

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 156 of 2007**

Dated: 17<sup>th</sup> December, 2009

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson**

**IN THE MATTER OF :**

**Former Chairman & Managing Director,  
B. M. Verma  
C-275, Sheikh Sarai, SFS Flats, Phase-1,  
New Delhi – 110017**

**... Appellant (s)**

**Versus**

**Uttarakhand Electricity Regulatory Commission  
80, Vasant Vihar  
Dehradun-248006**

**... Respondent (s)**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan  
Ms. Swapna Seshadri

Counsel for the Respondent (s): Mr. Suresh Tripathy for UERC  
Mr. B.C. Pandey with  
Mr. Sudheendra Tripathi for UPCL

**JUDGMENT**

**Per Justice M. Karpaga Vinayagam, Chairperson**

1. Mr. B.M. Verma has filed this Appeal against the impugned order dated 17.08.2007 passed by the Uttaranchal Electricity Regulatory

Commission imposing the penalty of Rs. 20,000/- on the Appellant under Section 142 of the Electricity Act. The Hon'ble Judicial Member Ms. Justice Manju Goel has confirmed the order of the State Commission while the Hon'ble Technical Member Mr. A. A. Khan set aside the same. Therefore, by the order dated 05.08.2009 the Appeal was referred to the Chairperson for further action under Section 123 of the Electricity Act. Consequently, this Bench took up the matter for consideration. The point of divergence are pivoting on the answers to the following references:

- A. Whether or not the Commission passed any valid order under the provisions Section 23 of the Electricity Act, 2003?
- B. Whether there was or there was not a specific direction by the Commission to the appellant to enforce load shedding for all consumers without any exception whatsoever?
- C. Whether the direction issued by the Commission was to UPCL, the licensee and/or to the Appellant and whether

or not such direction can be issue to any individual besides UPCL?

- D. Whether or not the commission has the jurisdiction to impose a personal penalty on the appellant under Section 142 of the Electricity Act, 2003 for violation of any direction issued by the State Commission under Section 23 of the Electricity Act?
- E. Whether or not the show cause notice issued by the Commission was to the appellant and if it was to the appellant whether such show cause notice could be issued to the appellant?
- F. Whether or not the appellant acted with mensrea?
- G. Whether or not the Appellant, in his capacity as Chairman and Managing Director of UPCL, had the discretion to prevent immediate disconnection of electricity to certain selective industries in view of emergency despite schedule of load shedding deemed to have been approved? If so, was the discretion exercised properly?
- H. Whether or not the appellant acted in a bonafide manner in the interest of UPCL and the State?

- I. Was the Commission required to give any instructions other than asking the appellant not to give selective treatment to any consumer?
- J. What is the effect of the Commission not requiring the disconnection to be given effect to in case of all consumers at any time after the 20.01.2007 and after the incidents of violation of direction complained of?

On these points, this Bench heard the learned counsel for the parties

- 2. Before dealing the points for reference it would be appropriate to refer to the minimal facts of this case as well as the arguments advanced before this Bench by the counsel for the parties.
- 3. Mr. B. M. Verma, the Appellant was the Chairman & Managing Director of the Power Corporation of Uttrakhand. On 7.12.2006 the State Commission sent the letter asking the Appellant on behalf of the Power Corporation to submit a plan for regulating the supply and demand area-wise and consumer-wise to enable the State Commission to pass the load shedding schedule order under Section 23 of the Electricity Act.

4. On 3.1.2007, the Appellant sent a tentative plan of available power. However, the State Commission asked the Appellant to submit a revised plan as per NDLC Scheme. Accordingly, the Appellant submitted revised plan on 08.01.2007 showing the load schedule programme for approval of the Commission.
5. The said plan submitted on 8.1.2007 was approved by the Commission by the order dated 9.1.2007 and the Appellant was directed to publish the load shedding schedule for the months from January to March 2007 in the newspapers. Accordingly, the said plan was published. On 19.1.2007 the Appellant informed the Commission that the said plan approved by the Commission has been published and implemented. In the said letter it was stated by the Appellant that though some of the continuous process industries have approached and requested them to supply electricity in the peak hours on payment of higher rate, the Power Corporation would restrict the tariff rate till it is revised.
6. The State Commission received the complaint dated 19.01.2007 from M/s Khatima Fibres Limited reporting that the Power Corporation has been supplying electricity by diverting from the load shedding schedule, to seven industries by giving them

exemption. On the basis of this complaint, the State Commission on 25.01.2007 sent a letter to the Appellant, asking for the explanation for the said diversion and deviation. On 1.2.2007 the Appellant sent a reply admitting that the exemption for four industries had been given. Again on 7.2.2007, the Appellant wrote another letter to the Commission reiterating that the exemption to the four continuous process industries were given as a special case.

