

COURT-II

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

**ORDER IN APPEAL NO. 09 OF 2015 ON THE FILE OF THE
APPELLATE TRIBUNAL FOR ELECTRICITY, NEW DELHI**

Dated: 16th April, 2018

**Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. S.D. Dubey, Technical Member**

In the matter of:

M/s Ginni Global Private Limited
2nd Floor, Shanti Chamber,
11/6B, Pusa Road,
New Delhi-110 005

..... Appellant(s)

Versus

1. The HP State Electricity Board Ltd.

Vidyut Bhawan,
Shimla-171004
Himachal Pradesh

2. The State of HP

Through its Principal Secretary (Power)
HP Govt.,
Shimla-171002
Himachal Pradesh

3. The HP Energy Development Agency (HIMURJA)

SDA Complex, Kasumpti,
Shimla-171009
Himachal Pradesh

4. Himachal Pradesh Electricity Regulatory Commission

Keonthal Commercial Complex, Khalini,
Shimla-171002
Himachal Pradesh

..... Respondents

Counsel for the Appellant (s) : Mr. R.K. Mehta
Ms. Himanshi Andley

Counsel for the Respondent(s) : Mr. Anand K. Ganesan
Ms. Parichita Chowdhury for R-1
Mr. Satish Arya, Law Officer, HPERC

Mr. Pradeep Misra
Mr. Manoj Kr Sharma for R-4

The Appellant has sought the following reliefs in Appeal No. 09 of 2015:

- (a) Set aside the Impugned Order dated 10.09.2014 passed by Himachal Pradesh Electricity Regulatory Commission in Review Petition No. 12 of 2014;
- (b) Direct the Respondent Himachal Pradesh State Electricity Board Limited to make payment of the arrears to the Appellant @15 Paise per Unit w.e.f. 22.05.2010 along with interest @ 1.5% per month in terms of the PPA;
- (c) Pass such other Order/s as may be deemed just and proper in the facts and circumstances of the case.

The Appellant has presented this Appeal for consideration under the following Question of Law:

- I. Whether the Commission was justified in entertaining and allowing the Review Petition filed by the Board for review of the order dated 22.05.2010 in the year 2014 i.e. after a lapse of four

years even though the said Review Petition was grossly barred by limitation?

- II. Whether the Commission was justified in entertaining the Review Petition on the basis of letter dated 21.04.2012 of Principal Secretary, Department of Power, GoHP, even though the review jurisdiction of the Commission under the Electricity Act, 2003 is confined to Order 47 Rule 1 CPC and the letter dated 21.04.2012 could not be a ground for review under Order 47 Rule 1 CPC?
- III. Whether the Commission was justified in reviewing the order dated 22.05.2010 on the basis of the letter dated 21.12.2014 of the Principal Secretary, Department of Power, in spite of the settled position of law that a subsequent event cannot be a ground for review?
- IV. Whether the Commission acted without jurisdiction/in excess of its jurisdiction in entertaining the Review Petition for review of the order dated 22.05.2010 even though the Board had challenged the said order dated 22.05.2010 before the Hon'ble High Court of Himachal Pradesh by way of a Writ Petition which has been dismissed by the Hon'ble High Court by a well considered judgment dated 06.08.2013?

It is the well settled position of law as laid down by the Hon'ble Supreme Court that once an order has been subjected to challenge by way of proceedings before a Higher Forum and such proceedings have been disposed of by the Higher Forum, the Court/Tribunal passing the original order does not have any jurisdiction to review the original order.

- V. Whether the Commission was justified in drawing a distinction between a Review Petition and Revision of a Tariff and holding that even if the Review Petition is not maintainable, the Commission has the suo-moto power to revise the Tariff at any time, thereby transposing itself in the position of the Board and granting relief on that basis?

