

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION,
SHIMLA

In re:

Complaint under the Himachal Pradesh Regulatory
Commission (Conduct of Business) Regulations, 2005,
read with the Electricity Act, 2003.

M/s Himalaya International Ltd. Shubh Khera,
Paonta Sahib, Distt. Sirmour (H.P.)

... Complainant

V/s

1. The Chairman, HPSEB, Vidyut Bhawan, Shimla 171004.
2. The Chief Engineer (Commercial), HPSEB,
Vidyut Bhawan, Shimla-171004.
3. The Chief Engineer (Operation) South, HPSEB,
Vidyut Bhawan, Shimla-4.
4. The Superintending Engineer, HPSEB, Nahan
Distt, Sirmour.
5. The Assistant Executive Engineer, HPSEB,
Paonta Sahib, Distt. Sirmour, H.P.
6. The Sub-Divisional Officer, HPSEB,
Badripur, Paonta Sahib, Distt. Sirmour. (H.P.)

... Respondents

Complaint No. 242/2006 & 243/2006

(Decided on 7.3.2008)

CORAM
YOGESH KHANNA,
CHAIRMAN.

Counsel:-

For the complainant

Sh. Rahul Mahajan,
Advocate.

For the respondents

Sh. Satyan Vaidya,
Advocate.

ORDER

M/S Himalaya International Ltd. Shubhkera, Poanta Sahib, H.P. (the complainant firm) which is growing mushrooms in control climatic conditions and processing other vegetables and fruits, has invested 30 crores rupees in the venture and exports its product to USA. The Firm has obtained load of 990

KW with contract demand of 1100KVA. As power tripping for even few seconds disturbs the process, and it is necessary to maintain climatic controlled atmosphere, the said Firm, was given electricity supply by the HPSEB (the Board) in 1996 after the deposit of Rs.6,29,640/- for Independent Feeder. It is alleged that the Board and its officers diverted the power from complainant's Independent Feeder to many other industrial and domestic consumers. In June, 2002, there have been excessive power tripping and the Firm suffered massive crop failure and I.Q. Frozen mushroom and vegetables have also spoiled. Despite requests made, no corrective measures were taken to improve the tripping. Firm also suffered on account of non-exemption of Peak Load Violations, as promised by the State Govt. at the time of setting up the plant. The Firm claimed a sum of Rs. 1,98,53,730/- as compensation for violation of standards with regard to quality, continuity and reliability of service by the licensee and has also requested for a refund of Rs. 47,77,712 charged towards PLEC & PLVC by the Board.

2. The Firm has been persistently pursuing its claim, since June, 2002 with the Board and the Board Level Disputes Settlement Committees through repeated letters right from 29.6.2002. In both the cases the IEDRM i.e. BLDSC took cognizance of the complaints in Sept, 2004, but these remained undisposed of till Oct, 2006. Even after the field staff furnished their comments on 31.3.05 and 28.12.04, no serious attempt has been made to resolve the issues, excepting the closure of the case with the permission to withdraw the same on 29.10.2006. Non-attendance of the grievances of the complainant especially during the period from 29.6.2002 to Sept. 2004 and from May., 2005 to Oct., 2006, remained unexplained.

3. With this background the Firm has on 22nd November, 2006 filed two applications registered as 242 and 243 of 2003 with the Commission, for the redressal of its grievances and for award of compensation for the loss suffered by it due to the violation of standards of performance, with regard to quality, continuity and reliability of service by the licensee and for refund of the amount charged towards PLEC/PLVC by the Board. Subsequently through a Miscellaneous Application the Firm, also made request for reference of these disputes, raised in the original complaints, for adjudication by the sole arbitrator, as the arbitral process will result in quick and expeditious disposal

of the disputes, especially when the Board has been totally inefficient and has completely failed to restore/adjudicate the complaints in question during last four years and it had been giving date after date.

4. Under regulation 53 of the HPERC (Conduct and Business) Regulations, 2005 the arbitration of disputes, which under the Act, are within the scope of the jurisdiction of the Commission, may be commenced on an application made by any of the parties to the disputes. Putting reliance on the said regulation 53 and the verdict of the **Kerala High Court, in the case M/S Afcons Infrastructure Ltd and another V/s M/S Cherian Varkey Construction Ltd (reported as AIR 2007 (NOC) 233 KER)**, and also taking into account of the nature of the dispute, value involved and possibility of quick and expeditious disposal, the Commission decided on 24.3.2007 to refer the matter for adjudication and settlement through arbitration by a retired Judge of the High Court i.e. Mr. Justice D.P. Sood (Retd) Judge of the High Court of H.P. In pursuance to the said decision, the reference to the sole arbitrator was made on 29.3.07. The arbitrator became functional and the matter was under adjudication and the sittings were being conducted by him as the award was to be made by him within a period of three months from the date of his nomination as such. In the meanwhile the respondents i.e. the HPSEB, filed the appeal No. 78/2007 before the Appellate Tribunal for Electricity and the Hon'ble Appellate Tribunal vide its judgment dated 11th September, 2007, has ruled that the Commission cannot be equated with the Civil Court and as such it cannot apply the judgment of the High Court of Kerala on section 89 of the Civil Procedure Code. The power of State Commission conferred under section 86 (1) (f) to refer a dispute to arbitration relates to disputes between licensees and distribution companies and transmission licensees. The words "any dispute" appearing in sub-section (1) of section 86, cannot be given wide meaning as to include dispute between a licensee and a consumer. Hence the Commission did not have power to refer for arbitratotion the dispute between the Board and applicant firm, relating to compensation for violation of Standards of Performance. In the result Commission order dated 29.3.2007 for reference to the arbitration has been set aside and the Commission has been directed to proceed with complaint cases 242 and 243 of 2006 from the stage immediately before the passing of the

