Before the Himachal Pradesh Electricity Regulatory Commission
(Appellate Jurisdiction)

Appeal No. 255/06

Present for :M/S Himalyan Vege Fruits Ltd :Sh. Rahul Mahajan, Adv.

HPSEB and others : Sh Bimal Gupta, Adv.

Order

(The case was last heard on 17.02.07 and the order reserved)

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24.03.2007

M/S. Himalayan Vege Fruits Ltd. Parwanoo through Sh. Yoginder Diwan its Managing Director(hereinafter referred to in short as the appellant) has filed an appeal against the impugned order of the Himachal Pradesh Electricity Ombudsman passed on 4.11.2006 in the appeal under rule 13 of the Himachal Pradesh Electricity Regulatory Commission (Guidelines for Establishment of Forum for Redressal of Grievances of Consumers) Regulations, 2003, read with sub-section (6) of section 42 of the Electricity Act, 2003 against the order dated 28.12.2005 (in complaint) passed by the Forum, for Redressal of Grievances of Consumers (hereinafter referred to in short as " the Forum").

2. The orders made by the Forum disposing of the complaint and the Electricity Ombudsman, deciding the appeal, moved by the complainant are exhaustive and self explanatory. The memorandum of appeal filed in this case discloses no substantial question Law involved in this matter.

3. This is the admission hearing of the Second Appeal moved before this Commission. The Appellate Court cannot interfere with a pure finding of facts. A Court of First Appeal is competent to enter into questions of facts and decide whether the findings of facts by the lower Court are erroneous or not. But a Court of Second Appeal is not competent to entertain questions as to the soundness of a finding of fact by the Court below. A Second Appeal can only lie on one or more of the grounds specified in section 100 of Civil Procedure Code. The existence of a substantial question of law is the sin quo non for the exercise of the jurisdiction under the said section 100. Sub-sections (3) & (4) of section 100 (ibid) read as under:-

> "(3) In an appeal under this section, the Memorandum of appeal shall precisely state the substantial question of Law involved in the appeal.
> (3) Where High Court is satisfied that a substantial question of law is involved in an case, it shall formulate that question."

4. Thus the Court to whom a Memorandum of Second Appeal is presented for admission is required to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily. The limitations to the power of the Court imposed by Section 100-101 of Civil Procedure Code in a Second Appeal aught to be attended to and the appellant aught not to be allowed to question the findings of the First Appellate Court upon a matter of fact.

5. Thus the primary question is to be considered and determined is as to whether there is any substantial question of law is involved or not.

6. Shri Rahaul Mahajan, Advocate, appearing on behalf of the appellant i.e. M/S Himalyan Vege Fruits Ltd., when asked to pin point the substantial question of law involved in this appeal, stated that the Electricity Ombudsman acting as the First Appellate Court has failed to adjudicate on all points raised in appeal and it has resulted in error of law causing miscarriage of justice. Thus there is substantial question of law involved in the appeal now being filed. In his support he has cited the **decision of the Honb'ble Supreme Court taken in State of Rajasthan V/s Harphool Singh (through his LRs) (2000) 5 SCC 652** which lays down that the First Appellate Court is duty bound to make a critical analysis of the matter before it. It cannot mechanically affirm findings of the trial Court without due and proper application of mind and it further lays down that where there are glaring inconsistencies and contradictions in the evidence and issues raised are serious, the Second Appellate Court is not hampered by the provisions of S 100 from interfering with even concurrent findings of fact of the lower Court.

7. The facts as disclosed from records of this case reveal that the appellant has been provided with an electricity connection of category of L.S by the respondent Board. The parties agreed to 275.875 KW of connected load. No contract demand was recorded by the appellant in the A&A Form. The appellant objected to the demand of Rs. 4,31,894, raised by the respondent Board through the bill dated 6.7.2005, on the ground that the complainant cannot be charged on the basis of contract demand which he had not indicated in the A&A Form. The appellant filed representation under the HPERC (Guidelines for Establishment of Forum for Redressal of Grievances of Consumers) Regulations, 2003, which was decided by the Forum on 28.12.2005 concluding that:-

   (a) the demand charges for the period 1.11.2001 to 30.6.2003 should be charged from the complainant consumer on the basis of contract demand of 275.875 KW in accordance with the provisions of HPSEB Tariff applicable from 1.11.2001 and in consonance with the orders dated 3.8.2002 of the HPERC in complaint Case Nos. 3 of 2002 and 99/2002. The demand charges for 7/03 to 2/04 on the basis of contract demand of 153 KVA and for 3/04 to 9/04 on the contract demand of 85 KVA have been rightly charged and upheld.

   (b) delay in sanctioning revision/reduction of contract demand is not substantiated and hence rejected.

