

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY  
COMMISSION, SHIMLA**

M/s Jaiprakash Power Ventures Ltd;  
JUIT Complex, Wagnaghat,  
P.O. Dumehar Bani,  
Kandhghat Distt Solan, H.P. 1732115

... Petitioner

V/s

1. The Himachal Pradesh State Electricity Board Ltd.  
Kumar House, Shimla-171004
2. State of Himachal Pradesh,  
(through Chief Secretary)  
Shimla
3. State of Himachal Pradesh  
{through Principal Secretary (Power)}  
Shimla.

... Respondents

Review Petition No. 19 of 2011

(Decided on 8<sup>th</sup> October, 2013)

**CORAM**

**SUBHASH C. NEGI**

**CHAIRMAN**

Counsel:-

for the petitioner : Sh. Pawan Upadhayay  
Advocate

for the respondent: Sh. Bimal Gupta  
Advocate

**ORDER**

(Last heard on 31.8.2013 and Orders reserved)

M/s Jaiprakash Power Ventures Ltd; (hereinafter referred as the “review petitioner”) has moved this petition, seeking review of this Commission’s Order dated 24.1.2011 passed in petition No. 11/2010, determining the tariff on the additional cost incurred on Baspa-II Hydro

Electric plant.

2. During the scrutiny of the review petition, this Commission observed that the Himachal Pradesh State Electricity Board Ltd (in short "HPSEB Ltd.) (hereinafter referred as the "respondent Board") had preferred an Appeal, registered as Appeal No. 43 of 2011 and I.A. 65 of 2011, challenging the impugned Order dated 24.1.2011 before the Hon'ble Appellate Tribunal for Electricity and review petitioner was informed that the review petition moved before this Commission is not maintainable at this stage in view of regulation 63(1)(a) of the Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 and also the conditional stay granted by the APTEL vide its order dated 29.3.2011 passed in IA 65 of 2011. However, the consideration of review petition on the merits was kept in abeyance pending the disposal of the respondent's appeal before the Hon'ble APTEL.

3. The review petitioner, moved another petition registered as petition No. 31 of 2012, before this Commission stating that the Hon'ble Appellate Tribunal vide its Order dated 6.2.2012 had upheld this Commission's Order dated 24.1.2011, and thereby vacating the stay order dated 29.3.2011. Accordingly, the review petitioner through M.A No. 31 of 2012 prayed this Commission to fix a date for hearing and consideration of the review petition No. 19/2011, on merits.

4. In rebuttal, the respondent Board contended that the review petitioner in the present case has not filed any cross appeal before the Hon'ble APTEL assailing the impugned order dated 24.1.2011. The Hon'ble APTEL vide its Order 6.2.2012 has dismissed the appeal, filed by the respondent Board, and

the respondent Board has challenged the decision of the Hon'ble APTEL before the Hon'ble Supreme Court by way of a Regular Second Appeal No 4185 of 2012, which is pending, though ad interim stay has not been granted. According to the respondent Board the Order dated 24.1.2011 has now merged into the APTEL Order dated 6.2.2012 passed in Appeal no. 43 of 2011. Hence no review petition is maintainable.

5. The review petitioner strongly objects to the contention raised by the respondent Board and states that the power of review is an independent, distinct and separate remedy available under the statute, which has nothing to do with the appeal, as the grounds for filing a review are different from the grounds for filing an appeal. In this case the review petitioner has opted to exercise its rights, as available under Order 47 rule 1 CPC. The pendency of an appeal filed by the respondent Board on other grounds, which were not the part of the review, would not in any manner affect the processing of the review petition and the review petition is, therefore, maintainable. He further, to buttress his argument, in support of his contention, submits that the challenge by the respondent Board in the Appeal before the Hon'ble APTEL was only on the two issues, i.e. one relating to the force majeure event and the other on the adjustment of insurance amount. The said two issues were considered and rejected by the Hon'ble APTEL. In relation to other issues, which are part of the review petition, were not agitated before the Hon'ble APTEL, the principle of merger does not apply.

6. In order to appreciate nature of the controversy raised and ramifications thereof a brief synoptical view of the facts in relation to the issues raised in the review petition would be necessary.

