthly settlement, the Company can sell that excess energy and if the Company anticipates that their consumption will be lower, it can bank and sell the energy, but the KSEB Ltd. can say that they do not require the energy and therefore restrict generation. The approach of the Commission is therefore not consistent with the scope and ambit of Clauses 10 to 12.

4.11 The finding in regard to issue number 3 also requires reconsideration for the reasons stated above. As per respondent's letter dated 16.05.2020 addressed to the Special Officer Revenue that the Company had to shut down

the factories from 24th March onwards and the power generated from 24th March to 16th May 2020 was 57,01,301 units and requested to adjust the said amount of energy in their consumption in the factory. Intimation on 16.05.2020 regarding the generation of electricity during the prior period will not entail the Company to adjust the said power in their future consumption. Had they informed the Board on 24th March itself regarding their intention to bank the energy or to sell the energy in which event the Board would have the opportunity to keep the energy in bank or to purchase the energy or to restrict generation.

4.12 The Commission committed a very serious error when it considered as to whether INDSIL has the obligation to sell the banked energy and whether KSEB Ltd. has any obligation to purchase the excess banked energy as issue number 4. The Commission relied on Clauses 10 and 11 of the Agreement and came to the finding that there was deemed sale. Now coming to Clause 11 of the Agreement it can be seen that the said clause deals with energy generated in excess of the requirement of the Company. It is stated in the said Clause that if the energy in excess of the requirement of the company is generated from the project during one accounting year, the company may sell the excess banked energy to KSEB Ltd.

4.13 Pausing here for a moment**,** it can be seen that the energy should be banked before selling it and it is from such banked energy that the Company can sell to KSEB Ltd.Therefore, selling of energy should be a conscious act and no sale can be effected without the knowledge of the purchaser. Transaction of the sale involves an offer to sell for a price and the acceptance of such offer. Any sale should conform to the provision in the Sale of goods Act, 1930. Therefore, the option in Clause 11 of the Agreement to sell banked energy should be exercised by the Company by offering it to KSEB Ltd.

4.14 In the instant case as can be seen from the records and especially from the observation of the Commission that on 16.05.2020, the Company informed KSEB Ltd. regarding excess generation during the previous period. Before that date, KSEB Ltd. was unaware of the excess generation. The SLDC is only monitoring the availability of the energy in the grid and scheduling it and has no facility to understand the specific source from which the energy is flowing into the grid. Its duty is to control and distribute the power in the grid. So, if

excess energy from an unknown source comes to the grid it will go unnoticed and it may go to places outside Kerala where energy is required and consumed by different users.

4.15 The other aspect dealt with by the Commission on the basis of Clause 11 based on the sentence; "The sale shall be deemed to be effected at the EHT Terminal of KSEB where the power generated by the Company is fed into the KSEB grid". This sentence was understood by the Commission as a deemed sale as if energy fed in to the grid will automatically become a sale of energy. The said understanding is a fundamental mistake. In every sale, one of the important aspects is the situs of goods at the time of sale. Electricity being a commodity that cannot be stored, always there will emerge a doubt regarding the situs of electricity at the time of sale.

4.16 The situs of electricity at the time of sale assumes importance because the wheeling charges and T&D charges are to be collected on the basis for utilisation of the KSEBL grid. Suppose the situs of the sale is at Palakkad, the company shall have to pay the wheeling and T&D charges from Kuthungal to Palakkad. It is only to avoid such confusion that situs of sale is clearly mentioned in the Agreement that the same is at the EHT Terminal of KSEB where the power generated by the company is fed into the KSEB grid. The further sentences in the said Clause make the position clearer. It is stated that the energy fed into the KSEB grid, less banking Commission, royalty, and/or levies shall be deemed to be the energy sold to the KSEB.

4.17 Therefore, the edifice of the reasoning of the Commission is on a shaky foundation, thereby the conclusion reached became faulty. Hence the Order passed by the Commission in OP No.44/2020 dated 06.07.2021 requires review and reconsideration.

4.18 Further, in view of the order dated 23-09-2021 of the Honourable Supreme Court of India in Miscellaneous Application No.665 of 2021 In SMW(C) of 2020 read with regulation 67(1) of the KSERC (Conduct of Business) Regulations, 2003, the present petition is in time.

5. The following are the Grounds upon which the Review Petitioner preferred review against the Order dated 06.07.2021 of the Commission in OP No. 44/2020:

A. The reasoning of the Commission to arrive at the findings on issue number 2 is not fully correct. TheCommission had observed in paragraph 40 as follows **"**Admittedly, if there is generation from the station and no factory consumption, banking of energy is bound to take place". The above statement is not correct, Moreover, the Commission had relied on the additional clarification dated 09.03.2021 which led to the observations at paragraph 44 of the Order. While doing so the Commission had omitted to consider the additional submission made on behalf of KSEB Ltd. in compliance with daily Order dated 08.03.2021. In the said additional submission the KSEB Ltd. had clearly explained the reason for establishing the substation in the land owned by INDSIL and that the power generated at Kuthungal SHEP is not specifically utilised for distributing in the nearby area. Kuthugal Substation is a part of state grid. Rajakkad, Senapathi etc., functions essentially as an extension of the grid of KSEBL. Hence, the observations in paragraph 40 to 45 require review and reconsideration, being an error apparent on the face of the record.

B. The findings of the Commission on the issue number 3 happened to be arrived at on the basis of a wrong understanding of the Clauses in the Agreement and by restricting theconsideration to Clause 12. Therefore, the observations and findings in paragraphs 46 to 55 require review and reconsideration being an error apparent on the face of the record.

C. The findings of the Commission on issue No.4 is not correct.There cannot be any deemed sale. As already submitted, the transaction of sale is governed by the Sale of Goods Act, 1930 except what is stated in Article 366 (29A) of the Constitution of India. Those transactions are known as deemed sale. Therefore, the observations and findings contained in paragraphs 56-61 require review and reconsideration being an error apparent on the face of the record.

D.The Commission has formulated a subsidiary question as to whether the Company had offered to sell excess banked energy. After considering the issue primarily on the basis of a letter issued by the Company dated 16.05.2020 came to the conclusion that the said letter is an offer to sell excess energy. Here also the Commission proceeded on the assumption that the energy was earlier banked with KSEBL and it was such energy that was sought to sell. It is to be noted that the Company had not produced any document to show that at any point of time prior to generation of electricity the Company informed its desire to bank energy. Therefore, the observations and finding in paragraphs 62-67

require review and reconsideration being an error apparent on the face of record**.**

E. While dealing with issue No.6 also the Commission proceeded on the assumption that the whole energy generated was banked**.** No doubt banked energy can be sold to KSEB Ltd. before the close of the water year. It is because when energy is banked it will be utilised by KSEB Ltd.If it is not banked the same will not be scheduled and made use of. The finding of the Commission in this regard therefore requires review and reconsideration being an error apparent on the face of the record

F. The Commission has considered the issue regarding the rate at which the banked energy should be purchased. Having considered such an issue the Commission ought to have found that after coming into force of the Electricity Act, 2003, all existing agreements should be construed in the light of the provisions of the said Act and regulations made thereunder.

G. Without prejudice to the earlier contentions, the Commission ought to have found that, the actual quantum of energy banked can be assessed at the end of the accounting year as the generator has every right to use the banked energy at any time before 30.06.2020 and thus, sale if any, can be effected only on 30.06.2020. Thus, assessing the quantum of energy for sale at any time prior to 30.06.2020 is meaningless. Nevertheless, the rate applicable is also as on 30.06.2020, as per the existing regulations for the entire quantity. Therefore, the order and finding in paragraphs 94 (2) require review and reconsideration being an error apparent on the face of record.

