

Case No.23/06

Present: For Petitioner, HPSEB: Sh.R.L Sood, Sr.Adv.
Consumer Representative: None

In the matter of:

Himachal Pradesh State Electricity Board, Vidyut Bhawan, , Shimla-171004.

Regarding review under section 94 (f) of the Electricity Act, 2003, for review of impugned order dated 4th January, 2006.

ORDER

The Himachal Pradesh State Electricity Board (hereinafter referred to as the petitioner Board) has approached this Commission to review the impugned order dated 4th January, 2006 under section 94 (f) of the Electricity Act, 2003 (hereinafter referred to as the Act) to quash the penalties and consequences flowing therefrom vide which this Commission with regard to contravention of section 65 of the Act, sub-regulation (2), of Regulation 35 of the HPERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 and of the Tariff Order dated 29.06.2005, has imposed a penalty of Rs., 1,00,000/- and an additional penalty of Rs. 6,000/- per day w.e.f. July 1, 2005 upto date of compliance to the satisfaction of the Commission.

The Tariff Order dated 29.6.2005 (for the FY 2005-06), which came into force w.e.f. 1.7.2005, in para-3, provided that the consequential orders which the Commission may issue to give effect to the subsidy that the State Govt. may provide, shall not be construed as amendment to the tariff, in terms of sub-regulation (2) of Regulation, 35 of the HPERC (Terms and Conditions for Determination of Tariff) Regulations, 2004. The petitioner Board was to make appropriate adjustments in the bills to be raised on the consumers for the subsidy amount in the manner the Commission may direct. The licensee, however, issued bills for the month of July,2005 and even upto the month of November, 2005, after providing subsidy without consequential orders of the Commission as per the Tariff Order and the aforesaid regulations. There has been whole sale contravention of the Tariff Order dated 29.06.2005, section 65 of the Act, the HPERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 and the HPERC (General Conditions of Distribution licence) Regulations, 2004 , with utmost impunity of the orders of the Commission. The petitioner Board has also pleaded guilty to the said contraventions. Section 142 of the Act provides that if the Commission is satisfied that any person has contravened any provision of the Act or the Rules or Regulations made thereunder or any direction issued by the Commission, the Commission may, after giving such person an opportunity of being heard in the matter, without prejudice to any penalty to which he may be liable under the Act, direct that such person shall pay by way of penalty, which shall not exceed 1.00 lac rupees for each contravention and in case of a continuing failure with an additional penalty, which may extend to 6000/- rupees for every day during which the failure continues after the contravention of the first such direction. The Commission, before imposing penalty under section 142, keeping in view the principal of natural justice, afforded opportunity to the petitioner Board to answer the interrogatories as per sub-regulation (3) of Regulation 62 of the HPERC (Conduct of Business) Regulations, 2005. Now the petitioner Board has moved the review petition under section 94 (f) of the Act to review the impugned order dated 4th January, 2006 and to quash the penalties and consequences flowing therefrom on the grounds, inter alia,-

- (a) that the penalty is being imposed without prejudice to any other penalty which may be imposed in future, as piecemeal imposition of such penalty is not permissible under the Act; and the Commission has not made up its mind or recorded its complete satisfaction before passing the impugned order;
- (b) that in the absence of inquiry, the letter dated 2.11.05 of the HP Govt., could not have been rejected on mere apprehension; and could not constitute a legal and valid ground to visit the petitioner with penalties;
- (c) that in view of the mandate of sections 65 and 108 of the Act, the directions of the State Govt. in their letter dated 2.11.05 were mandatory and binding on the Commission;
- (d) that the petitioner Board was bound by the directions given by the State Govt. in order to avoid public reaction;
- (e) that there is no requirement in law that subsidy had to be received by the petitioner Board only by cheque or draft and the receipt through drafts or cheques constitute a transparent payment;
- (f) that it was incumbent upon the Commission to have framed necessary guidelines so as to guide and control the discretion in the matter of imposition of penalties .

The Commission has competence, authority and power to review its own decision, directions or orders subject to the parameters as envisaged under section 114 of the CPC, extended by the provisions of section 94 of the Electricity Act, 2003. Generally, the power to review is available to the Commission in cases where orders have been made but not appealed by the party aggrieved despite a right available to it. All the more review can be resorted to rectify accidental clerical mistake or apparent error on record. Section 114 of the CPC gives substantive right to review in certain circumstances and Order 47 of CPC provides the procedure therefor. The provisions relating to review constitute an exception to the general rule that once the judgment is signed and pronounced by the Court it has no jurisdiction to alter it. An application for review of judgment/orders may be made on the following grounds,-

- (i) discovery of new and important matter or evidence;
- (ii) mistake or error apparent on the face of the record;
- (iii) any other sufficient reason.