It is the settled position of law that what is legally not permitted to be done directly can not be done indirectly. It is thus submitted that since the Review petition was grossly barred by limitation, was beyond the scope of Order 47 Rule 1 CPC and the order dated 22.05.2010 sought to be reviewed had already been challenged by the Board before the Hon'ble High Court of Himachal Pradesh by way of a Writ Petition which had been dismissed by the Hon'ble High Court, the Commission acted without jurisdiction/in excess of its jurisdiction in reviewing the order dated 22.05.2010 by the impugned order. It may also be

stated that even though GoHP letter dated 21.04.2012 on the basis of which review was sought by the Board and allowed by the Commission was issued during the pendency of the matter before the Hon'ble High Court, the Board did not bring the same to the notice of the Hon'ble High Court.

- VI. Whether the Commission acted without jurisdiction/in excess of its jurisdiction in holding that the Notification dated 16.07.2005 issued by the GoHP in the Department of Pollution Control in exercise of powers under Section 5 of the Environment (Protection) Act, 1986 was not a statutory notification in performance of statutory obligation under the Environment (Protection) Act, 1986?
- VII. Whether the Commission acted without jurisdiction/in excess of its jurisdiction in holding that issuance of directions under Section 5 of the Environment (Protection) Act is in the realm of the State Government policy and Directions under Section 5 of the Environment (Protection) Act are not necessary to be issued in the form of a Notification?
- VIII. Whether the Commission erred in holding that the Notification dated 09.09.2005 issued by the GoHP in the Pollution Control Department in exercise of Powers under Section 5 of the Environment (Protection) Act, 1986 could be withdrawn without

issue of a fresh Notification by the Pollution Control Department under the said Act?

- IX. Whether the Commission erred in holding that the letter dated 21.04.2012 has the effect of modification of the Notification dated 09.09.2005 and withdrawal of the mandatory requirement of minimum 15% water discharge as stipulated in the Notification dated 09.09.2005 in the case of Small Hydro Projects which were commissioned after 2005 like the Taraila Hydro Electric Project of the Appellant?
- X. Whether the Commission erred in holding that by virtue of the letter dated 21.04.2012 issued by the Principal Secretary, Department of Energy, GoHP, the Projects whose IAs and PPAs are signed before 09.09.2005 but which are commissioned after 09.09.2005, minimum discharge will be determined based on long term study and till such time minimum discharge as provided in the TEC/MoU/IA/PPA in each case will apply and not 15%?
- XI. In view of the clear stipulation in the letter dated 21.04.2012 to the effect that the notification dated 09.09.2005 has prospective effect for projects commissioned after 09.09.2005, whether the Commission erred in holding that by virtue of the said letter dated 21.04.2012, the appellant whose Small Hydro Plant was

commissioned in 2007 is not liable for minimum 15% Water discharge?

It is submitted that the view taken by the Commission runs contrary to the plain language of the letter dated 21.04.2012. The Notification dated 09.09.2005 issued under Section 5 of the Environment (Protection) Act, 1986 continues in force and is binding qua the power plant of the Appellant until it is withdrawn by another notification issued under the said provision. It is thus submitted that the Commission which is a quasi-judicial authority grossly erred in giving a go by to the Notification dated 09.09.2005 issued by GoHP in the Pollution Control Department in exercise of Powers under Section 5 of the Environment (Protection) Act.

- XII. Whether the Commission was justified in reducing the Tariff by 0.15 paise per unit/withdrawing the 0.15 paise per unit increase on account of minimum mandatory water discharge even though the Appellant is continuing to discharge minimum 15% water in compliance with the Notification dated 09.09.2005 since the violation of the said Notification entails both imprisonment as well as penalty?
- XIII. Whether the Commission was justified in entertaining the Review Petition and passing the impugned order contrary to and

based on its own interpretation of the Notification dated 09.09.2005 issued by the GoHP in the Pollution Control Department without even impleading much less hearing the Pollution Control Department?