7. On receipt of this letter of 07.02.2007, The State Commission sent a letter on 08.02.2007 disapproving the selective exemption given by the Appellant to the four industries. It is stated in the letter that the State Commission never allowed any such exemption and as such the Appellant should not show any discrimination to any selective industry and he should maintain the uniformity in the treatment of the supply of electricity to all industries.
8. On 15.3.2007 the Appellant sent a separate letter informing the State Commission that five industries were already exempted and seeking further approval of load shedding schedule for the period 16.3.2007 to 30.5.2007 without making any reference to the letter of the State Commission dated 08.02.2007.

9. In response to this letter the State Commission again wrote a letter dated 21.03.2007 to the Appellant, that the Power Corporation should adopt uniformity and transparency in the process as approved by the Commission but the Appellant had been granting exemption to some industrial units on selective basis and this should not have been done. It further directed the Appellant to give the particulars of the list of industries whom exemption had already been given by the Appellant.
10. On 30.3.2007 the Appellant sent a letter stating that on 20.1.2007 when he was attending the marriage, he received a telephone call from one of the industries, being a continuous process industry requesting him to intervene as it was threatened to be disconnected from the supply of electricity by the Transmission company, and therefore he directed the Transmission company not to disconnect the supply. It was also admitted by him in the said letter that the Appellant had already allowed exemption to five industries, as they are continuous process industries.
11. On receipt of this letter dated 30.03.2007 from the Appellant admitting that the exemption was given to five industries without approval of the State Commission, the State Commission thought it

fit to issue a show cause notice. Accordingly on 13.04.2007, the same was issued. The Appellant then sent a reply to the show cause notice on 20.4.2007 giving explanation for the exemption given to the industries by the Appellant. After enquiry, the State Commission found that the Appellant had violated the orders of the State Commission and consequently, imposed the penalty on the Appellant. Hence, this Appeal by the Appellant.

- 12.** As stated earlier, there is the divergence of opinion among the two Members of the other Bench. Hence, the matter was posted before this Bench for hearing the learned counsel for the parties. The learned counsel for the parties were heard. On going through the details of the facts narrated above and also hearing the counsel for the parties, it is noticed that three factors have emerged.

**A.** In pursuance of the letter by the State Commission directing the Appellant on behalf of the Corporation to submit the plan before the Commission enabling it to finalize the load shedding schedule and to pass the order under Section 23 of the Act, the Appellant submitted the final revised plan on 08.01.2007 and accepting the same, approval order was passed on 09.01.2007

by the State Commission directing the Appellant to publish the same in newspapers and implement it.

**B.** On noticing that the Appellant had been granting exemption to selective industries in deviation to the load shedding schedule finalized by the State Commission, the State Commission sent a letter dated 08.02.2007 to the Appellant intimating him that the State Commission had never granted any exemption to any selective industries and, therefore, the Appellant should not grant any exemption to selective industries without the approval of the Commission in deviation of the orders passed the Commission.

**C.** Despite the receipt of the letter dated 08.02.2007 from the State Commission the Appellant did not take any step to stop the supply in line with the load shedding schedule approved by the Commission. On the contrary, the Appellant sent a letter dated 15.03.2007 to the Commission asking for the extension of the exemption to the other industries for the further period without replying to the letter dated 08.02.2007 sent by the Commission..

These three things have been well brought out through the facts narrated above.

13. On these aspects as well as on the points of reference the learned counsel for the Appellant as well as the learned counsel for the Respondent argued at length.
14. It was mainly contended by the learned counsel for the Appellant that assuming that an act of violation has been committed in this case, it was committed by the Corporation only and not by the Appellant and therefore, the Appellant cannot be penalized personally and the Corporation was responsible for the said act. To highlight this aspect he has referred to so many materials available on record. On finding some substance in this submission, this Bench felt that it is necessary to issue notice to the Power Corporation to know the exact stand of the Power Corporation with reference to the role played by it with reference to the act of violation attributed to the Appellant, particularly, when the Power Corporation was not made a party in this Appeal. Hence, this Bench issued notice to the Power Corporation directing it to appear before this Bench and to make submissions with reference to the said aspect in order to enable this Bench to find out whether the Appellant can be personally held responsible for the act of

violation which was stated to have been committed by the Appellant on behalf of the Power Corporation.