   (c) the respondent Board should verify and reconcile with the complainant consumer the factual position with regard to exclusion of the penalty of Rs. 75,570/- in the figures worked out for the month of 2/2003. It should not include for recovery in their total claim of Rs. 3,99,410/-. The demand charges for 2/2003 should be calculated on the basis of 80% of the contract demand and not on the reading recorded by MRI in Feb, 2003, which stood declared erratic/wrong by the Chief Electrical Inspector vide his orders dated 28.7.2003."

8. The findings of the Forum were challenged before the H.P. Electricity Ombudsman, by way of an appeal on the grounds that:-

   (a) the Forum's order is wrong, illegal, arbitrary and contrary to the record/factual position, the law and the Tariff Policy, and is based on surmises and conjectures.

(b) the Forum has erred in not appreciating the fact that at the time of applying for electric connection, no contract demand was mentioned in the A&A Form and same was subsequently filled up by the respondent Board's officials. There was no concept of the contract demand in 1995 so the complainant did not mention the same in 1995.

(c) the Forum has not considered the Tariff Policy wherein the Commission has ordered the demand charges should be levied on the actual maximum recorded demand in a month in any thirty minutes interval or 80% of the contract demand whichever was higher.

(d) the findings of the Forum that the contract demand cannot be less than 125 KV is wrong and illegal and against Tariff Policy of the HPERC's order.

(e) the Forum has not considered the order dated 28.7.2003 of the Chief Electrical Inspector vide which the penalty of Rs. 75,570/- of the respondent was set aside. No appeal against the order was made. Thus the Forum's order to the respondents for verifying and reconciling the same is uncalled for and unjustified.

(f) the Forum has failed to take into consideration the fact that the revision/reduction of contract demand for 153 KVA was made under duress and the delaying tactics of the respondent forced the complainant to file fresh A&A Form with contract demand of 85 KVA.

9. After going through the petition, respondents' pleas before the Forum, documents, replies filed by the parties and after hearing the parties, the Electricity Ombudsman concluded that:-

(i) the disputed amount is Rs. 3,94,410/- not Rs, 4,31,893 which is mentioned by the complainant. The overhauling of accounts w.e.f. Nov., 2001 onwards was rightly done in compliance to the Commission's order. The demand of Rs. 3,94,410 for drawal of energy by the complainant for the period w.e.f. 1.11.2001 to 6/2003 is per directions of the Commission.

(ii) the contract demand of the complainant was 275.875 KW, which was agreed through the A&A Form on 22.11.1995 was continuing. But during the month of 6/2003 the complainant has filed another A&A Form for revision/reduction in his contract demand and connected load to 199.700 KW and the contract demand was reduced to 112 KW which was again amended with connected load of 275.875 and contract demand of 153 KVA and the same was sanctioned and accepted w.e.f. 30.6.2003.

(iii) it cannot be accepted that the complainant was not aware of his contract demand and the same was later on manipulated by respondents themselves. The complainant was well aware of the fact that for enhancing or altering his contract demand he has to complete some formalities, which he had complied with on 13.10.2006 i.e. at the time of applying for revision of his load to 153 KVA;

(iv) the complainant has attempted to mislead the Ombudsman by giving different Serial numbered A&A Forms on different occasions.

(v) the Respondents had already calculated and levied the charges according to the Tariff Policy, wherein the HPERC has ordered that the demand charges should be levied on the actual recorded demand in a month in any thirty minutes interval or 80% of the contract demand whichever was higher. Thus the complainant's demand defeated.

10. Aggrieved by the decision taken by the Electricity Ombudsman, the appellant has challenged the findings of the electricity Ombudsman on the following grounds:-

(i) that the findings of the Electricity Ombudsman are totally based on surmises and conjectures.

(ii) that the Electricity Ombudsman being a first Appellate Forum ought to have given findings on all issues and points raised in the appeal. The non adjudication on all points which were raised in appeal has resulted in error of law causing miscarriage of justice.

(iii) that the Electricity Ombudsman has failed to take into consideration that the concept of contract demand was not in existence in the year 1995 and consumers were charged on the basis of connected load.

(iv) that the Electricity Ombudsman has failed to take into consideration the tariff policy as well as the HPERC regulations and orders passed in compliant No. 99/2000 & 3/2000.

(v) that there was no concept of contract demand in 1995, so no question arises of filling contract demand in AA Form submitted in the year 1995. the Form were in the custody of HPSEB and they have themselves filled in his contract demand later on.

(vi) the Electricity Ombudsman has also failed to give any findings that the applicant is not liable to pay a sum of Rs. 75,570/- as the demand of the same has been set aside by the Chief Electrical Inspector on 28.7.2003.

(vii) that the Electricity Ombudsman also failed to take note that contract demand for 153 KVA was made under duress and delaying tactics of the HPSEB to force the appellant to file fresh AA Form for 85 KVA based on last 10 years of maximum load drawn by the appellant. The appellant has never drawn a load exceeding 78 KVA.

