

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

Petition No. 1 of 2020
Instituted on 07.11.2019
Heard on 01.02.2022
Decided on **15.02.2022**

In the matter of:-

M/s Pinnacle Hydro Energy Pvt. Ltd.
(having its registered Office at D-119,
1st Floor, Saket, New Delhi-110017)
through Sh. Brijesh Kumar Verma S/O
Sh. Sahab Singh Verma (Authorised Signatory)

.....Petitioner

Versus

The HP State Electricity Board Ltd. through its,
Chief Engineer (Commercial)
Vidyut Bhawan, Shimla-171004

.....Respondent

CORAM

DEVENDRA KUMAR SHARMA
CHAIRMAN

BHANU PRATAP SINGH
MEMBER

YASHWANT SINGH CHO GAL
MEMBER

Counsel: -

For the Petitioner: Sh. Dinesh Kumar, Advocate

For the Respondent: Sh. Kamlesh Saklani
(Authorised Representative)

ORDER

The present Review Petition has been moved by M/s Pinnacle Hydro Energy Pvt. Ltd., a Company incorporated under the Company Act, 1956, having its registered office at D-119, 1st Floor, Saket, New Delhi-110017 (hereinafter referred as “the Petitioner”) seeking Review of the Order dated 26th Sept., 2017, passed in the Joint Petition No. 48 of 2017 moved by the

Petitioner and the Himachal Pradesh State Electricity Board Ltd., Vidyut Bhawan, Shimla-171004(hereinafter referred as “the Respondent Board”) for approval of the Power Purchase Agreement (PPA in short) under Section 86(1)(b) of the Electricity Act, 2003 (hereinafter referred as “the Act”) in respect of Serai Small Hydro Electricity Project (SHEP)(2MW) situated in Distt. Kullu (HP)(hereinafter referred as “the Project”).

2. An application for condonation of delay in filing Petition was also filed and vide Order dated 30.07.2020, the said application was allowed and the Petition was admitted for hearing.

3. The factual matrix of the case is as under:-

- (a) The Review Petitioner has been allocated the Serai SHEP (2MW) in Kullu Distt. (HP) for implementation on Build, Own, Operate and Transfer (BOOT in short) basis, and an Implementation Agreement (IA in short) was executed with the Govt. of Himachal Pradesh (the GoHP in short) on 17th Oct., 2013 and Supplementary Implementation Agreement (hereinafter referred as “SIA”) has been signed on 18th May 2015.
- (b) The Review Petitioner started the construction of the Project in April, 2016. The construction Schedule of the Project was approved by the HIMURJA, the nodal agency of the GoHP and the date of synchronization had been fixed as 15.03.2018 and Date of Commercial Operation (CoD) of the Project was 31.03.2018.
- (c) The Government of India notified revised tariff policy for the power projects on 28th January 2016 which is applicable for the period of 5 years from the date of publication of the policy in the Official Gazette.
- (d) The Central Electricity Regulatory Commission (hereinafter mentioned as “the CERC”) had also notified the Regulations for Small Hydro Projects on 17th April 2017 which were applicable for a period of 3 years w.e.f. 01.04.2017 to 31.03.2020. According to the said Regulations, the

tariff determined therein was applied to the renewable energy projects to be commissioned during the said control period which means that the hydro Projects achieving COD within the control period of 01.04.2017 to 31.03.2020 will get power tariff as per the norms laid therein.

- (e) In March 2017, the Review Petitioner applied to the Respondent Board for connectivity of the power generated in the Project to the Grid of the Respondent Board and the permission for connectivity was granted on 15.02.2018, with certain conditions. The Connection Agreement between the Review Petitioner and the Respondent Board was signed on 26th February 2018.
- (f) The Commission vide notification dated 31.03.2017 extended the operation of the Himachal Pradesh Electricity Regulatory Commission (Promotion of Generation from the Renewable Energy Sources Terms and Conditions for the Tariff Determination) Regulations, 2012 (hereinafter mentioned as the R.E. Regulations 2012). The Review Petitioner alleges that the notification dated 31.03.2017 has been issued in violation to the tariff policy, framed by the Government of India, and the Regulations framed by the CERC in the year 2017. Besides, the notification of extension dated 31.03.2017 is not sustainable in the eyes of law as the same has been issued in violation to the statutory provisions and the principles of natural justice and fair play.
- (g) When the Review Petitioner approached the Respondent Board for the sale of power to be generated at Serai SHEP, the Respondent Board asked the Review Petitioner to meet the requirement of filing a Joint Petition under Section 86(1)(b) of the Act. Accordingly, Joint Petition No. 48 of 2017 was filed for approval of the PPA and the Commission approved the PPA with Clause 6.2 providing the tariff of Rs.3.17 per kWh and the other terms and conditions of the PPA were subject to the provisions of the RE Regulations of 2012.