6. **The respondent, M/s INDSIL Hydro Power and Manganese Ltd. submitted their reply affidavit dated 16.02.2022 along with a copy of the Order dated 07.09.2020 of this Commission in RP No. 2/2021, relating to M/s Edayar Zinc Ltd., in response to the review petition. The contentions of the respondent are as follows:**

6.1The Review Petition is not maintainable in law or on facts.

6.2. A perusal of the Review Petition will itself show that it is nothing but a re-agitation of the legal and factual issues decided by the Commission in its Order dated 06.07.2021 in OP No. 44/2020. As held by this Commission in an earlier Order dated 07.06.2020, in RP No. 2/2021 in the case of M/s Edayar Zinc Limited, the issues decided cannot be sought to be re-agitated on merits. The

power of review is extremely restricted and discretionary. Suffice to state the present Review Petition does not disclose any valid or substantiate ground for a review. The KSEB Ltd. is effectively re-agitating the issues on merits which can only be done in Appeal and not by way of Review before this Commission. For this reason alone, the Review Petition is liable to be dismissed.

6.3. Without prejudice to the above, a perusal of the Order dated 06.07.2021 of this Commission in OP No. 44/2020 will show that in the first instance this Commission has framed eight issues. Thereafter this Commission has elaborately and properly analysed, considered and rendered its decision on each issue. There is no error much less any error apparent warranting any review.

6.4. The fact that the Review Petition is not maintainable is further evident from the following.

(i)With respect to the finding in paragraph 40 of the Order sought to be reviewed, the Statement in paragraph 10 of the Review Petition reads as follows: -

"*10. Therefore, the observation in paragraph 40 that the energy generated if not consumed in the factory, banking will take place automatically is a conclusion which cannot be legitimately drawn from the clauses relied on by the Honourable Commission".*

Xxx xxx xxxxxxxxx

Xxx xxx xxxxxxxxx

Obviously, this cannot be a ground for review apart from the fact that the findings of this Honourable Commission in every respect are legal and proper.

*(ii)*With respect to the findings in paragraphs 41 to 45 of the impugned Order, the Statement in paragraph 11 of the Review Petitionstarts as follows:-

"11. The observations and findings in paragraphs 41 to 45 are *not consistent with clause 12 of the agreement".*

Obviously, what is sought is a re-appreciation which is impermissible in the scope of review. The facts and contentions thereafter taken is further evidence of re-agitation on the merit which is absolutely impermissible in review jurisdiction. The same applies to the averments in paragraphs 13 to

16 of the Review Petition. None of these are permissible to be agitated in review.

*(iii)*Paragraph 17 of the Review Petition thereafter reads as follows:-

"*17. Therefore, the edifice of the reasoning of the Honourable Commission is on a shaky foundation, thereby the conclusion reached became faulty. The Order passed by the Hon'ble Commission in OP No. 44/2020 dated 06.07.2021 requires review and reconsideration on thr following among other".*

Obviously, the remedy is that of an Appeal and not Review.

6.5. None of the grounds raised in the Review Petition are therefore legal, sustainable or warrant exercise of the review jurisdiction by the Commission. The Review Petition is liable to be dismissed.

Hearing on the Review Petition and responses of the Parties.

7. The matter was heard through video conference mode on 23.02.2022. Senior Advocate Raju Joseph appeared on behalf of the Review Petitioner and Senior Advocate Joseph Kodiantharaappeared on behalf of the Respondent during the hearing. At the beginning, the Commission requested the Petitioner Counsel to present his views as to why the orders of the Commission is required to be reviewed and what are the circumstances for such a review under Code of Civil Procedure, 1908 or under any other relevant provisions.

7.1. During the hearing the Petitioner contended as follows:

7.2. The Review Petition is maintainable under Section 94(1) (f) of the Electricity Act, 2003 and no new documents have been produced before the Commission to review the matter. Under Section 94 of the Electricity Act, 2003, the Commission has the power to review its decisions, directions and orders as per Section 114 and Order 47 Rule 1 of CPC. At the same time the Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 empowers the Commission to review its orders, directions or decisions. Regulation 67 is framed by the Commission under Section 181(1) and (2) (zl) and (zp) of the Electricity Act, 2003. Even though the legislation made by the Commission is a subordinate legislation, it will form part of the main legislation if properly made. Such legislation is binding on the author of the legislation ie.the Commission. The Hon'ble Supreme Court has said that a regulation made by the Commission is binding to the Commission also. If we go by the Regulation 67 made by the Commission it has a wider range of power and there is no restriction for review as stated under Order 47 Rule 1 of CPC. Therefore, the review power of KSERC as per Regulation 67 of KSERC (Conduct of Business) Regulations, 2003 is wider than that available to any other Courts.

So, any affected party can file review before the Commission under Regulation 67 of KSERC (Conduct of Business) Regulations, 2003.

7.3 There is no scope for review in the straitjacket formula but it can be done depending upon the scope and circumstances of the case. One parameter in review is by producing a document which was not produced before the tribunal or found with due diligence that a copy of the same was not available or without knowledge of the petitioner at that time. It is not so here and they are solely depending upon the materials already relied on by the Commission and their attempt is to point out the way in which the Commission understood the scope of each clause of the Agreement in a different manner. Whether the understanding of the Commission is a reasonable one or not is the question. If the Commission feels that the mistake pointed out by the petitioner is a mistake, then the Commission has a duty to correct it because every authority has a fundamental duty to keep the report correct in a correct position. It is not in the interest of the petitioner or parties alone. It is for the public authority who have satisfaction that the report they are keeping is correct.

7.4 The finding in Paragraph 40 of the Order that 'if there is generation from the station and no factory consumption, banking of energy is bound to take place' does not come from Clause 9 or any other Clauses of the original Agreement.

7.5. The interpretation in paragraph 41 is not correct by a proper reading of all the Clauses in total. The mistake done by the Commission is that Clause 12 was taken in isolation and the finding was arrived at paragraph 41.

7.6 With regard to the Issue No.3 raised in the impugned Order and the observations in paragraphs 46 to 48 of the impugned order, the request of the Company to bank energy came only after generation and not before generation. Further, the noting of the Commission in Para 49 that "The Commission also notes that as contented by the petitioner, KSEB Ltd. has accepted the energy generated from the plant and distributed it in the surrounding areas during the period" is absolutely wrong. The KSEB Ltd. has purchased 75 to 80 percentage of energy from outside. Here the generation is only 20 to 25 percentage.

7.7. The noting of the Commission in paragraph 49 that "The Commision also notes that as contended by the petitioner, KSEB Ltd. has accepted the energy generated from the plant and distributed it in the surrounding areas during the period" is absolutely wrong. Paragraph 49 necessitates only when the Company makes request to bank energy. When they make such request either such request will be accepted or if KSEB Ltd. had excess energy, they will inform that they are not in a position to accept their request. There was no such occasion. KSEB Ltd. was not in a position to accept their request and receive the energy.

7.8. The KSEB Ltd. has built a substation at Neriamanglam in the year 2012. There are lot of feeders connected to that substation. Electricity comes from various generating stations. It is very hard to tell from which point does these electrons come from. So, it cannot be said that the KSEB Ltd. used the energy generated at the station alone.