impugned order dated 29.3.2007. The Hon'ble Appellate Tribunal has not given its finding as to the question whether the Commission had jurisdiction to adjudicate upon a dispute, as the same has not been challenged before it. With this background, both these appeals have been recalled.

5. Without considering the basic question of jurisdiction and maintainability, the consideration on merits would be fallacious. It has been held in **Suresh Kumar Bhikam Chand Jain Vs. Pandey Ajay Bhushan (1998)/ SCC 205**, the plea of jurisdiction can be raised at any stage. It is also the settled law that no Statutory Authority or Tribunal can assume jurisdiction in respect of the subject matter which the statute does not confer, if the Court or Tribunal exercises the jurisdiction then the order is vitiated. Moreover in **Shrist Dhawan (Smt) V/s Shaw Bros (1992) / SCC 5334** it has been laid that error of jurisdictional fact renders the order ultra vires and bad in law.

6. The Hon'ble Appellate Tribunal for Electricity, had the opportunity to consider the scope of the provisions of section 42(5) to (8) of the Electricity Act, 2003 in various cases i.e. **Reliance Energy Limited V/s Maharashtra Electricity Regulatory Commission and Maharashtra State Electricity Distribution Company V/s Prayas, Kerve Road Pune (Appeal Nos. 30 of 2005, 164 of 2005 and 25 of 2006) decided on 29.3.2006 (2007 APTEL 543); Dakshin Haryana Bijli Vitran Nigam Ltd V/s Princeton Estate Condominium Association, DLF Universal Ltd (Appeal Nos 105 to 112 of 2005) decided on 29.3.2006; (2007 APTEL 356) and Dakshin Haryana Bijli Vitran Nigam V/s DLF Services Ltd (Appeal No. 104 of 2005) decided on 29.3.2006.) (2007 APTEL 764); and Reliance Energy Ltd. V/s K.H. Nadkarni & Others (Appeal No. 11 of 2005) decided on 26.5.2006 (2007 APTEL 298) and CSEB V. Raghuvir Singh Ferro Alloys Ltd. & Others (Appeal Nos. 125, 126 & 127 of 2006) decided on 28.11.2006 (2007 APTEL 842); Himachal Pradesh State Electricity Board V/s M/S Emm Tex Synthetics Ltd. Jagat Khana Nalagarh & other (Appeal No. 117 of 2007, decided on 5th November, 2007;** In the aforesaid decisions the Hon'ble Appellate Tribunal, has concluded that the relation between a consumer and a distribution licensee is governed by Part VI – Distribution of Electricity-Sub-section (5) to (8) of section 42-provides with respect to Forum for Redressal of Grievances and the Appellate forum i.e. Ombudsman as well. When a Forum has been constituted for redressal of grievances of consumers

by the mandate of section 42, no other forum or authority has jurisdiction. The State Electricity Regulatory Commission, being a regulatory, the highest State level authority under 2003 Act as well as rule making authority has to exercise such functions as are provided in the Legislative enactment and it shall not usurp the jurisdiction of the Consumer Redressal Forum or that of the Ombudsman. The special provision excludes the general is also well accepted legal position. The Regulatory Commission being a quasi-judicial authority could exercise jurisdiction, only when the subject matter of adjudication falls within its competence and the order that may be passed is within its authority and not otherwise. It follows that the State Regulatory Commission has no jurisdiction or authority to decide the dispute raised by individual consumers or the Consumer Association. The consumers have a definite forum to remedy their disputes under section 42(5) and further representation under section 42(6). Further section 42 (8) also saved the rights of consumer to approach any other forum such as the forums constituted under the Consumer Protection Act, 1986 or other Courts as may be available.