- XIV. Whether the Commission was justified in reviewing the order dated 22.05.2010 and withdrawing the 0.15 paise per unit increase on the basis of letter dated 21.04.2012 of the Principal Secretary, Department of Power, GoHP in spite of the categorical submission of the State Govt. before the Commission in writing to the effect that the State Govt. is again collecting material information from concerned departments/authorities to take appropriate decision in the public interest as to whether the notification dated 09.09.2005 requires proposed amendment in accordance with the Cabinet decision dated 18.04.2012 which was conveyed to the Board vide letter dated 21.04.2012 or revert to the prior position?

It is submitted that the above categorical statement on behalf of the State Govt. before the Commission clearly shows that the State Govt. had not made up its mind with regard to modification of the Notification dated 09.09.2005. The Commission was, therefore, not justified in withdrawing the increase of 0.15 paise

per unit based on the Notification dated 09.09.2005 by the impugned order.

- XV. Whether the Commission erred in holding that the directions contained in the letter dated 21.12.2012 is not an amendment per-se of the directions issued vide Notification dated 16.07.2005/ 09.09.2005 but the said directions are limited to SHPs from whom power is being purchased by the Board under PPAs for supply to consumers in the State and the Board has been directed to approach the Commission for review of the orders allowing enhanced tariff on the basis of minimum 15% water discharge?

It is submitted that in the absence of any fresh Notification withdrawing the Notification dated 09.09.2005, the Commission erred in holding the State Govt. Agencies are responsible for compliance of the directions contained in the letter dated 21.04.2012 issued by the Principal Secretary, Department of Power, GoHP to the Board.

- XVI. Whether the order dated 22.05.2010 passed by the Commission could be treated as a Tariff Order?
- XVII. Whether the jurisdiction of the Commission under the HPERC Regulation is confined to giving incentives/benefits to the Small

Hydro Power Plants but does not extend to withdrawal of such benefits?

XVIII. Whether the impugned order of the Commission suffers from contradiction in terms of as much as on the one hand it has held that both the notification dated 09.09.2005 as well as the letter dated 21.04.2012 are in public interest, the Notification dated 09.09.2005 on environmental considerations and letter dated 21.04.2012 on Tariff considerations?

It is submitted that even on the above findings of the Commission, larger Public Interest must prevail over Tariff considerations. The Commission was, therefore, not justified in giving preference to Tariff considerations over Public Interest.

ORDER

PER HON'BLE JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. We have heard learned counsel, Mr. R.K. Mehta, appearing for the Appellant, learned counsel, Mr. Anand K. Ganesan, appearing for the first Respondent and learned counsel, Mr. Pradeep Misra, appearing for the fourth Respondent.

2. The learned counsel appearing for the Appellant, at the outset, submitted that, the instant Appeal, being Appeal No. 09 of 2015 filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi may kindly be disposed of as withdrawn.

3. *Per contra*, learned counsel, Mr. Anand K. Ganesan, appearing for the first Respondent and learned counsel, Mr. Pradeep Misra, appearing for the fourth Respondent submitted that, the submissions made by the learned counsel appearing for the Appellant, as stated above, may be placed on record and the instant Appeal may be disposed of.

4. The submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, as stated above, are placed on record.

5. In the light of the submissions made by the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents, as stated above, the instant Appeal, being Appeal No. 09 of 2015, filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi is dismissed as withdrawn at the risk of the learned counsel appearing for the Appellant and in the interest of justice and equity.

6. With these observations, Appeal No. 09 of 2015 filed by the Appellant on the file of the Appellate Tribunal for Electricity, New Delhi, stands disposed of.

IA NO. 11 OF 2015

7. In view of the Appeal, being Appeal No. 09 of 2015 on the file of the Appellant Tribunal for Electricity, New Delhi being dismissed as withdrawn, the relief sought in IA No. 11 of 2015 does not survive for consideration and, hence stands disposed of.

8. Order accordingly.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

js/vt