15. Accordingly, the Power Corporation through its counsel appeared before this Bench and filed a detailed affidavit alongwith several documents. It has been specifically stated in the affidavit filed on behalf of the Corporation that the act of violation committed by the Appellant was at his own discretion without any authorization from the Corporation and that the Board of Directors was never consulted with reference to the act of violation. The Corporation also produced various copies of the letters of correspondence between Appellant and the other officers of the Power Corporation. According to the counsel for the Corporation, these letters would show that the Appellant not only gave the oral directions to the Transmission company not to stop the supply of electricity to such industries but also sent letters in writing to the Transmission company directing them not to disconnect the supply to these industries which is contrary to the load shedding schedule. The counsel for Power Corporation has also produced other letters in order to show that the exemption was given to selective industries by the Appellant at his own discretion inspite of the fact that the

said exemption given by the Appellant had been opposed by some of the officials of the Corporation in writing and as such the Power Corporation was not the party to this act of violation which was committed by the Appellant only on his own decision and as such the Power Corporation cannot be held responsible.

16. On going through these documents it is noticed that the Appellant, taking the decisions on his own and using his own discretion gave those oral as well as written directions to the Transmission company not to disconnect the supply of electricity in peak hours to those selective industries which is not in line with the load shedding programme finalized by the State Commission. A perusal of the other documents would also make it clear that the officers of the Corporation sent a note advising the Appellant to give effect to the load shedding schedule issued by the Commission without any violation. Nevertheless, the Appellant did not heed to the advice of those officers. On the other hand, in one of the documents he commented in writing that the State Commission's letter dated 08.02.2007 stating that no exemption should be given within the approval of the Commission and that the Commission had not granted any exemption to any industry

was vague and that it might be interpreted in a different way by different persons. These comments would make it evident that the Appellant neither inclined to follow the orders of the Commission nor tried to correct himself on the advise of the officers of the Power Corporation and he has taken his own decision and acted accordingly. This aspect may be further discussed while we deal with the points of the reference.

17. In the light of the above factual situation, let us now refer to the other aspects pointed out by the learned counsel for the Appellant and deal with his arguments made before this Bench. The learned counsel for the Appellant reiterated the submissions made before the other Bench of this Tribunal. In addition to the same, he as well made some more additional submissions raising new grounds. Let me refer to those submissions. They are as follows:

- A. There is no specific order passed by the State Commission with regard to the disconnection of electricity to the continuous process industries.
- B. On 01.12.2007 a reply was sent by the Power Corporation to the Commission that the continuous process industries were granted exemption only as per the decision taken in the meeting

held in the State Commission on 29.01.2007 to give such exemption as per the earlier notification issued before the bifurcation of Uttar Pradesh State Electricity Board to the effect that the same practice would continue till the new rules are framed and the same was also conveyed to the Technical Member. So, the exemption was continuously given only in pursuance of the said decision.

- C. On 15.03.2007 the Corporation had sent a request seeking for the approval for the load shedding schedule for the subsequent period from 16.03.2007 to 31.05.2007. In the said letter the Corporation has mentioned about the industries to which already exemption was granted. When the State Commission sought information relating to these industries by the letter dated 21.03.2007 the said information was immediately supplied to the Corporation on 30.03.2007.
- D. Besides this on receipt of the letter dated 21.03.2007 a communication was issued by the Appellant on behalf of the Corporation on 26.03.2007 to those specified industries proposing to withdraw the continuous supply of electricity as per the load shedding schedule. However the government

directed that no disconnection is to be effected by the Corporation till the State Commission takes any decision. So his order was not implemented as his hands were tied.

- E. There is a resolution dated 26.06.2001 passed by the Board of Directors granting all the powers of management and decision making to the Chairman and Managing Director, the Appellant. So this resolution establishes that all the powers could be exercised by the Appellant on behalf of the Corporation and so Corporation was responsible for the act in question.
- F. The letter dated 08.02.2007 sent by the Commission informing the Corporation that exemption had never been granted by the Commission and the Appellant should not grant such exemption, was never brought to the notice of the Appellant by the Corporation officials. It was brought to the notice of the Appellant only on 15.03.2007. Thereupon the Appellant issued a communication on 26.03.2007 to all the specified industries that supply would be withdrawn. Therefore, the alleged act of violation cannot be said to be the act of the Appellant with deliberate intention. As such the mensrea has not been established.