- (h) The GoHP also framed Hydro Policy on 02.07.2018 and issued directions to the Commission mandating that the tariff rates are to be determined on the basis of the Commercial Operation Date (COD) of the Project and further directed that the Regulations may be amended to enable all power developers to sign the PPAs accordingly. The Review Petitioner, in order to seek justice to have equal treatment at par with other power developers, had been representing to various authorities with a hope that the Review Petitioner will be granted tariff on the basis of date of COD, but nothing fruitful could be achieved.
 - (i) The Project of the Review Petitioner was commissioned in the year 2018 but no payment for the energy generated at the Project was being paid since PPA was not signed on account of consistent stand and demand of the Review Petitioner to have payment of the tariff on the basis of COD. Since the matter was delayed for a sufficiently long period, the Review Petitioner was compelled to sign the PPA on 27.04.2019.
 - (j) It is alleged that the Order dated 26th September 2017, passed in Joint Petition No. 48 of 2017, is neither in conformity with the provisions of the Act nor the Regulations.
 - (k) The notification dated 31.03.2017 is wrong, illegal, null and void and has been issued in violation of the Tariff Policy of Govt. of India in as much as that even the requirements of previous publication under Section 181(3) of the Act and Articles 14 and 19(1)(g) of the Constitution of India have not been met as the RE Regulations 2012 after having been expired were to be treated as repealed in the eyes of law and could not have been extended. Also, the notification dated 31.03.2017 extending the RE Regulations is arbitrary, unilateral, unfair and unjust and is to be treated as non-est.
4. As per the Review Petitioner, the RE Regulations, 2012 had expired on 31.03.2017 and the extension of the same by notification dated 31.03.2017 is

illegal as the said notification do not comply with the statutory requirements *inter alia*, that:-

- (a) The draft notification, for extension of RE Regulations 2012 was published in the Rajpatra dated 17.03.2017 stipulating a period of fourteen days for receipt of objections/suggestions to these Regulations. The previous publication rules clearly stipulate that the time for filing objections is to be counted in the manner that first day shall be the day after the publication and shall include the day of expiry notified in the notification, but no day of expiry has been mentioned in the notification. Even according to the established judicial norms, the last date of receipt of objections, the 14th day comes to 31.03.2017. Any further proceedings in the matter could only have been done after 31.03.2017 i.e. on 01.04.2017. This violation vitiates the entire process of extension of the RE Regulations, 2012.
- (b) In the notification dated 17.03.2017, no date has been given for hearing, as such, the notification is not only against the previous publication rules but also against the principles of *audi altrum partum*.
- (c) All the matters in pursuance of notification in question could have been taken up for consideration only after 01.04.2017 but without meeting the requirement of law with regard to time, the notification for the extension of the RE Regulations, 2012 has been published on 14th day from the date of publication of the notice, as such, the procedure adopted in the matter is unjust and unfair which has caused not only grave prejudice but has further resulted into miscarriage of justice.
- (d) In the notification dated 17.03.2017, it has been notified that after consideration and finalization, the amended RE Regulations shall

come into force from the date of publication in the Rajpatra. The final notification after the process adopted for amending the RE Regulations has been published in the Rajpatra on 6th April, 2017 but the same has been made applicable from 01.04.2017. Thus. the two contradictory notifications destroying each other also destroy the entire process of amendment,-

- (i) that previous publication rules were not followed as aforesaid;
- (ii) that no date was mentioned in the draft notification for consideration of the draft regulations;
- (iii) that the so-called amended Regulations were at variance with the draft Regulations.

4.1 The tariff for the Project has been determined on 26th Sept., 2017, when only the CERC (RE) Regulations were in force, as the notification dated 31.03.2017 and the extension of RE Regulations, 2012 has no force of law as no Regulations exist for the control period 01.04.2017 to 30.09.2017. As such, the tariff determined by the CERC is applicable and should have been made applicable to the Project.

4.2 There are errors on the face of the Order dated 26.09.2017 to the extent that the other terms and conditions of the PPA shall be subject to the provisions of the RE Regulations, 2012, as the RE Regulations, 2012 had expired and its extension by notification is neither legal nor valid. The provisions of law and regulations have been wrongly relied upon and the same has resulted into wrong conclusion, as such, the order dated 26.09.2017 deserves to be reviewed.