7.9. The Annexure VI letter mentioned in paragraphs 50,51,52 and 53 of the impugned order is against Clause 10 and 11 of the Agreement. This letter is the basic cause of action for the entire issue. Here the dispute is not regarding the electricity generation process that the company was continuing but on the production of electricity for the month of January, February, March and April 2020.Through that letter the company intimated that they are unable to pay cash for the month of January, February, March and April but want it to be adjusted. The entire controversy is not subsequent but prior to 16.05.2020. So, this letter is not in consonance with the requirements under Clauses 10 & 11. Only with prior intimation, the Board can tell them that we do not require energy and please restrict generation. After generation nobody can restrict it.

7.10. SLDC is scheduling energy and for that SLDC is to be intimated about the requirement and then only scheduling can be done. Any energy entering the grid unnoticed will go to the places of low voltage. Without the knowledge of the SLDC if the power entered the grid and the Board is unaware of it, then the Board is not benefitted. That is why banking is important. For banking, prior intimation and intention to sell energy must be there. So banking is to be done with proper methods. In this case there should be prior intimation and then only Board can schedule energy accordingly. There is no question of banking after generation. Energy cannot be stored like other commodities. Energy generated is energy utilized. There is no issue regarding subsequent period.

7.11. Before coming to Clause 12, the Commission ought to have noted Clauses 10 and 11 of the Agreement. Then the findings in the paragraphs 54 and 55 of the order would not have been there.

7.12. Regarding the Issue No. 4 and the observations in paragraph 56 and 57 of the impugned order, Clause 10 clearly shows that banking is not automatic. Banking should be a voluntary action on the part of the generator. If it is banked energy then it should be purchased. When an intention for banking is given by the generator, then the Board has the option to utilize it somewhere else. If the letter dated 16.05.2020 is taken as an intimation to bank subsequent energy, then the KSEB Ltd. is bound to accept it. But it is not relevant here because the period under consideration are January, February, March and April, 2020. It is a period prior to this letter. KSEB Ltd. will normally collect 1% of energy so banked as its

commission towards wheeling and loss towards transmission and distribution charges. Significance here is that if the energy put into the grid, normally it will go to factory, even if it is banked then also it is the company's product not KSEB Ltd.'s. That is why wheeling charge and T&D loss charges are levied and KSEB Ltd. collect 1% of energy so banked as its Commission.

7.13. Clause11 of the Agreement is also crucial. It says that the sale shall be deemed to be effected at the EHT terminals of the KSEB Ltd. where the power generated by the company is fed into the KSEB Ltd. grid.The sale deemed to be effected was considered as deemed sale by the Commission. The energy fed in the KSEB Ltd. grid less banking commission, becomes the property of KSEB Ltd. When a sale takes place, where the good is situated is taken into consideration. Deemed sale is different which is mentioned in Article 366(29)(A) of the Constitution of India. Hon'ble Supreme Court said the word 'sale' should be required in Sale of Goods Act, 1930. Electricity sale is not a deemed sale, it is pakka sale. In NTPC vs. State of Andhra Pradesh, (MANU/SC/0356/2002) the Hon'ble Supreme Court observed that electricity is a good and electricity can't be stored, as soon as it connects to the grid the sale takes place. Since it is a captive generation as soon it fell into the grid it should reach on the other end. Otherwise, if the energy is banked, the banked energy will be used by KSEB Ltd. If the energy is not banked, KSEB Ltd. cannot use it. Further, as per Clause 11, the first aspect is that accounting should be settled on monthly basis. On the other hand the company consumed more energy than the energy generated in the plant, therefore they have to pay energy charges to the Board and the year of accounting will be taken from 1st July to 30thJune (water year).

7.14. The banking does not take place on suo motto basis. The generator was saying in their letter dated 16/05/2020 that generation is still continuing and surplus banked power after adjustment as above will be added to the generated power in the month of May 2020 and told to adjust the bill of January, February and March, a proposal that consists of around 31 lakh units of energy produced in excess till 24thMarch. From 24thMarch onwards there is no consumption. The request of the generator in the letter dated 16/05/2020 that the banked energy as on June 30th may be adjusted against the further future consumption is not correct.

7.15. There is no strait jacket formula for review. This is only a question of perception. Error apparent means without the aid of any other authority, without the aid of long drawn arguments, if a person can straightly point out that the view taken is apparently not in a view which any reasonable man would take. By reading the Clauses 10, 11 and 12, it can be seen that the literal meaning of these Clauses taken together is not the meaning or the manner by which the Commission understood it. The error made is human and infallibility should not be the attitude

of anybody. That is why in our system so many correction procedures such as review, appeal, second appeal, revision, writ jurisdiction etc. are there. All these systems are there because we all are human beings and we have no infallibility. So, there is no need to restrict or reject a review petition on technical grounds. The meaning given to 3 main Clauses 10, 11&12 of the Agreement by the Commission based on the entire decision arrived at are no longer correct. Apply the spirit of those Clauses into the conclusion, then the Commission will find it is not correct. That is why it is qualified as an error apparent on the face of record. It is not the patent error. It is an apparent error.

8. During the deliberations of the KSEB Ltd.'sCounsel, the Commission interfered and commented the following:

8.1 The KSEB Ltd. had not submitted any documents before the Commission at the time of issuance of the Order to establish the reasons mentioned in Clause 12 such as high-level reservoir, break down of transmission lines or reasons beyond control of KSEB Ltd. so as to restrict the generation. Lack of understanding on transmission and the fundamental principles of physics that electrons will flow into an area where there is demand is evident on the part of KSEB Ltd. The power produced at Kuthungal will be used at Kuthungal itself. The argument that the energy produced is not at all used is wrong because the said energy might have been used by shops, houses etc. around Neriamangalam area.

8.2 The Commission further commented that by reading paragraph 53, it can be inferred that on 16/5/2020 KSEB Ltd. got the intimation from the petitioner. KSEB Ltd. has slept over 3 months to this proposal. During this period generation continued. If KSEB Ltd. reacted to the letter on right time, then they could have restricted generation from that point of time itself. Another aspect is that the Special Officer (Revenue) did not tell the Company that he has not required the power but said that it is a month-to-month adjustment and also due to the settlement of bills in the month of February and march, they can't adjust it after re-opening the bill. So, this is the absolute lapse on the part of KSEB Ltd. The argument that the petitioner didn't send intimation was incorrect. If KSEB Ltd. responded within 3 days from the date of intimation, the power production could be curtailed, so that the entire responsibility is with KSEB Ltd.

8.3 The Commission further observed that the argument of the Advocate is incorrect with respect to the data for the month of January, February and March given in Annexure 5. From the Annexure 5, it is obvious that at the end of March, 2020, there was no banked energy to the credit of the respondent. It is also evident that the entire banked energy from the period of July 2019 to February 2020 was

adjusted against the consumption from the plant and there was 'Nil' closing balance of banked energy in the months of February and March 2020.

9. The objections raised by M/s INDSIL during the hearing are as follows.

9.1. These are not the matters for a review. The Commission has rightly rendered its findings. But these findings do not suffer from any error apparent on it.

9.2 The respondent invited the attention of the Commission to paragraph 50 and 51 of the Order dated 07/09/2021 of the Commission in RP No. 2/2021(which was produced along with his reply affidavit.). The said paragraphs are extracted below:

50.*"The review power available to the Commission is akin to the powers conferred to a Civil Court and hence to be used in such manner. In Ajit Kumar Vs. State of Orissa (1999) 9 SCC 596, Hon. Supreme Court has reiterated that power of review in the Tribunal is similar to the one conferred upon a civil court as follows.*

> *'30. The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of a new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing in arguments or correction of an erroneous view takenearlier, that is to say the power of review can be exercised only for correction of a patent error of law or fact which satres in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression 'any other sufficient reason used in Order 47 Rule 1 means a reason sufficiently analogous to those specified I the Rule.*
>
> *31. Any other attempt except an attempt to correct an error or an attempt not based on any ground set out in Order 47 would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."*

51. It is also pertinent to mention the observations of Hon'ble Supreme Cout in Parsion Devi v. SumitriDevi (1997) 8 SCC 715.