7. The review petitioner filed original petition No. 11 of 2010 seeking determination of the tariff on the additional cost incurred on Baspa Hydro Electric Plant making the following prayers:-

- (a) to approve the additional of capital expenditure of Rs. 96.75 crores in the capital cost of Baspa-II HEP towards cost of protection work of Pothead Yard due to Force Majeure Event and determine the payment of tariff thereon; and
- (b) to adjust the claim of Rs. 27.09 crores received towards capacity charges as part of Insurance claim against the payment of tariff from the addition of capital cost of Rs. 96.75 crores; and
- (c) to include the additional expenditure of Rs. 1,80,35,726/- in the capital cost of Baspa-II HEP for the purpose of determination of tariff for FY 10 onwards and also make a suitable provision for the additional expenditure that may arise on the advice of the SJVNL to the applicant for payment, to form part of the capital cost for the purpose of tariff; and
- (d) to include the additional compensation paid for land amounting to Rs. 7,93,34,966/- in the capital cost of Baspa-II HEP for the purpose of determination of tariff from FY 08 onwards; and
- (e) to allow payment of interest on new arrears due from Himachal Pradesh State Electricity Board (in short "HPSEB" or "Board") on account of tariff determined for the additional capital cost from FY 07 onwards in line with clause 10.11 of the PPA; and
- (f) to direct the HPSEB to reimburse the service tax payable to the

SJVNL of Rs. 78,61,378/- and also allow reimbursement of Service Tax w.e.f. January, 2010 onwards; and

- (g) to allow 0.25% additional O&M expenses being paid to the SJVNL plus service tax; and
- (h) to pass such other and further order(s) as this Commission may deem fit and proper in the premises of the case.

8. The Commission vide Order dated 24.1.2011 partly allowed the prayers i.e. prayers (a), (b), (c), (e), (f) and (g) in favour of the petitioner and rejected the other prayers.

9. The review petitioner being aggrieved by the rejection, preferred to file the present review petition No. 19/2011, on the following issues, namely:-

- (1) addition in the capital cost due to Force Majeure Event on account of fall of boulders on Pothead Yard on 19.1.2006.
- (2) additional cost paid as land compensation
- (3) interest on normative loan
- (4) reimbursement of Service Tax on O&M Charges paid to SJVNL
- (5) additional O&M Expenses being paid to SJVNL
- (6) adjustment of Rs. 27.09 crore already recovered by M/s JHPL through insurance.
- (7) Income Tax (MAT)
- (8) interest on arrears.
- (9) arrears payable by the Board

10. The respondent Board filed an Appeal i.e. Appeal No. 43 of 2011 under section 111 of the Electricity Act, 2003 challenging the impugned Order dated 24.1.2011 passed in Petition No. 11/2010. The said challenge was

only in

respect of two claims i.e.:-

- (a) the claim related to the additional capital expenditure of Rs. 96.75 crores; and
- (b) the claim related to capacity charges as a part of insurance claim.

11. The Hon'ble Tribunal delivered its judgment dated 6.2.2012 in Appeal No. 43/2011 rejecting the appeal of the respondent Board and the respondent Board has assailed the same before the Hon'ble Supreme Court by way of Regular Second No. 4185 of 2012, which is pending for adjudication before the Supreme Court. The application for ad-interim stay has not been granted by the Hon'ble Supreme Court.

12. In the meantime the Commission had issued True-up Order dated 23.4.2012, wherein the impugned Order 24.1.2011 (on the Force Majeure Event of Jan., 2006) had been duly considered and incorporated.

13. The issue of MAT is also one of the issues raised in the review petition. After the vacation of stay by the Hon'ble APTEL, upholding the order of the Commission Order dated 24.1.2011, the Hon'ble APTEL issued Order dated 21.10.2011, in respect of the payment of MAT by the HPSEBL to M/s JPVL (Appeal No. 39 of 2010), against which the HPSEBL has preferred an appeal (registered as Civil Appeal No. 4980 of 2012) in the Hon'ble Supreme Court. The Hon'ble Supreme Court while adjudicating the said Civil

Appeal on 9.5.2012 did not grant any stay on the Orders of the Hon'ble APTEL. Subsequently the Commission vide its combined Order dated 6th Sept., 2012 (on payment of MAT and on Revision of MYT Order dated 15.7.2011) gave effect to the APTEL Order dated 21.10.2011.

14. The Learned Counsels representing the parties were asked to clearly demarcate the issues raised in review petition:-

- (i) which clearly stand disposed of by the Appellate Court;
- (ii) which stand considered and dealt with in the impugned judgment, and
- (iii) which involve clerical or arithmetical mistakes.

15. The respondent Board has chosen not to file its response to the petition on merit and has been stressing for the consideration of the issue of maintainability of the review petition and decision thereon before proceeding further on the merits of the matter.

