

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

In the matter of:-

M/s Jala Shakti Limited
House No.135, Upper Julakari,
Chamba, HP

....Petitioner

Versus

1. The State of Himachal Pradesh thro' its
Principal Secretary (MPP & Power)
GoHP, Shimla-171002
2. The HP State Electricity Board Ltd. thro' its,
Chief Executive (SO),
Vidyut Bhawan, Shimla-171004
3. The Director
HIMURJA, SDA Complex Kasumpti,
Shimla-171009

....Respondents

Petition Filing No. 9 of 2016

(Decided on **3rd August, 2016**)

CORAM

S.K.B.S. Negi
CHAIRMAN

Counsels: -

for the petitioner:	Sh. Ajay Vaidya Advocate
for the Respondent No.1	Sh. Shanti Swaroop, Legal Consultant
for the respondent No. 2	Sh. Ramesh Chauhan, Authorised Representative
for the respondent No. 3	Sh. Pradeep Bhanot, Snr. PO

ORDER

(Last heard on 30.07.2016 and Orders reserved)

M/s Jala Shakti Ltd having its office at House No. 135 Upper Julakari, Chamba (HP), which is a company incorporated under the Companies Act, 1956 (hereinafter referred as “the petitioner”) through Sh. Mahashu Ram Thakur , S/o Sh. Kunj Lal its

authorised signatory , has moved this petition seeking directions of this Commission that the Power Procurement Agreement dated 11th January, 2007 (PPA) executed by it with the erstwhile Himachal Pradesh State Electricity Board the predecessor of the Himachal Pradesh State Electricity Board Ltd.(hereinafter referred as “the respondent Board”) in relation to Dunali Hydro Electric Project (5.00MW) located on Baleni-Ka-Nala Khad, a tributary of river Ravi in Chamba Distt. HP (hereinafter referred as “the project”), be amended with the rider i.e. Tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission’s regulations on power procurement from renewable sources, as and when such regulations are framed and the tariff clause in the PPA may be ordered to be substituted @ Rs.2.95 paisa per unit in the amended PPA from May, 2013 i.e. from the date of commissioning of the project.

2. The petitioner has earlier moved petition No. 198 of 2014 to increase the tariff of the power, generated from its said project and delivered to the HPSEB Ltd. from the project, from Rs. 2.50 per unit (as given in the PPA) to Rs. 2.95 per unit (as provided in the Commission’s Order dated 09.02.2010 passed consequent to the APTEL Order dated 18.09.2009, or in the alternative to re-determine the tariff upwards considering the project specific capital cost.

3. The Commission, after considering the petition No. 198 of 2014 on merits, vide its Order dated 19.09.2015, declined to increase the tariff of Rs. 2.50 p.u. to Rs. 2.95 p.u. and also disagreed to re-determine the project specific cost, but gave the liberty to the petitioner to approach, with the supporting data, the Commission under second proviso to sub-regulation(1) of regulation 6 of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by Distribution Licensee) Regulations,2007, which empowered the Commission to review or modify the PPA, where, after the approval of the PPA, there is a change in statutory Laws/Rules and State Govt. Policy.

4. The petitioner now, without availing the liberty given to him, to approach the Commission to review or modify the PPA, on the ground of change in statutory Laws, Rules and State policy, is seeking the amendment in PPA, retrospectively with effect from the date of the COD of the project, solely with the aim to enhance the tariff for the power generated from the project from Rs. 2.50 to Rs. 2.95 per unit.

5. In response, the respondent Board, opposes the maintainability of the present petition stating-

- (i) that the present petition preferred by the petitioner is hit by the principle of res-judicata, hence not maintainable. The petitioner had invoked the jurisdiction of the Commission by way of a petition bearing No. 198/2014 on the same cause of action which was decided by the Commission on 19.09.2015 by a speaking order whereby the petition was disposed of rejecting the claims of the petitioner. This being so, the petitioner is legally not entitled to rake up time and again the same issues, which have been decided by the Commission earlier;
- (ii) that since the PPA in this matter has been approved by the Commission on 28.03.2005 i.e. much earlier to the framing of the Himachal Pradesh Regulatory Commission (Power Procurement from Renewal Sources and Co-generation by the Distribution Licensee) Regulations, 2007, the provisions of the Regulation 2007 are not attracted in the matter, therefore, the petition deserves dismissal.