> *'9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An*

error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its Rule power of review under Order47 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

9.3. What is sought here is re-hearing or persuading the Commission to come to a different conclusion that is not possible in a review. The review power of the Commission is limited as stated in Paragraph 52 to 56 of the Order dated 07.09.2021 in RP No. 2/2021 of the Commission. The said paragraphs are extracted here:

52.Hon Supreme Court reiterated that the review power is limited. It was held in Lily Thomas vs. Union of India, (2000) 6 SC 224 that: "56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise."

53. The petitioner has mentioned that review can be sought for 'any sufficient reason' in addition to correct the error apparent on the face of record or on account of any new fact or evidence. However, the term 'any sufficient reason' cannot be enlarged to include reasons beyond the scope of words mentioned in the said provision. It has been held that in the Judgment dated 03-09-2020 in Shri Ram Sahu Vs Vinod Kumar Rawat & Others, Hon Supreme Court citing from earlier judgments has held that: "6.2 In the case of Lily Thomas vs. Union of India, (2000) 6 SC 224, it is observed and held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. It is further observed in the said decision that the words "any other sufficient reason" appearing in Order 47 Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram vs. Neki, AIR 1922 15 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526"

54. Thus, as mentioned above, the Commission is vested with limited powers under the Review jurisdiction. The contentions of the petitioner for invoking the provisions of the review is in fact beyond the scope of the

review jurisdiction. At the outset, the petitioner could not succeed in invoking the powers of the Commission to a review of the Order since the petitioner failed to point out any apparent error on the face of record or produce a new and important matter of evidence. The petitioner could not bring out any sufficient reason for a review. The petitioner emphasised on invoking the review power for a clarification of para 26 II(c) of the impugned Order. However, as per the impugned Order the said para (clause 8 of the Guidelines) was deleted. However, as mentioned in Para 12 of the Order, as a general rule all OTS Orders are applicable only to that OTS Scheme and valid only for the period of validity of the Scheme.

55. The petitioner also sought to direct KSEB Ltd for settling the dues based on the actual recorded demand. The Commission is of the view that this prayer is beyond the scope of the review jurisdiction. KSEB Ltd on the other hand pointed out that they have accepted the decision *of the Commission in the impugned Order and implemented the OTS 2021 and not proposed any changes or modification in the conditions. As pointed out by the KSEB Ltd as per the provisions of the Supply Code 2014, the licensee has to propose conditions for the OTS scheme and the petitioner has no locus standi in proposing the conditions of the Scheme. In these circumstances, the Commission has no other means but to reject the petition.*

56. It is to be noted that the petitioner in the guise of the review petition, has placed before the Commission their grievance regarding the request for reduction in contract demand which was not resolved as per the provisions of the Supply Code 2014, by KSEB Ltd. The grievance of the petitioner is that even after seeking reduction in contract demand on account of closure of the company, KSEB Ltd did not reduce the same as per the provisions of the Supply Code, which is one of the reasons for mounting arrears of the petitioner. KSEB Ltd on the other hand argued that contract demand was not reduced due to the inaction of the consumer. The Commission is of the view that KSEB Ltd may take up the matter appropriately for an amicable settlement, considering the issues involved in the matter in a time bound manner.

9.4. The power of review is to correct the mistake, not to substitute a view. What the KSEB Ltd. is trying to say is a different view from the view arrived at by the Commission. If a different view other than the view taken by the Commission is possible, that is the term for appeal not review.

9. 5. The fact that the Review Petition is not maintainable is further evident from the following para 4 of the reply affidavit:

(i) *With respect to the finding in paragraph 40 of the Order sought to be reviewed, the Statement in paragraph 10 of the Review Petition reads as follows: -*

"10. Therefore, the observation in paragraph 40 that the energy generated if not consumed in the factory, banking will take place automatically is a conclusion which cannot be legitimately drawn from the clauses relied on by the Honourable Commission".

Xxx xxx xxxxxxxxx

Xxx xxx xxxxxxxxx

Obviously, this cannot be a ground for review apart from the fact that the findings of this Honourable Commission in every respect are legal and proper.

9.6 The Commission may arrive at a decision based on certain views. The parties may have different views on such conclusion. However, review of the said order cannot be done merely saying that a different view is possible. The review petitioner is of the view that the observations and findings in paragraphs 41 to 45 are not consistent with Clause 12 of the Agreement. This does not amount to a review. Conclusion become faulty is not a scope of review. Even if it is faulty, appeal is the provision. The facts that are taken on further evidence on merit is absolutely impermissible

9.7. The Commission's finding on the issue No.2 is at paragraph 45 of the impugned order which states that 'it is established that power consumption at the petitioner's Palakkad units and the scheduling of power by SLDC and its generation from the petitioner's Kuthungal SHEP are not correlated, but independent of each other'. This finding rendered by the Commission is based on its reasoning on the interpretation of the Clause 12 and the finding is absolutely correct. Also, Clause 12 of the agreement is an independent clause dealing with scheduling and generation. It says "*if the KSEB grid is not in a position to absorb the energy from the project for any reasons such as high-level storage in reservoirs, break down of transmission lines and or other reasons beyond the control of KSEB, the generation from the project will have to be restricted to the extent of generation for captive consumption as directed by KSEB".* This shows that the schedule of power generation from the project shall be as directed by the KSEB Ltd. So how can anybody say this is a review petition and argue he is not re-agitating the matter.

9.8. The finding of the Commission on the issue No.3 is at paragraph 55 of the impugned order which states that "*after careful examination of Clause 12 of the Agreement and the submissions above, the Commission is of the firm view that restriction if any, has to be imposed by KSEB Ltd. and for the reasons mentioned in the Agreement. No obligation as per the agreement is cast upon the petitioner to inform KSEB Ltd. to enable restrictions on the generation from the plant".* If this finding is not questioned how can the argument is there on merit. If that is the position, the argument particularly on a review petition cannot be taken on the validity of the intimation given by the generator company.

9.9. The last line of paragraph 55*" Since generation from the Kuthungal SHEP is independent of consumption at the petitioner's factory at Palakkad as informed by Chief Engineer (System Operations), and the generation from the plant is scheduled by KSEB Ltd and is dependent on the release of upstream water by KSEB Ltd, the argument that the petitioner has not informed KSEB Ltd about the lack of consumption at the factory so as to restrict the generation, cannot be sustained. It is also a fact that KSEB Ltd. accepted the energy generated from the Kuthungal SHEP and distributed it in the surrounding areas during this period" is also important.*

9.10. The finding of the Commission on the issue No. 4, which is mentioned at paragraph 67 of the order that *"Hence the Commission is of the firm view that KSEB Ltd. having availed energy from the petitioner and said it to its consumers cannot at the same time deny payment to the petitioner"* is also absolutely correct.

9.11. The open access purchase can't be an issue here. Clause 11 is self evident and the observations of the Commission in Clause 11 are absolutely correct. Here also nothing arises for the review. It doesn't mean that the company generates on its own and the KSEB Ltd. schedule themselves. If the company generates more than their requirement, it can sell it to KSEB Ltd. It is simple and there is no complication.