16. According to the respondent Board, the impugned Order dated 24.1.2011 was the subject matter of the proceedings before the Hon'ble APTEL in Appeal No. 43 of 2011, which has been disposed on 6.2.2012. Once the decision of the Hon'ble Tribunal, as the Appellate Authority, has been passed, the decision of the Commission merges with the decision of the Hon'ble Tribunal. In the circumstances, the jurisdiction of the Commission to review its decision no longer survives as the decision of the Commission has already merged with the decision of the superior authority.

17. Sh. Bimal Gupta, the Learned Counsel for the respondent Board, has in his support cited the decisions of the Hon'ble Apex Court rendered in

- (i) **Narayana Dharamasamghom Trust V/s Swami Parkasananda and others (1997) 6 SCC 78;**

- (ii) **Amba Bai and Ors V/s Gopal and ors. (2001) 5 SCC 570**
- (iii) **Thungabhadra Industries Ltd V/s Government of Andhra Pradesh (1964) 5 SCR 174; and**
- (iv) **Kiran Chit Fund V/s Bal Reddy (2008) 7 SCC 166.**

18. Per contra, Sh. Pawan Uppadhyay, the Learned Counsel for the review petitioner, submits that the issue of maintainability is no more res-integra for the reason that this Commission has categorically directed the respondents to file its reply on merits. He further argues that –

- (i) The issue of merger would apply only when the issues are common before both the fora. If the issue is not common, the applicability of principle of merger does not arise. In the present case the issues under the consideration of APTEL were squarely related to the capital expenditure of Rs. 96.75 crore and the insurance claim of Rs. 27.09 crore. If the contention of the respondent Board that the judgment of this Commission has merged with the judgment of the Hon'ble APTEL is to be accepted, what is the effect of the said judgment on the issues which were raised in review petition? Whether these issues get automatically approved and the HPSEB Ltd, is now liable to make additional payment since the appeal filed by the HPSEB Ltd. has been rejected?
- (ii) The respondent has cited **Narayana Dharamsanghom Trust Vs. Swami Prakasananda & Ors (1997) 6 SCC 78** in support of his claim but the said judgment does not relate to the present issue and therefore is not applicable for the following reasons:
  - (a) The sole issue in the entire proceeding in the cited judgment

was the dispute to the election of the committee of Sh. Naraya Dharamsangam Trust i.e. there was only single issue for consideration of both the review court and the Appellate Court, which is not the subject matter of the present case.

(b) In case of number of issues under review, if some of the decisions are challenged in appeal and what would be the consequences of balance issues is not addressed in the judgment.

(iii) The judgment in *AMBA BAI & Ors Vs. GOPAL & Ors.*, 2001(5)SCC 570 again is not related to the context under issue.

(iv) The issue in the case **Thungabhadra Industries Limited Vs. Government of Andhra Pradesh (1964) 5 SCR 174** related to the turnover tax under the Madras General Sales Tax Act. The judgment is general in nature and stipulates and deals with a situation where a common issue is pending before the Appellate Court and the review court and, therefore, the judgment is not applicable in the present facts and circumstance of the case;

19. Sh. Pawan Upadhyay, the Learned Counsel for the review petitioner, has further stressed that the power of review is provided under the statute i.e. under section 94 of Electricity Act, 2003. The said power cannot be taken away without the specific provisions of law. The respondent has not cited any judgment to throw light on the pending issues. There was no judgment to state that when various issues are decided by a court some in favour of one party or some in favour of other and both the parties chose different forums for the redressal of their disputes i.e. one party goes for appeal and other for review,

the review will become inadmissible. The review in the circumstances aforesaid is maintainable being a legal right guaranteed under the statute to the petitioner and the decision on appeal which is on different issue would not affect the merit of the case pending in review.

20. On the aforementioned factual back drop, issue which emerges for consideration of this Commission is whether the review petition is maintainable, and if so to what extent the claim of the review petitioner can be upheld?

21. As the petition has been filed before the Commission for review of the Commission's Order dated 24.1.2011, under section 94 (1)(f) of the Electricity Act, 2003, read with regulation 63 of the Conduct of Business Regulations, the conditions prescribed under Order XLVII of the Civil Procedure Code are to be satisfied for review. Any person aggrieved by a direction, decision or order of the Commission from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may apply for review of the direction, decision or order of the Commission upon -

- (a) discovery of new and important matter or evidence which after exercise of due diligence was not in the knowledge of the applicant and could not be produced by him at the time when the decree or order was passed;
- (b) some mistake or error apparent on the face of the record; and
- (c) for any other sufficient reason.