6. The petitioner has filed the rejoinder to the Board's response stating that the petition is not hit by the principle of re-judicata or that the cause of action is not the same as in preferred in earlier petition No. 198/2014.

7. Sh. Ajay Vaidya, learned Advocate for the petitioner, submits that the contention of the Respondent Board is totally irrelevant and has no bearing on the present petition. The main prayer of the petition in that petition was that after considering the all facts the Commission has the power to re-determine the tariff according to the APTEL Order 28.09.2009 and the Commission Order dated 09.02.2010. In that petition the petitioner has filed the petition for re-determination of tariff, here in the present petition the petitioner is seeking the indulgence of the Commission due to the fact of discrimination as met to the petitioner. The petitioner had legitimate expectation and right of being considered for the rate of Rs.2.95 p.u. alongwith all other hydel developers having capacity of 5 MW. The respondent Board has failed to apply its mind to all relevant factors, which it was under obligation to do while scrutinizing and signing the PPA, which was to be signed after 01.07.2006 and had to sign the PPA according to the mandate of the Commission with the rider that "tariff and other terms and conditions of the PPA shall be subject to the provisions of the Commission's regulations on power procurement from renewable sources, as and when such regulations are framed".- In his support Sh. Ajay Vaidya, the learned Advocate has cited the judgment of the Hon'ble Apex Court rendered on 06.05.2016- **Satyendra Kumar & others V/s Raj Nath Dubey**

& others AIR 2016 SC 2231, laying that where the decision is on a pure question of Law then a Court cannot be precluded from deciding such questions of Law differently.

8. Sh. Ramesh Chauhan, representing the Respondent Board, strenuously contends that the petitioner's arguments, raised in the rejoinder, are baseless for the reason that-

- (a) this Commission, while deciding the petition No. 198 of 2014, earlier moved by the petitioner, has made out the specific issue "whether the Commission can review the already concluded PPA entered into between the petitioner Company and the Respondent No. 2, i.e. "the HPSEBL" and decided that issue against the petitioner;
- (b) the Commission after considering the petition No. 198 of 2014 on merits declined to increase the tariff of Rs. 2.50 p.u. to Rs. 2.95 and had not agreed to re-determine the project specific cost, per verdict of Hon'ble APTEL dated 18.09.2009 and that decision has attained finality as no appeal was preferred to the Appellate Forum;
- (c) the petitioner now, without availing the limited liberty given to him to review/modify the PPA, on the ground of change in Law, Rules, and State Govt. Policy, is seeking the amendment in PPA, retrospectively with effect from the date of the COD of the project, solely with the aim to enhance the tariff for the power generated from the project from Rs. 2.50 to Rs. 2.95 per unit. There is a settled principle of law that the things which cannot be done directly cannot be done indirectly;
- (d) the Hon'ble Apex Court verdict, cited by the petitioner, does not support its case.

9. The Commission has gone through the petitions and averments contained in both the petitions in extenso and also the reliefs claimed in both the petitions. It is clear that the facts on the basis of which subsequent petition was filed, existed on the date on which the earlier petition was filed. No fresh cause of action arose in between the first petition and the second petition. From the facts available on record, it is evident that on the joint petition (i.e. petition No. 199 of 2004) moved by the petitioner company and the predecessor of Respondent Board, the Commission accorded its approval on 28.03.2005 to the PPA, and the PPA was executed on 11.01.2007, and there is gap of 2 years from the date of the approval of the PPA, under section 86 (1)(b) of the Act, till the execution of the PPA, and the petitioner failed to explain the justification for the delay of 2 years in execution of the PPA, after the Commission's approval. In all the documents the tariff