4.3 The factual position that CoD of the Project was after the date when the control period under RE Regulations, 2012 had come to an end, but the same has been ignored, which has resulted into violation of rights of the Review Petitioner as the CERC has determined the tariff rate of Rs.5.07 per unit and whereas as per the impugned order, the tariff granted in favour of the Review Petitioner is only Rs. 3.17 per unit.

4.4 The impugned order is discriminatory as the Power developers who have not signed the PPA earlier to 01.10.2017 and have achieved CoD on or thereafter have been allowed tariff determination under new Regulations, but the various projects including the Project of the Review Petitioner has been denied tariff determination under new Regulations though the CoD of the Project is after 01.10.2017. Hence, two different units, starting generating electricity in the same control period, are being given different tariff rates, which is further against the basic principles of equality.

4.5 The fixation of tariff in the PPA is not sacrosanct and the Commission is empowered to amend the tariff order if found inconsistent with the provisions of the Act.

5. In response to the Petition, the Respondent Board has submitted that the Petition is not maintainable in eyes of law and that the Review Petitioner has not approached this Commission with clean hands and has suppressed the material facts and that the Petitioner in disguise of the present Petition while challenging the impugned Order dated 26.09.2017, has indirectly challenged to the Regulations.

5.1 It is averred that the CERC (RE) Regulations are not applicable to the Independent Power Producers selling power to the Respondent Board and rather the RE Regulations, 2012 are applicable and extension of the said Regulations is in accordance with the mandate of law given in the Act. Further, it is wrong to allege that the extension of RE Regulations is in violation to the Tariff Policy framed by the Govt. of India and the Regulations framed in the year 2017 by the CERC.

5.2 It is also averred that the State Commission, in discharge of its functions is to be guided by the directions issued by the State Govt. under Section 108 of the Act in the matter of policy involving public interest. However to proceed on the basis that the State Commission is bound to follow such directions goes against the scheme of the Act. The State Commission alone is vested with the

authority to frame Regulations, as provided in the Act and determine the tariffs in accordance with the Regulations and also consider the suggestions of the State Govt. while determining these tariffs but not in the terms of directions under Section 108 of the Act. As a matter of the fact, the State Govt. is a major stakeholder in the power sector. Therefore, its suggestions may be considered and due weightage may be placed on such policy directions.

5.3 It is further averred that since the Respondent Board is the regulated entity, under the Act, the Regulations framed/orders passed by the Commission are applicable in toto. The PPA was approved by the Commission in Petition No. 48 of 2017 vide its Order dated 26.09.2017. The Order passed by the Commission is in conformity with the provisions of the Act and the relevant Regulations framed thereunder. It is further averred that the notification issued on 31.03.2017 is legal in the eyes of law and does not suffer from any irregularity.

5.4 The Respondent Board has further averred that the grounds of challenge taken in the present Petition cannot be taken in a Review Petition. As per them, the Act is a complete Code in itself and if anyone is aggrieved by the Regulations/notifications, the vires of the same can only be challenged before the Hon'ble High Court by way of filing a Civil Writ Petition under Article 226/227 of the Constitution of India. Hence, the instant Petition is not maintainable in the eyes of law and deserves dismissal.

5.5 As per them, the Review Petitioner has miserably failed to point out any error apparent on the face of the record in the order impugned or any other grounds for the review of the order dated 26.09.2017 passed by the Commission in Petition No. 48 of 2017, wherein the PPA was approved after filing the joint Petition for the Project. Further, the Commission is not having the jurisdiction to entertain such Petitions where the vires of the notification/regulations has been made out as bone of contention. It is specifically denied that the CERC Regulations govern the field in the State of

Himachal Pradesh and were applicable in the present matter. The determination of tariff is one of the core functions of the State Commission which is to be done in an independent manner and these functions are being discharged by the Commission by following the provisions of the Act and the Regulations made thereunder. There is no error on the face of record in the impugned order. Furthermore, the Commission cannot sit as an Appellate Court in the review proceedings and on this sole ground, the present Petition is required to be dismissed in the interest of justice and fair play.

6. We have heard Sh. Dinesh Kumar, Ld. Counsel for the Review Petitioner and Sh. Kamlesh Saklani, Authorised Representative of the Respondent Board.

7. It has been submitted by Sh. Dinesh Kumar Ld. Counsel that the extension of RE Regulations, 2012 is bad in the eyes of law as the previous publications rules have not been adhered to and the RE Regulations 2012 have been extended illegally, which has no force of law. He also submits that when the PPA was approved, there were no valid Regulations in force and only the CERC (RE) Regulations were in force and tariff should have been fixed as per CERC (RE) Regulations. He also submits that there are errors apparent on the face of record, as such the Order dated 26.09.2017 is required to be reviewed.