22. It is well settled law that there are definite limits to the exercise of power of review. Order XLVII, Rule 1 of the Civil Procedure Code provides for filing an application for review. Such an application for review would be

maintainable not only upon discovery of a new and important matter or evidence or when there exists an error apparent on the face of the record, but also if the same is necessitated on account of some mistake or for any other sufficient reason. An erroneous decision cannot be reheard and corrected. It is obvious that there cannot be re-hearing of the matter during review and an error, which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the exercise of review power.

23. Order XVII, Rule (1) of the Civil Procedure Code permits an application for review being filed “from a decree or order from which an appeal is allowed but from which no appeal has been preferred.” In the present case, it would be seen, on the date i.e. 3.3.2011 when the application for review was filed, the respondent Board had not filed any appeal (as Appeal No. 43 of 2011 has been filed by the HPSEB on 18.3.2011).

24. Now coming to the consequences of the order issued in Appeal No. 43 of 2011, by the Hon’ble APTEL, it would be apt to say that in common understanding that an order of the higher Court staying the decision of a lower Court brings to a halt the operation of the order passed by the lower authority, but does that mean what has been decided in that original order can be undone owing to the stay ordered by an Appellate authority.

25. In **Style (Dress Land) Vs. Union Territory, Chandigarh, AIR 1999 SC 3678** and number of other cases, enlisted below, explaining the legal position on the vesting of rights and accrual of liability as a consequence of the stay order:-

(i) **Kanoria Chemicals and Industries Ltd Vs. U.P. State Electricity**

**Board (1997) 5 SCC 772**

- (ii) South Eastern Coalfields Ltd Vs. State of M.P. AIR 2003 SC 4482**
- (iii) Karnataka Rare Earth Vs. Senior Geologist, Department of Mines and Geology AIR 2004 SC 2915 : 2004 AIR SCW 476 : 2004 AIR Kar R 669**
- (iv) Amarjeet Singh Vs. Devi Ratan, AIR 2010 SC 3676,**
- (v) A Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam AIR 2012 SC 2010**
- (vi) Nava Bharat Ferro Alloys Ltd Vs. Transmission Corporation of A.P. Ltd., AIR 2011 SC 538;**

the Hon'ble Supreme Court has observed that –

- (i) an order of stay granted pending disposal of a writ petition/suit or other proceedings, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the Court in such a case to put the parties in the same position they would have been for the interim orders of the Court;
- (ii) an interim order merges with the final order and therefore the benefits obtained under an interim order, if any, have to be restored;

26. From the preceding para it becomes clear that no litigant can derive any benefit from mere pendency of a case in a court of law, as the interim order always merges in the final order to be passed in the case and if the petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the Court. The fact that the petition is found, ultimately, devoid of any merit, shows that a frivolous petition had been filed. The maxim *actus curiae neminem gravabit*, which means that the act of the court shall prejudice no one, becomes

applicable in such a case. Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court.

27. In light of the above discussion, it is amply clear that the review petition is maintainable and Appeal No. 43/2011 filed by the respondent Board cannot stand in the way of review petition being entertained. However, since the part of the issues in disputes stands disposed of and decision thereon stand merged in the APTEL Order, the disposal of this review petition is to be subject to the decision already rendered by the Hon'ble APTEL.

28. Now after considering the maintainability of the review petition the Commission proceeds to consider the review petition itemwise on merits as under:-

**(1) Addition in the capital cost due to Force Majeure Event on account of fall of boulders on Pothead Yard on 19.1.2006.**

The claim related to the additional Capital Expenditure of Rs.96.75 Crores, has been under consideration in Appeal No. 43/2011, decided by the Hon'ble APTEL on 6.2.2012, rejecting the appeal of the respondent Board. Thus the jurisdiction of the Commission to review no longer survives, as the decision of the Commission has already stands merged with the decision of the Superior Authority i.e. Hon'ble APTEL.

**(2) Additional cost paid as land compensation.**

It is the settled law that a decision even if erroneous, cannot be reheard and corrected on review. In the impugned order the Commission has already

considered and rejected the claim for payment of the additional land compensation for the reason that the capital cost to be admitted for the purpose of tariff determination has to be determined in accordance with the provisions of the PPA signed by the applicant with the Board on June, 4, 1997. The said PPA, does not provide for admissibility of the claim of the petitioner for additional cost on account of land compensation. As such this issue cannot be reconsidered on review.

**(3) Interest on normative loan**

This was also an issue under consideration in the original petition in para 45(b) of the impugned order. This Commission has duly considered the issue and has recorded its findings thereon. Such findings can no longer be reheard and corrected in review.