9.12. As per the Clause 11, the energy banked is deemed to be energy sold. Nobody needs an exercise to bank. It is automatic. At the end of the accounting year the company cannot carry forward it. But it can be deemed to be sold. That is why in the letter dated 16/05/2020 the company intimated that there could have been surplus energy in June and this can be banked. The Commission finds that the consumption and generation are unrelated and the generation is solely scheduled by KSEB Ltd. But the Officer of the KSEB Ltd. says that the generation never depends upon consumption. The generated electricity admittedly is used, not denied. The company generated excess energy by the end of June 2020 which is

not required by the company and this is the banked energy. If it is excess, it will be banked and it is deemed to be sold.

9.13. The respondent concluded his submissions stating that in order to apply Section 94(1)(f) of the Electricity Act, 2003, the Commission has to go by Order 47 Rule 1 of CPC wherein review powers are restricted and the copy of the judgment of the Hon'ble APTEL to substantiate his views will be submitted before the Commission.

Analysis and Decision of the Commission

10. The Commission has examined in detail KSEB Ltd.'s submissions and the respondent's reply affidavit to the review petition filed by KSEB Ltd. with connected documents against the Order dated 06.07.2021 in OP No. 44/2020 and considered the contentions raised by the parties at the time of hearing as per the provisions of the Electricity Act, 2003 and Regulations made thereunder. The Commission noted that vide Order dated 06.07.2021 in OP No. 44/2020 the Commission ordered the following:

> *(1) KSEB Ltd. is obliged to purchase the excess banked energy from Kuthungal SHEP of the petitioner as on 30-06-2020 as per the Agreement dated 30-12- 1994.*
>
> *(2) Considering the Order of the Commission dated 02-06-2017, the rate applicable for the sale of energy banked by the petitioner till 04-06-2020 shall be as per Clause 11 of the Agreement, that is at the EHT rate at 110kV level of Rs.5.40/kWh.*
>
> *(3) For the energy banked by the petitioner between 05-06-2020 and 30-06- 2020, the rate applicable shall be as per the provisions of the KSERC (Renewable Energy and Net Metering) Regulations, 2020 that is the average Power purchase cost applicable for the relevant financial year i.e., 2020-21.*
>
> *(4) The Commission further directs KSEB Ltd. to file the details of power purchase cost for the financial year 2020-21, by 30-07-2021, so that the Commission is able to notify the APPC for the financial year 2020-21.*

11. Aggrieved by the above Order of the Commission, KSEB Ltd. filed this review petition after a gap of 113 days from the date of Order along with the petition seeking condonation of delay of 68 days in this regard in view of the Order dated

23.09.2021 of the Honourable Supreme Court in Miscellaneous Application No. 665 of 2021 in AMW(C) No. 3 of 2020 read with Regulation 67(1) of the KSERC (Conduct of Business) Regulations, 2003. As per the Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003, and its amendments, the Review Petition against the order/direction of the Commission has to be filed within 45 days from the date of the Order. However, the Commission noted that the present Review Petition filed by the KSEB Ltd. can be considered as within the time in view of the above said order of the Honourable Supreme Court.

12. The Commission also perused the copy of the decision of the Hon'ble APTEL in ***TamilnadElectricity Board Vs. Central Electricity Regulatory Commission and NTPC Ltd. [2010 ELR (APTEL) 0450***] subsequently submitted by the respondent, inviting attention of the Commission to Para 16 and the findings in Paras 17 to 22 with respect to applicability of Section 114 and Order 47 of CPC to review under Section 94(1)(f) of the Electricity Act, 2003. Paras 16 to 22 of the said decision are quoted below:

> *16. Refuting the above preliminary objections the Learned Senior Counsel for the Appellant would make the following submissions to substantiate his plea that the Appeal is maintainable.*
>
> *(i) It is true that the Central Commission while exercising its power of review under Section 94 of the Act, has to act in the same manner as are vested under the Code of Civil Procedure while passing order in the Review Petition. Only when the said order rejecting the Review is on merit the said order cannot be appealed under order 47 Rule 7. But in the present case order impugned passed by the Central Commission is not the order rejecting the review on merit but it is an order rejecting the Petition for merely condoning the delay in filing of the Review Petition. As such the Central Commission did not exercise the power under Section 94 of the Act to satisfy as to whether sufficient ground is made out to entertain the review. It merely refused permission for the invocation of Review Jurisdiction. Hence, the dismissal of the Review Petition cannot be said to be in the exercise of jurisdiction in terms of Section 94 of the Act or under Order 47 Rule 1 and Rule 4(1) of the CPC. Therefore, the bar under Order 47 Rule 7 would not apply to the impugned order.*
>
> *(ii) The words "an order" occurring in Section 111 of the Act conferring Appellate Power to the Tribunal means any order which is not subject to any qualification. This is because unlike the scheme of the CPC with regard to the maintainability of appellate/revisional powers provided under the*

CPC, the scheme of appeals under the Electricity Act 2003 is entirely different and distinct.

(iii) There are various decisions rendered by the various High Courts in the matter of Letters Patent Jurisdiction where it has been held that an Appeal lies from an order refusing to excuse delay in filing the appeal. It has been further held that the right derived under Clause 15 of the Letters Patent is not affected by Order 47 Rule 7. Similarly, under the Provincial Insolvency Act the various High Courts have held that the statutory provisions of the Appeal would prevail over the Order 47 Rule 7 of CPC and accordingly, an Appeal would lie against an order passed in the Review Petition whether rejecting or granting. Therefore, Section 111 of the Electricity Act has to be construed to the Rule 15 of the Letters Patent and parimateria under the Provincial Insolvency Act. This has been decided by the Bombay High Court in AIR 1924 Bom. 399 Nagindas Motilal v. Nilaji; MANU/AP/0080/1964: AIR 1964 AP 162 Sattemma v. Vishnumurthy and AIR 1956 Nag 215 Ram Prasad v. Dagdulal; AIR 1941 Mad 588 ChidellaVeraiyya v. Kollam Koti Reddy; AIR 1937 Lahore 568 Sher Singh v. Firm Bishan Lal; AIR 1955 Tripura 49 Pushharan v. Ramkrishan. Therefore, Order 47 Rule 7 cannot be said to have any control over any of the Appeal powers conferred on the Tribunal under the Electricity Act, 2003.

(iv)Section 94 of the Act gives the power of Review to the Central Commission. This cannot accommodate a provision relating to the Right of Appeal to the Appellate Tribunal. Section 111 is a substantive provision relating to Appeal. It does not provide for any such qualification as contained in Order 47 Rule 7. The meaning and scope of this provision under Section 111 cannot be said to be governed by some other part of the statute. Therefore, the Appeal powers given to the Tribunal cannot be curtailed. Hence the Appeal is maintainable.

17. We have heard the learned Counsel for the parties and considered their submissions.

18. The question that arises for consideration is as follows: "whether the Appeal is barred in terms of the provision of Order 47 Rule 7 of the Code of Civil Procedure when the order impugned was said to be passed by the Central Commission rejecting the Review Petition on the ground that it is time barred under Section 94(1) of the Electricity Act?

19. It is not disputed that the Central Commission has got the power to review its owns order or to reject the prayer for Review. This Review

jurisdiction of the Central Commission is provided under Section 94(1)(f) of the Act 2003. This provision is as follows:

94 - Powers of the Appropriate Commission (1) the Appropriate Commission shall for the purposes of any inquiry or proceedings under this Act have the same powers as are vested in the civil court under the Code of Civil Procedure 1908 in respect of the following matters namely.