The expression “any sufficient reason” has not been defined in the Code. However, relying on various judgments the Hon’ble Supreme Court in AIR 1954 SC 526 has held that the words “any sufficient reasons” must mean “a reason sufficient on grounds at least analogous to those specified in the rules”. Thus the power of review is very limited in scope. The power of review in every court is to prevent miscarriage of justice or to correct grave and palpable errors committed by it (AIR 1963 SC 1909 page 1911). The Supreme Court in the leading case of the Northern India Caterers Ltd. Vs Lt. Governor of Delhi (AIR 1980 SC 674) has observed that a review proceedings cannot be equated with the original hearing of the case and finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier judicial fallibility.

In Hari Vishnu Kamath V/s Ahmed Ishaque, AIR 1955 SC 233 (244) it has been laid that what is an error apparent on the face of record cannot be defined precisely or exhaustively, it should be determined judicially on the face of the facts of each case. Further in view of the decisions in Satyanarayan V/s Mallikarjun AIR 1960 SC 137 (141-42) & Beant Singh V/s Union of India, AIR 1977 SC 388 (389) no error can be said to be an error apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it. In other words, an

error cannot be said to be apparent on the face of the record where one has to travel beyond the record to see if the judgment is correct or not.

In view of the express provisions of section 142 of the Electricity Act, 2003 which empowers the Commission to impose the penalties “without prejudice to any other penalty to which he (guilty person) may be liable under this Act,” the contention that the penalty is being imposed without prejudice to any other penalty which may be imposed, is violative and is not permissible under the provisions of the Act, has no substance. The legality or the constitutionality of the said provisions of the Act have neither been challenged nor set aside by the Court of competent jurisdiction. Moreover, as is apparent from the contents of impugned order there was sufficient material before the Commission to satisfy itself that the reasonable circumstances existed to invoke the penal provisions of the Act.

So far as the contention raised relating to the rejection or the mandatory nature of the directions of the State Govt. contained in its letter dated 2.11.2005 is concerned it is apt to point out that this finding cannot be reviewed under section 94 (f) of the Act. The contents of this impugned letter were also not in conformity with para 5.5.4 of the National Electricity Policy and section 65 of the Act. Besides this a review is by no means an appeal or revision in disguise where an erroneous decision is reheard and corrected. The orders passed by the Commission are appealable under section 111 of the Act. Apart from this remedy of appeal, the remedy of revision is also available under sub-section (6) of the said section 111, which empowers the Appellate Tribunal for Electricity to examine the legality or correctness of the order of the Commission.

With regard to the contention that the petitioner Board is bound by the directions given by the State Govt. does not hold good. It would be correct to state that so long as the petitioner Board is the instrumentality of the State Govt., it is bound to carry out the decisions/directions of the State Govt., but under the Act it enjoys the status of the licensee and is required to discharge its obligations as such and is to comply with the requirements of the law. Further there is no ground to review the matter regarding the adjustments in quarterly basis. While exercising the powers and discharging functions the Commission under sub-section (3) of section 86 of the Act, it is required to ensure transparency. In view of the provisions of section 65 of the Act, the Commission in its wisdom has directed the payment by cheques or drafts. In this context no error can be considered to be apparent on the face of the record which may justify the review of the impugned order to that extent also.

The argument put forth on behalf of the petitioner Board that there are no proper guidelines for imposing fines and penalties under the Act, is also wrong as Regulations 62 of the HPERC (Conduct of Business) Regulations, 2005 lays down the procedures and guidelines for imposition of penalties for the contravention and non-compliance of the orders or directions given under the Act, as provided in section 142, or rules or regulations made thereunder. The impugned orders has been made after due compliance of the said statutory requirements.

The plea of guilty may justify the leniency in imposition of penalties. In this case maximum permissible penalties have been awarded and no note has been taken of the fact that the

petitioner Board has pleaded guilty to the alleged contraventions, and , it though late, has also moved an application for consequential orders, as contemplated in para 3 of the Tariff Order dated 29.6.2005, to give effect to the subsidy provided by the State Govt.

The Commission after serious consideration to the pleadings made and arguments advanced during the hearing and various verdicts of the Apex Court accept the review petition only to the extent of dilution in the penalty imposed by the Commission. The penalty will now be Rs. 25000/- and penalty of Rs.500/- per day w.e.f.July 1st, 2005 to the date on which the petition for consequential orders has been filed before this Commission. The penalty, as reduced, be deposited with the Secretary of the Commission within a period of 30 days from the date of this order.

Announced in the open court.

(Yogesh Khanna)
Chairman

Dated: 22.4.2006