**(4) Reimbursement of Service Tax on O&M Charges paid to SJVNL**

While dealing with this issue in para 36 of the impugned order, the Commission mentioned that the situation has essentially arisen on account of change in law after the COD of the project and in such circumstances the increase in cost is allowed either through tariff or otherwise. Under these circumstances, the Commission held that the petitioner would be entitled to the cost actually paid to the SJVNL on account of service tax on O&M charges for maintenance of ICF from time to time and the recovery of the cost would be through the tariff mechanism. In view of this, the findings of the Commission need not be interfered with on the review.

**(5) Additional O&M Expenses being paid to SJVNL**

The review petitioner in his application for determination of tariff on additional capital cost has, interalia, prayed to the Commission to allow 0.25% additional O&M expenses being paid to the SJVNL plus tax. In this regard, the Commission, in para 45(d) of the impugned order, clearly stated that the O&M expense for additional capitalization for interconnection facility has been determined at 1.25% p.a. of additional capitalization as per the service agreement signed between the petitioner and the SJVNL. The Commission, in that order had not considered 0.25% additional O&M expenses being paid by the petitioner to the SJVNL as per the term of the service agreement signed between the petitioner and the SJVNL and the Commission will consider these expenses on submission of documentation in support of the actual payments made by the petitioner to the SJVNL.

It is settled law that important matter of evidence, which was within the knowledge of review petitioner and was not produced by him at the time, when the order sought to be reviewed was passed, cannot be produced at the review stage, the Commission, therefore, reiterates its decision that the Commission shall consider these expenses on submission of documentation in support of the actual payments made by the petitioner to the SJVNL.

**(6) Adjustment of Rs. 27.09 Core already recovered by M/s JHPL through insurance.**

The claim relating to adjustment of Rs. 27.09 Crore, already recovered by M/S JHPL, through insurance, has been under consideration in Appeal No 43/2011 decided by the Hon'ble APTEL on 6.2.2012, rejecting the appeal of the respondent Board. Thus the jurisdiction of the Commission to review on this issue no longer survives, as the decision of the Commission has already

stands merged with the decision of the superior Authority i.e. Hon'ble APTEL

(7) **Income Tax (MAT)**

The Commission in the impugned Order has computed the income tax (MAT) in para 45(h) (Table 13) for each of the financial year from FY07 onwards till FY 11 by considering the rate of MAT applicable in each year as stated hereunder:-

Year	Rate of Mat
FY 07	11.22
FY08	11.22
FY09	11.33
FY10	16.995
FY11	19.993

The review petitioner submits that in view of the fact that the impugned order has been passed by the Commission on 24.1.2011, the entire cumulative Annual Fixed Charges for the period for FY 07 to FY 11 should be reckoned as income in the books of accounts and income tax payable will be as applicable for the financial year 2011, therefore, the rate of MAT ought to have been applied by the Commission at 19.993% as against different rate (s) for respective years. After the vacation of stay by the Hon'ble APTEL upholding the impugned order dated 24.01.2011, the Hon'ble APTEL issued order dated 24.10.2011, in respect of payment of MAT by the HPSEBL to M/S JPVL (Appeal No. 39/2010), against which the HPSEBL has preferred an Appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court, while adjudicating the said appeal on date 9.5.2012 (Civil Appeal No. D4980/12), did not grant any stay on the order of the Hon'ble APTEL. Subsequently the Commission vide its combined order dated 6.9.2012 on payment of MAT and order dated 15.7.2011 on revision of MYT has given

effect to the APTEL order dated 21.10.2011.

In view of the above discussion, the Commission finds no reason to review the impugned order on this score as the impugned order dated 24.1.2011 and the MAT Order dated 21.10.2011 have already been factored in the Commission orders dated 23.4.2012 and 6th September 2012.

**(8) Interest on arrears.**

Interest on arrears is to be allowed in terms of the PPA. The Commission in the impugned order in para 47 (Table 14) has determined the arrears payable by the respondent Board to the petitioner for the period upto 31.12.2010 and has allowed time to the respondent Board (in para 48) upto 31.3.2011, for making payment of the entire arrears by 31.3.2011. Further the Commission has also mentioned in the said para 48 that the interest beyond 31.3.2011 will not be allowed as pass through to the respondent Board. The review petitioner now claims the interest from 1.4.2011 till the date of actual payments. In this regard review petitioner also submits that an application for rate of interest on arrears is pending with the Hon'ble Supreme Court in case No. 27266 of 2012. As such the review is not maintainable on this account.

In view of the above findings there is no merit in the review petition. Consequently, the review petition is dismissed, being devoid of merits.

**(Subhash C. Negi)**  
**Chairman**