...(f) reviewing its decision, directions and orders

Thus, Section 94(1)(f) incorporates by reference to the provisions of the Code of Civil Procedure in regard to exercise of power over the Review of its own decision, directions and orders. Accordingly, the relevant provisions of CPC 114 and Order 47 Rule 7 deal with Review as if it has been provided for in Section 94 of the Electricity Act including the provision of Order 47 Rule 7.

20. The provision of the Order 47 Rule 7 reads as under:

Rule 7 - Order of rejection not appealable, objections to order granting application (1) An order of the court rejecting application shall not be appealable; but an order granting an application may be objected to at once by an appeal from the order granting the application or in an appeal from a decree or order finally passed or made in the suit.

21. So, a reading of Section 94 of the Act would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. If the intention of Parliament was to restrict the incorporation of the review only to the extent that the Central Commission exercise powers and not to deal with any other incident of review such as Rule 7 of Order 47, the same would have been incorporated for separately.

22. In other words, the Parliament would have provided for a separate provision stating that the Appropriate Commission shall have the powers to review its decision, directions and orders de horse the CPC . As a matter of fact, Section 94(2) deals with the powers of the Commission to pass interim orders. In this section, the Parliament has chosen to say that provision of the CPC will not apply but has specifically recognised the power to pass interim orders under Sub-section (2) of 94 of the Act. So the distinction in approach adopted in the case of interim orders under Section 94(2) of the Act and in the case of Review under Section 94(1)(f) is quite relevant. In the case of Review Parliament had decided that the application shall be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in

the case of interim order under Section 94(2) of the Act. Therefore, the implication mentioned in Rule 7 of Order 47 will certainly apply.

13. The Commission also observed that the Review Petitioner prayed before this Commission to review and reconsider the Order in 44/2020 dated 06.07.2021 by allowing the Review Petition. The KSEB Ltd. argued that this Review Petition is maintainable under Section 94(1)(f) of the Electricity Act, 2003.At the same time the Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 which was framed under the Section 181(1), (2) (zl) and (zp) of the Electricity Act, 2003 empowers the Commission to review its order, directions or decisions.

14. According to the Review Petitioner, the Regulation 67 made by the Commission has a wider range of powers and there is no restriction for review as stated under Order 47 Rule 1 of CPC. Therefore, the powers of KSERC as per Regulation 67 of KSERC (Conduct of Business) Regulations, 2003 is wider than that available to any other Courts. Any affected party can file for review. In view of the above, the said Regulation 67 is applicable here. According to the Review Petitioner there is no straitjacket formula for review, but it can be done depending upon the scope and circumstances of this case. They have not submitted any new document for the purpose of review. According to them, they attempted to point out the way in which the Commission understood the scope of each Clause of the Agreement in a different manner. Whether the understanding of the Commission is a reasonable one or not is the question. So, there is no need to restrict or reject a review petition on technical grounds. According to them, the meaning given to 3 main Clauses 10,11&12 of the Agreement by the Commission based on the entire decision arrived at are no longer correct. Apply the spirit of that clause into the conclusion, then the Commission will find it is not correct. That is why it is qualified as an error apparent on the face of record. It is not the patent error. It is an apparent error.

15. The Commission further observed that the main contention of the respondent is that the Review Petition is not maintainable in law or on facts. According to the respondent, a perusal of the Review Petition will itself show that it is nothing but a re-agitation of the legal and factual issues decided by the Commission in its Order dated 06.07.2021 in OP No. 44/2020. The KSEB Ltd. is effectively re-agitating the issues on merits which can only be done in Appeal and not by way of review before this Commission. For this reason alone, the Review Petition is liable to be dismissed. According to them, the Commission has rightly rendered its findings and these findings do not suffer from any error apparent on it. The respondent has cited the Order dated 07.06.2020 of this Commission in RP No. 2/2021 in the case of M/s Edayar Zinc Limited wherein it was held that the issues decided cannot be sought to be re-agitated on merits in the light of the findings of the Hon'ble

Supreme Court in many cases that the power of review available to the Tribunal is the same as has been given to a Court under Section 114 read with Order 47 CPC and any other attempt except an attempt to correct an error or an attempt not based on any ground set out in Order 47 would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment.

16. According to the respondent, the Commission is vested with limited powers under the review jurisdiction and the contentions of the petitioner for invoking the provisions of the review is in fact beyond the scope of the review jurisdiction. The power of review is to correct the mistake, not to substitute a view. What the KSEB Ltd. is trying to say is a different view from that arrived at by the Commission. If a different view other than the view taken by the Commission is possible, that is the term for appeal not review.

17. The respondent subsequently submitted a copy of the decision of the Hon'ble APTEL in ***TamilnadElectricity Board Vs. Central Electricity Regulatory Commission and NTPC Ltd. [2010 ELR (APTEL) 0450***] to show the applicability of Section 114 and Order 47 of CPC to review under Section 94(1)(f) of the Electricity Act, 2003. The findings of the Hon'ble APTEL in this case is that,

> *'a reading of Section 94 of the Act would indicate that it incorporates the provision of the CPC not only in respect of Rule 1 but also in respect of Rule 7 of Order 47. So, the distinction in approach adopted in the case of interim orders under Section 94(2) of the Act and in the case of Review under Section 94(1)(f) is quite relevant. In the case ofReview, Parliament had decided that the application shall be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim order under Section 94(2) of the Act'*

18. The Commission examined the averments of the petitioner as well as the respondent and noted that the power of review of the Commission is envisaged under the provisions of Section 94(1)(f) of the Electricity Act 2003, which provides that the Commission may review its directions, decisions or Orders as per the provisions under the Code of Civil Procedure, 1908.Section 94(1) of the Electricity Act-2003 is extracted below:

> *Section94. (Powers of Appropriate Commission) :(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -*
>
> *(a) Summoning and enforcing the attendance of any person and examining him on oath;*

(b) Discovery and production of any document or other material object producible as evidence;
(c) Receiving evidence on affidavits;
(d) Requisitioning of any public record;
(e) Issuing commission for the examination of witnesses;
(f) reviewing its decisions, directions and orders;
(g) Any other matter which may be prescribed.:

Order 47 Rule 1 of the Code of Civil Procedure, 1908 dealing with review of the orders and decisions of a Civil court is quoted below:

"Application for review of judgment. - (1) Any person considering himself aggrieved, —

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
(b) by a decree or order from which no appeal is allowed, or
(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation: The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

19. The power of review under Section 94(1)(f) is akin to that under Order 47 Rule 1of Code of Civil Procedure, 1908. At the instance of affected parties or the generating companies or the Commission on its own motion may review its own decision only if such order was made under: (i) mistake or error of fact apparent

on the face of the record; (ii) discovery of new and important matter which was not within the applicant's knowledge at the time when the order was made; or (iii) any other sufficient reason to meet the ends of justice. So, as per the provisions of the Electricity Act - 2003 and Order 47 Rule 1 of the Code of Civil Procedure, 1908, the review jurisdiction of the Commission is very limited.

20. For reviewing its decisions, the discovery of new and important matter or evidence, which was not within the knowledge of the petitioner or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on face of record, or for any other sufficient reason is needed.

21. The Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 empowers the Commission to review its orders, directions or decisions. The above regulation is framed by this Commission as per the enabling provisions under Section 181(1), (2) (zl) and (zp) of the Electricity Act, 2003.

Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 reads as follows:

> *67. Powers of review, -*
>
> *(1) Any person or party affected by a decision, direction or order of the Commission may, within forty-five days from the date of making such decision, direction or order apply for the review of the same.*
>
> *(2) An application for such review shall be filed in the same manner as a petition under Chapter III of these regulations.*
>
> *(3)The Commission may after scrutiny of the application, review such decisions, directions or orders and pass such appropriate orders as the Commission deems fit within forty five days from the date of filing of such application: Provided that the Commission may, at its discretion, afford the person or party who filed the application for review, an opportunity of being heard and in such cases the Commission may pass appropriate orders as the Commission deems fit within thirty days from the date of final hearing: Provided further that where the application for review cannot be disposed of within the periods as stipulated, the Commission shall record the reasons for the additional time taken for disposal of the same".*

22. The argument of the Review Petitioner that the Regulation 67 made by the Commission has a wider range of power and that there is no restriction for review as stated under Order 47 Rule 1 of CPC is not sustainable. The regulations framed under Section 181 of the Electricity Act, 2003 cannot override the provisions and

intentions of the parent Act. The Regulation framed under the enabling provisions of the Act is to be interpreted bearing in mind the objective of the relevant Section of the Act. It is a settled law that regulations cannot limit the meaning of the statute because regulation is a subordinate legislation. It is trite that rules cannot go beyond the statute. In ***Babaji KondajiGarad v Nasik Merchants Co-operative Bank Ltd (1984 AIR 192)*** this rule was enunciated in the following manner:

> *Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with.*

23. The aforesaid principle is reiterated by the Hon'ble Supreme Court in ChenniappaMudaliar's case holding that a Rule which comes in conflict with the main enactment has to give way to the provisions of the Act.

24. It is also a well-established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held by the Hon'ble Supreme Court in Taj Mahal Hotel's case:

The Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect.

25. Similarly, as pointed out by the Respondent, the Hon'ble APTEL in ***Tamilnad Electricity Board Vs. Central Electricity Regulatory Commission and NTPC Ltd. [2010 ELR (APTEL) 0450]*** observed at para 22;

> "*22. In other words, the Parliament would have provided for a separate provision stating that the Appropriate Commission shall have the powers to review its decision, directions and orders de horse the CPC. As a matter of fact, Section 94(2) deals with the powers of the Commission to pass interim orders. In this section, the Parliament has chosen to say that provision of the CPC will not apply but has specifically recognised the power to pass interim orders under Sub-section (2) of 94 of the Act. So, the distinction in approach adopted in the case of interim orders under Section 94(2) of the Act and in the case of Review under Section 94(1)(f) is quite relevant. In the case of Review, Parliament had decided that the application shall be in total consonance with the provision of the Order 47 Rule 7 of the CPC but not in the case of interim order under Section 94(2) of the Act. Therefore, the implication mentioned in Rule 7 of Order 47 will certainly apply."*

So, it is amply clear that the review power envisaged under Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003 shall be in total consonance with the provisions of the Order 47 Rule 1 of CPC.

26. The Hon'ble Supreme Court in ***Yashwant Sinha and Ors, Vs. Central Bureau of Intelligence and Ors (MANU/SC/1564/2019)*** observed as follows:

57. *In Haridas Das v. Usha Rani Banik (Smt.) and Ors. MANU/SC/8039/2006: (2006) 4 SCC 78, the question arose out of an appeal in the High Court, wherein the High Court accepted the prayer for review. This Court held as follows*:

> *13.... The parameters are prescribed in Order 47 Code of Civil Procedure and for the purposes of this lis, permit the Defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the Rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection....*

59. *In State of West Bengal and Ors. v. Kamal Sengupta and Anr. MANU/SC/3011/2008: (2008) 8 SCC 612, this Court, inter alia, held as follows:*

> *21. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.*

64. In Sow Chandra Kante and Anr. v. Sheikh Habib MANU/SC/0064/1975 : (1975) 1 SCC 674, the judgment involved a request to review the decision of this Court refusing special leave to appeal in a matter, this Court held as follows:

> *... A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. ...*

27. According to the KSEB Ltd.there is no strait jacket formula for review and there is no need to restrict or reject a review petition on technical ground. They are of the view that the meaning given to 3 main Clauses 10,11&12 of the Agreement by the Commission based on the entire decision arrived at are no longer correct and the literal meaning of these Clauses taken together is not the meaning or the manner by which the Commission understood it. So, it is qualified as an error apparent on the face of record. So, the Order under challenge is to be reviewed. The above version of the KSEB Ltd. is not in consonance with various decisions of the Hon'ble Supreme Court.

28. In the Judgment dated 03-09-2020 in ***Shri Ram Sahu Vs. Vinod Kumar Rawat & Others***, Hon. Supreme Court citing from earlier judgments has held that*: "6.2 In the case of Lily Thomas vs. Union of India, (2000) 6 SC 224, it is observed and held that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power".* Further, the Hon'ble Supreme Court in a very recent judgment in Vikram Singh AliasVickyWaliaandAnr.v. State of Punjab and Anr. (MANU/SC/0758/2017), observed that '*even establishing another possible view would not sufficeto invoke* review*jurisdiction'.*

29. It is also pertinent to mention here the observations of Hon Supreme Court in ***Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715***. *"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be 'reheard and corrected'. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise'."*

30. The observations of the Hon'ble Delhi High Court in ***AizazAlam Versus Union of India & Others (2006 (130) DLT 63: 2006(5) AD (Delhi) 297*)** are as follows: -

> *"We may also gainfully extract the following passage from the decision of the Supreme Court in Meera Bhanja V. Nirmala Kumari Choudhury, where the Court, while dealing with the scope of review, has observed: The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC. The review petition has to be entertained on the ground of error apparent on the face of record and not on any other ground (emphasis added) The review must remain confined to finding out whether there is any apparent error on the face of the record".*

31. In ***Kamlesh Verma v. Mayawati [(2013) 8 SCC 320],*** the Hon'ble Supreme Court examined the scope of review and laid down its conclusions in paragraph 20.2 as follows:

> *20.2. When the review will not be maintainable:*
>
> *(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
>
> *(ii) Minor mistakes of inconsequential import.*
>
> *(iii) Review proceedings cannot be* equated *with the original hearing of the case.*
>
> *(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
>
> *(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.*
>
> *(vi) The mere possibility of two views on the subject cannot be a ground for review.*
>
> *(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched*
>
> *(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
>
> ***(ix)*** *Review is not maintainable when the same relief sought at the time of arguing the main matter had been negative*

32. The review power available to the Commission is akin to the powers conferred to a Civil Court and hence to be used in such manner. In ***Ajit Kumar Rath vs. State of Orissa, (1999) 9 SCC 596,*** Hon. Supreme Court has reiterated that power of review vested in the Tribunal is similar to the one conferred upon a Civil Court as follows:

> *"30. The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression 'any other sufficient reason' used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the Rule. 14.*
>
> *31. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."*

33. What is sought here by the petitioner is to persuade the Commission to come to a different conclusion that is not possible in a review. The power of review is to correct the mistake, not to substitute a view. What the KSEB Ltd. is trying to plead is to accept a different view than the view arrived at by the Commission.The Commission may arrive at a decision based on certain views. The parties may have different views on such conclusions. However, review of the said Order cannot be done merely saying that a different view is possible.