was for Rs. 2.50 per unit. Further no stipulation has been made in the Commission's Order approving the PPA, that the project will come under Regulations as and when framed. The tariff of Rs. 2.50 per unit was known to the developers from the date of allotment of the project site and well before the signing of the IA on 18.11.2002 and the PPA on 11.01.2007 and the synchronization of the project on 16.05.2013. The decision of the Commission on the earlier Petition No. 198 of 2014 was not a determination of a pure question of Law alone but it decided the question of facts involved on merits. In light of this the judgment of the Hon'ble Supreme Court in **Satyendra Kumar & others V/s Raj Nath Dubey & others AIR 2016 SC 2231**, relied upon by the petitioner, is not applicable and such cannot be invoked in the present petition. Further Order 2, Rule 2 of the CPC provides that every suit /petition shall include the whole claim which the petitioner is entitled to make in respect of the same cause of action. The Commission finds as such, that the petitioner had omitted certain reliefs which were available to it, at the time of filing of the first petition and having relinquished the same, it cannot file a separate petition, in view of the provisions of sub-Rule (2) of Order 2, Rule 2, of the CPC.

9. It is settled law, the principles of re-judicata is based upon need of giving finality to the judicial decision and once issue had been decided between two parties in earlier proceedings and the decision becomes final, when no appeal is taken to Appellate Forum both parties would not be allowed to canvass the issue in further proceedings between the same parties. This view, taken by the Hon'ble Supreme Court in the case **Satyadhan Ghosal V/s Smt. Deorajin Debi** has been followed by the Hon'ble APTEL in its decision rendered in **M/s Indian Oil Cooperation Ltd., Noida V/s GERC and Anr. 2013 ELR (APTEL) 0301**.

10. Such type of prayers are barred by the provisions of Order Rule 2, of the CPC, particularly when the petitioner had ample opportunity to raise the same during the course of earlier hearing and having relinquished the said right the petitioner is barred to raise it subsequently. In this regards we are supported by the Division Bench judgment of the **Hon'ble Supreme Court reported as AIR 2014 Supreme Court 731**, wherein it is observed that-

“ We find as such that the respondent had omitted certain reliefs which were available to it at the time of filing of the first suit and after having relinquished the same, it cannot file a separate suit in view of the provisions of sub-rule (2) of Order 2, Rule 2, CPC. The object of Order 2, Rule-2 is to avoid multiplicity of proceedings and not to vex

the parties over and again on a litigative process. The Object enunciated in Order 2, Rule 2 CPC is laudable and it has a larger public purpose to achieve by not burdening the court with repeated suits.”

11. The Hon’ble Apex Court, in **Satyendra Kumar & others V/s Raj Nath Dubey & others AIR 2016 SC 2231**, relied upon by both the parties before this Commission, has concluded in para 13, thereof, that-

“ It is taken as a bar which precludes the parties after final judgment to reagitate and relitigate the same cause of action or ground of defence or any fact determined by the judgment. If the determination was by a Court of competent jurisdiction, the bar will remain operative even if the judgment is perceived to be erroneous. If the parties fail to get rid of an erroneous judgment, they as well as persons claiming through must remain bound by it.”

12. In view of the above discussion it can be safely concluded that the principle of re-judicata is squarely applicable in present case as the issue involved in petition No. 198 of 2014 is exactly one which has been raised in the present case and the grounds urged in support thereof are also similar and hence, the present petition which involved the same question of law as well as similar grounds, therefore, ought not to be entertained by this Commission. The principle of giving finality to the judicial decisions, as well as fairness requires that there should be end to litigation. Issues which are settled cannot be reagitated except by way of appeal, if permissible.

For these, reasons and following these settled principles of Law, the Commission finds no merit in the contentions raised on behalf of the petitioner and these are not tenable. Hence the Commission holds that this petition is not maintainable and declines to admit and entertain this petition.

--Sd/-
(S.K.B.S. Negi)
Chairman