7. The Hon'ble Supreme Court in its verdict given in **Maharashtra State Electricity Distribution Co. Ltd V/s Lloyds Steel Industries Ltd JT 2007 (10) SC 365** approving the decision of the Delhi High Court in **Suresh Jindal Vs. BSES, Rajdhani Power Ltd & Others and Dheeraj Singh Vs BSES Yamuna Power Ltd 132 (2006 DLT 339 DB)** has also concluded that complete machinery has been provided in section 42(5) and 42(6) of the Electricity Act, 2003, for redressal of grievances of individual consumers. Hence wherever a Forum/ Ombudsman have been created/appointed the consumer can only resort to these bodies for redressal of their grievances. The Hon'ble Supreme Court in its another decision dated 14.8.2007 in **Civil Appeal No. 2846 of 2006 Maharashtra Electricity Regulatory Commission Vs Reliance Energy Ltd & Others JT 2007 (10) SC 365**, has also not interfered with the decision of the Appellate Tribunal in First Appeal Nos. 30 and 164 of 2005 and 25 of 2006 (2007 APTEL 543) and has ruled that the adjudicatory function of the Commission is limited to the matters prescribed in section 86(1)(f) i.e. adjudication of disputes between the licensees and the generating companies and as such the Commission cannot adjudicate disputes relating to grievances of individual consumers. However the Commission has

jurisdiction only to issue general directions to prevent harassment to the public at large by its licensees/distributors.

8. Keeping in view the above discussion, it can be safely concluded that the specific provisions of section 42(5) and 42(6) of the Electricity Act, 2003 provide for setting up Forum for redressal of grievances and further representation to the Electricity Ombudsman. Thus the licensees/distribution companies are to decide the individual cases received by them after giving a fair opportunity to the consumers. The consumers who still feel not satisfied with the order passed by the licensee/distribution companies can approach the appropriate Forum constituted under section 42(5) of the Act and, if still not satisfied, with the order passed by the appropriate forum to approach the Ombudsman under section 42(5) of the Act. The Commission, therefore, has no jurisdiction to entertain and dispose of the complaint/application No. 243 of 2006, moved by the applicant firm, for refund of the amount charged towards PLEC/PLVC by the Board, because such consumer disputes fall within the perview of the Forum set up under section 42(5) and the Ombudsman appointed under section 42(6) of the Act.

9. It is also settled law that the special provisions exclude the general provisions. The provisions of sub-sections (5) & (6) of section 42 of the Act, are general in nature. The special provisions as contained in section 42(8) and section 57 of the Act, read with regulations framed thereunder, need to be considered. Sub-section (8) of the section 42 of the Act, provides that the provisions of sub-section (5), (6) and (7) shall be without prejudice of a right which the consumer may have apart from rights conferred upon him by the said sub-sections. Section 57 of the Act which is also the part of the Part-VI of the Act under the Head "Consumer protection: Standards of Performance, provides for the determination of the compensation by the Appropriate Commission. Sub-section (2) of section 57, reads as under:-

“(2) If a licensee fails to meet standards specified under sub-section (1), without prejudice to any penalty which may be imposed or prosecution may be initiated, he shall be liable to pay such compensation to the person affected as may be determined by the Appropriate Commission:

Provided that before determination of compensation, the concerned licensee shall be given a reasonable opportunity of being heard”.

10. The Commission, in pursuance of section 57, read with clause (i) of sub-section (1) of section 86 of the Act, has specified the standards of performance of the distribution licensee for providing quality and reliability and for determination of compensation payable thereunder. In view of the provisions contained in regulation 16(3) of the HPERC (Distribution Licensee's Standards of Performance) Regulations, 2005, these provisions have overriding effect. Table below regulation 7 of the said regulations provides for various channels available for a consumer to address his complaints and grievances. By virtue of item No. 3 of the said Table, all Standards of Performance (SOP) complaints, involving compensation, straightway, without being agitated either before the Forum and the Electricity Ombudsman come within the purview of the Commission. The affected person may, under section 57(2) of the Act read with regulation 16(3) of the said regulations (i.e. SOP Regulations), initiate proceedings before the Commission. Further it would be appropriate to note that by virtue of regulation 8 of the HPERC (Guidelines for Establishment of Forum for Redressal of Grievances of the Consumers) Regulations, 2003, the SOP complaints stand excluded from the purview of the Forum. In the light of this, the Commission has the jurisdiction to determine compensation as claimed in complaint/application in No. 242 of 2006 payable under section 57 of the Act, due to violation of Standards of Performance with regard to quality, continuity and reliability of service by the licensee.

11. In the result, the complaint No. 243 of 2006 is dismissed on account of the jurisdictional fact, with the liberty to the applicant to pursue the matter before the appropriate Forum/authority available to him under the law. So far as the complaint No. 242 of 2006 pertaining to the compensation payable due to the violation of the SOP, in regard to quality continuity and reliability of service by the Licensee is concerned the parties to the proceedings are directed to proceed further from the stage immediately before the date of passing the order dated 24th March, 2007 making reference for adjudication by the arbitrator.

The complaint case No. 242 of 2006 now be listed for hearing on 29.3.2008 at _____ or soon thereafter.

The order is made and signed on the 7th day of March, 2008.

(Yogesh Khanna)
Chairman