8. Sh. Kamlesh Saklani, Authorised Representative of the Respondent Board on the other hand has submitted that the RE Regulations, 2012 were in place on the date when the order dated 26.09.2017 was passed and neither there are errors on the face of record in the Order dated 26.09.2017 nor there is any irregularity or illegality in RE Regulations, 2012 which have been legally and validly extended. He also submits that vires of the Regulations cannot be challenged by way of Review Petition and the Review Petition is not maintainable.

9. We have carefully gone through the submissions made by the Counsel for the parties and have pursued the record. It is settled law that in the review

proceedings, the scope of interference is very limited and the Review can only be granted in case of clerical omission, mistake, or the like grave error and not for rehearing the case.

10. The Hon'ble Appellate Tribunal in its two judgments delivered in Appeal Nos. 18 and 30 of 2009-**Ispat Industries Ltd. Mumbai V/s Maharashtra Electricity Regulatory Commission Mumbai -2009 ELR (APTEL) 0618** and Review Petition No. 5 of 2008- **Maharashtra State Electricity Distribution Co. Ltd. Mumbai V/s Erotex Industries and Exports Ltd. and one another -2009 ELR (APTEL) 0700** has held that Section 94(1)(f) of the Electricity Act, 2003 empowers the Commission to review its decisions, directions and orders and provides that the Commission is vested with the same powers which are given to a Civil Court under Order 47, Rule 1, of the Code of Civil Procedure, 1908. Thus, the power of the Commission to review its own orders flows from Section 94(1)(f) of the Act, read with Regulation 63 of the HPERC (Conduct of Business) Regulations, 2005. The power of Review has been spelt out in Section 114, read with Order 47, of the CPC. The Review Petition has, therefore, to necessarily meet the requirements of Section 114 and Order 47 of the CPC.

11. As per the said provisions, the specific grounds on which order already passed can be reviewed are-

- (a) if there are mistakes or errors apparent on the face of the record, or
- (b) on the discovery of new and important matter or evidence which, after due diligence, was not within the knowledge or could not be produced at the time of making the order, or
- (c) if there exist other sufficient reasons.

12. It is thus clear that a Review cannot be equated with the original hearing of a case. A Review Petition has a limited purpose and cannot be allowed to be an appeal in disguise and it cannot be exercised on the ground that the decision was erroneous on merits. The power of Review, legally speaking, is

permissible where some mistake or error apparent on the face of the record is found and the error apparent on record must be such an error which may strike one on a mere looking at the record and would not require any long-drawn process of reasoning. But simultaneously, the material on record, which on proper consideration may justify the claim can not be ignored.

13. On a careful consideration of the contents of the Review Petition, submissions made by the learned Counsel for the parties, the Commission is of the view that when the Order dated 26.09.2017 in Joint Petition No. 48 of 2017 was passed, legally enforceable Regulations were in place i.e. RE Regulations, 2012 which were validly extended as per provisions of law. Significantly, when the Joint Petition No. 48 of 2017 was filed, a simple prayer for approval of PPA had been made and such prayer was allowed. Thus, we do not find that the Order dated 26.09.2017 is vitiated on account of any illegality or procedural lapse. On careful perusal of the record, we observe that there is no error apparent on the face of record. The Petitioner has also not been able to show that despite due diligence, the Petitioner could not produce any relevant material on record. Similarly, the Petitioner has not been able to substantiate that there exist sufficient reasons for reviewing the order.

14. As observed above, the power of Review, legally speaking, is permissible where some mistake or error apparent on the face of the record is found and the error on the face of record must be such an error which may strike one on mere looking at the record and would not be equated with the original hearing of a case. Also, review has a limited purpose and cannot be allowed to be an Appeal in disguise and it cannot be exercised on the ground that the decision was erroneous on merits. It is held in **Parsion Devi and Others V/s Sumitri Devi and Others (1997) 8 SCC 715, 1997 Supp 4 SCR 470** as under:

“ It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47, Rule 1, CPC. 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 fact 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 or 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. There is a clear distinction between an erroneous decision and an error apparent on the fact of the record. While the first can be corrected by the higher forum, the latter can be corrected only by exercise of the review jurisdiction.”

15. In view of the foregoing discussion and limited scope of review jurisdiction, we are of the view that there are no merits in the Petition. Thus, the present Review Petition deserves dismissal and accordingly the same is dismissed.

The file after needful be consigned to records.

-Sd- (Yashwant Singh Chogal) Member(Law)	-Sd- (Bhanu Pratap Singh) Member	-Sd- (Devendra Kumar Sharma) Chairman
---	---	--