(viii) Contract demand should have been taken on the basis of actual load drawn in every month or 80% of the demand of 85KVA from the date of tariff and regulations and instructions issued by the HPERC.

(ix) The findings of the Electricity Ombudsman to the extent that the appellant has tried to mislead him and the Forum is totally wrong and incorrect. In fact three AA Forms are filled and deposited with the distribution licensee, as such no question of misleading the Forum arises. The HPSEB

officials at Solan have later on filled contract demand in AA Forms in their custody.

11. The Learned Counsel appearing for the appellant has stated that the Forum has not considered the order dated 28.7.2003 of the Chief Electrical Inspector, whereby the demand of Rs. 75,570/- of the respondent was set aside. Instead of direction to the respondents for verifying and reconciling the same, the trial Court (Forum) and the Court of First Appeal (Electricity Ombudsman) should have decided this issue itself. Similarly the Electricity Ombudsman has failed to consider the fact that the Forum has erred in appreciating the evidence adduced before it in relation to other issues concerning reduction of contract demand to 153 KVA and filling fresh AA Form for 85KVA under duress/ delaying tactics of the respondents. This has resulted in error of law and has caused miscarriage of justice.

12. The Commission has given anxious thought and has found that the Forum which had the advantage of going through all the relevant records and evidence adduced before it, has considered both these issues. It had already stated that the penalty amount of Rs. 75,570/- which stood declared erratic/wrong on 28.7.2003, is not recoverable from the complainant. Even before the Electricity Ombudsman, the respondent Board has stated that the amount of Rs. 75,570/- set aside by the Chief Electrical Inspector has not be included in the bill and even in the letter dated 27.4.2005, not it has been accounted for in the accounts of the petitioner at the time of over hauling the accounts of the Complainant. Thus there was hardly any occasion to record any different finding by the Electricity Ombudsman. The other issue concerning delay in sanctioning the request for revision/reduction of the contract demand has too been considered by the Forum as well as the Electricity Ombudsman. There is nothing from which it can be concluded that both the Forum and the Electricity Ombudsman have not considered all these aspects and their findings recorded are on an inadmissible evidence. Thus the judgement of Supreme Court in State of Rajasthan V/S Harphool Singh (2000) SCC 652 cited by the learned Counsel for the appellant is not of any avail

13. The substantial question of law need not be ejusdem genris and this expression confers wide discretion on the Appellate Court to admit evidence when the ends of justice require it.

14. The Hon'ble H.P. High Court in Nirmala V/s Hari Singh AIR 2001 H.P.1, has held that in the Second Appeal, findings of fact can be interfered with only if relevant material is not considered or a finding is recorded on an inadmissible evidence.

15. In the commentary on Code of Civil Procedure. i.e. Mulla Code of Civil Procedure (Abridged) Thirteenth Edition by P.M Bakshi, at P 410-411 it has stated that a Kerala case i.e. Sankaranarayanan V/s. Ramaguptan 1929 KLT 744 spells out the object of the Amendment of 1976, which has restricted the scope of section 100 of Civil Procedure Code. The following propositions relevant to this aspect emerge from the judgement.

    (1) The first test to be applied in determining whether there is a substantial question of law' is whether the question raised is of general importance (or, in the alternative) whether the question directly and substantially affects the rights of the parties. It is sufficient if one or the other ingredient is satisfied.

    (2) It is not enough that the question only affects the rights of the parties;

(3) If these tests are satisfied, the court will further proceed to examine whether, the question raised has already been settled by the Supreme Court. If the question has been so settled, the appeal must be rejected at the threshold.

(4) If the question has not already been so settled, the Court can see whether the question is not free from difficulty, or at least calls for a discussion of alternative views – an area where a flexible approach may be possible.

(5) The question should not merely be an arguable one; it should impress the court as one which needs to be decided.

(6) If, at the admission stage, the court holds that the question has been properly decided by the first appellate court (though there are no binding authorities on it), admission of the second appeal will be refused. A party will not be allowed the "mere luxury of a debate" by admitting a second appeal"

In view of the foregoing discussion the Commission, after going through documents placed on the record and hearing the parties concludes that there is no substantial question of law to be determined. In this case, the entire evidence has been considered by both the Forum and the Electricity Ombudsman. It can also not be said that the courts below have placed reliance on any inadmissible evidence, which if omitted, would result in upsetting the conclusion arrived at by the Courts. The concurrent findings of facts recorded by Courts below is the result of proper appreciation of evidence. The Commission , therefore, declines to admit this appeal.

Announced in the open Court.

File be consigned to record room.

Dated. 24.03.07

(Yogesh Khanna)
Chairman.