34. It can be seen that the contention of the petitioner regarding issue No. 2 had been examined by the Commission in detail before conclusions were arrived at and orders issued. The Clause 12 clearly specifies that if KSEB Ltd. is not in a position to absorb the energy banked from the project it should be restricted. Further, the letter dated 10.02.2021 from the Chief Engineer (System Operations) made it amply clear that generation from Kuthungal SHEP and consumption of

power by the respondent's factory at Palakkad are independent of each other. The fact of establishment of a new substation in the premises of Kuthungal SHEP by KSEB Ltd. to feed the nearby areas such as Senapathy, Rajakkad etc. also supports the findings that consumption in the respondet's factory at Palakkad is not correlated with the generation from the Kuthungal SHEP. So, the finding rendered by the Commission is based on its reasoning on the interpretation of the Clause 12 and with the supportive documents. Hence, there is no merit in the Review Petitioner's contention in this regard.

35. Regarding the contentions of the petitioner on issue No.3, the Commission observed that the matter had already been examined and found that one major factor that could not be overlooked is that KSEB Ltd. used the energy generated from Kuthungal Power House for the needs of not only the Neriamangalam Power House, but also for the needs of the local areas such as Rajakumari, Senapati, Rajakkad, Udumbanchola and surrounding areas. Hence there is no merit in the argument of the KSEB Ltd. It is a fact that the respondent vide their letter dated 16.05.2020 brought to the notice of KSEB Ltd. the issue that the generation from the Kuthungal SHEP was continuing and the poor consumption at their factory was leading to a surplus power situation and offered a proposal that in case KSEB Ltd. do not agree for adjustment of the excess power in their future consumption ie. consumption subsequent to June, 2020, then KSEB Ltd. can purchase it as per Clause 11 of the Agreement. However, KSEB Ltd. did not react to the respondent's letter for three months and thereafter on 17.08.2020 sent a reply to the respondent pointing out that the respondent is not eligible for adjustment of excess power, but remained silent about the proposal to purchase the excess energy.

36.Further, Kuthungal SHEP is having the status of a'must run' plant. Hence, taking into account of the above facts and Clause 12 of the Agreement, the Commission was of the firm view that restriction, if any, has to be imposed by KSEB Ltd.for the reasons mentioned in the Agreement. No obligation as per the Agreement, is cast upon the petitioner to inform KSEB Ltd. to enable restrictions on the generation from the Plant. The Chief Engineer (Systems Operations) in his letter has also confirmed that the generation from the plant is dependent upon availability of water in the weir etc. Since generation from the Kuthungal SHEP is independent of consumption at the petitioner's factory at Palakkad as informed by CE (System Operations), and the generation from the plant is scheduled by KSEB Ltd and is dependent on the release of upstream water by KSEB Ltd., the argument that M/s INDSIL had not informed KSEB Ltd. about lack of consumption at the factory so as to restrict the generation, cannot be sustained.In

view of the above reasons the arguments of the petitioner in this connection deserve no merit.

37. Regarding the contentions of KSEB Ltd. on issue No.4, the Commission observed that the finding on the said issue which is mentioned at paragraph 67 of the impugned order is absolutely correct. No new points were put forth by the petitioner to alter the findings in this regard. It can be seen that the Clauses 10 and 11 of the Agreement had been clearly examined by the Commission to arrive at the conclusion that 'KSEB Ltd. having availed the banked energy from the petitioner and sold it to its consumers cannot at the same time deny payment to the petitioner'. While arriving at the above finding, the Commission observed that as per Clause 11 of the Agreement, the Company may sell the excess banked energy to KSEB Ltd. and not to any other party. In case, this option is not exercised, then the said energy is to be treated as lapsed at the end of the accounting year, as per the Agreement.

38. Hence, as per the terms of the Agreement, KSEB Ltd. has the obligation to purchase the excess banked energy, in case the respondent exercises such an option. It is evident that the respondent vide their communication dated 16.05.2020 had exercised their option of selling energy to KSEB Ltd., as per the provisions of Clause 11. However, KSEB Ltd. did not offer any response to the suggestions made by the respondent in their letter dated 16.05.2020 till 17.08.2020, and also remained silent about the proposal of the respondent for purchase of the excess banked energy by KSEB Ltd., as per Clause 11 of the Agreement. The Commission noted that since the respondent had exercised the option of selling the excess energy to KSEB Ltd., as per the terms of the Agreement, and KSEB Ltd. had sold this energy to its consumers in Rajakumari, Senapathi, Rajakkad, Udumbanchola and surrounding areas, the same has to be treated as a deemed sale.

39. The Commission observed that the data given in Annexure 5, clearly shows that the respondent had resorted to open access purchase of power totalling 6.76 lakh units, during the months of July and August, 2019 and no open access purchase is seen to have been made for the rest of the accounting period. The Commission further noted from Annexure-5 that, there is no open access purchase after August 2019 and there was 'Nil' banked energy as on March 2020. Hence, it can be concluded that there was no contribution of open access energy in the energy banked and billed as on 30.06.2020. This is due to the fact that the entire banked energy from the period July 2019 to February 2020 was adjusted against the consumption from the plant and therefore there was 'Nil' closing balance of banked energy in the months of February and March 2020. Hence, the entire

energy billed by the respondent was based on the generation from April to June, 2020 which was banked.

40. The Commission also noted that the findings on issue No.6 and 7 were arrived at on sufficient reasoning. The excess energy which was banked was directly the result of generation during the months of April to June, 2020 and lack of consumption at the respondent's factories. As per the provisions of the Agreement, no constraint is there on the generation from the plant even if there is no consumption at the factories. Further, the respondent's generating plant is a Small Hydro Station, having the status of 'Must Run' stations, is excluded from the Merit Order Purchases.

41. The Commission further observed that there is no mistake in arriving at the rate applicable for the purchase of banked energy by KSEB Ltd. The Commission in the Order dated 02.06.2017 in OP No. 02/2017 had already decided that the rate to be charged for excess banked energy from 01.04.2016 has to be at EHT rates as per Clause 11 of the Agreement. Further, the KSERC (Renewable Energy and Net Metering) Regulations, 2020 is effective from 05.06.2020 and hence the Commission was of the view that for the energy banked from this date, the rate applicable shall be the APPC as per the provisions of the said Regulations.

42. Thus, it can be seen that the Commission is vested with limited powers under the review jurisdiction. The contentions of the petitioner for invoking the provisions of the review is in fact beyond the scope of the review jurisdiction. The attempt of the petitioner to convince the Commission that the Commission has given wrong meaning to the 3 main Clauses 10, 11 and 12 of the Agreement to arrive at the findings could not succeed. The petitioner has not submitted any new documents along with the review petition before the Commission to establish their views or aguments to undertake review of the original Order. They have also failed to point out any apparent mistake or error on the face of records to succeed in invoking the review jurisdiction of the Commission.They also could not bring out any sufficient reason for review of the original Order. The Commission observed that while issuing the original Order dated 06.07.2021 in OP No. 44/2020, the Commission had not violated any of the provisions of the Electricity Act, 2003.

43. Hence, this Review Petition is not sustainable as per the above provisions and accordingly, the Commission rejects this Review Petition.

Orders of the Commission

44. After examining the petition filed by the KSEB Ltd. and the reply affidavit filed by the INDSIL Hydro Power and Manganese Ltd. along with documents and taking into account of the contentions of both the parties during the hearing, the Commission is of the considered view that the present petition for a review of the Order dated 06.07.2021 in OP No. 44/2020 is not maintainable either under Section 94(1)(f) of the Electricity Act, 2003 or under Regulation 67 of the KSERC (Conduct of Business) Regulations, 2003.

45. The Review Petition is disposed of. Ordered accordingly.

Sd/-	**Sd/-**
A. J. Wilson	**Preman Dinaraj**
Member (Law)	**Chairman**

Approved for Issue

Sd/-

Secretary