18. Refuting this submission, the learned counsel for the Commission vehemently contended that most of the submissions are new submissions which were not raised either before the State Commission or before the other Bench and so these submissions have to be rejected. He further elaborated that the order impugned as well as the findings rendered by Hon'ble Ms. Justice Manju Goel is perfectly justified and the finding rendered by the Hon'ble Mr. A. A. Khan is not correct as it was not based on the material available on record.

19. Keeping these submissions in mind, I shall, consider the various points of references quoted earlier and discuss the same one by one.

**20. A. Question No. 1. Whether or not the Commission passed any valid order under the provisions under Section 23 of the Indian Electricity Act, 2003?**

**Answer: -** The Tariff Order was passed on 12.7.2006. In the said order the State Commission prescribed the load shedding schedule in case of imposition of restriction on the industries in peak hours of the

day. On 7.12.2006 the Commission wrote a letter to the Appellant asking him to submit a plan for regulating supply under Section 23 of the Act. Accordingly, the Appellant sent a tentative plan through its letter dated 3.1.2007. Having not satisfied with the said plan, the Appellant was asked to send a revised plan as per the NDPL scheme. Accordingly, on 8.2.2007 the Appellant sent revised load shedding plan adopted by the North Delhi Power Corporation Ltd. (NDPL). On 9.1.2007 the Commission approved the said plan and wrote a letter to the Appellant conveying its approval. According to the approval, all industrial feeders would undergo load shedding between 5 PM and 10 PM. In response to this order dated 09.01.2007 the Appellant sent a reply to the Commission on 19.1.2007 intimating that the load shedding programme as approved by the Commission has been published and implemented in the whole state. In the very same letter the Appellant informed the Commission that though some of the continuous process industries approached the Corporation for supply of electricity even during the peak period on payment of higher rate the Power Corporation has decided to restrict to the tariff order till it is revised. So the letter dated 07.12.2006 by the Commission, letter dated 8.1.2007 and approval plan submitted by the Appellant dated

9.1.2007 and the confirmation letter dated 19.01.2007 intimating the implementation of the approved load shedding programme of the Commission would show that there was a specific order passed by the Commission on 9.1.2007 finalizing the load shedding schedule. The wording contained in letter dated 7.12.2006 sent by the Commission as well as order dated 9.1.2007 passed by the Commission would clearly show the said order dated 09.01.2007 passed by the Commission would apply to all industries and the same has to be construed to the order under Section 23 of the Act. Further through the letter dated 19.1.2007 the Appellant himself submitted that order passed by the Commission has been implemented and this will apply to all the industries including the continuous process industries. So it has to be concluded that a valid order dated 09.01.2007 has been passed under Section 23 of the Act validly by the Commission

**B. Question No. 2. Whether there was no specific direction was given by the Commission to the Appellant to enforce the load shedding schedule for all consumers without any discrimination?**

**Answer:-** On 19.1.2007 the Commission received a complaint from Ms. Khatima Fibers Limited that some industries have been exempted by the Corporation by supplying continuous electricity. contrary to the load shedding schedule. On receipt of this letter the Commission without any further delay specifically sent a letter on 25.1.2007 to the Appellant directing not to give any exemption to any industry without approval of the Commission. The above letter would specifically indicate that the load shedding schedule which was submitted on 8.1.2007 on the basis of the direction given by the Commission on 7.12.2006 had been approved by the Commission on 9.1.2007 and without getting approval for such exemption, the Corporation should not supply electricity to some selective industries which is a violation of the order passed by the Commission on 9.1.2007.

Though this letter was replied by the Appellant on 30.1.2007 there was no explanation to the said allegation. The Appellant sent another reply on 1.2.2007 to Commission. In this letter he admitted that the Corporation has given exemption to some industries. Again on 7.2.2007 the Appellant sent another letter

admitting that some industries have been given exemption as a special case. On receipt of this letter the Commission immediately instructed and informed the Appellant by its letter dated 8.2.2007 that such exemption have never been given by the Commission and the exemption given by the Corporation is an utter violation of the earlier order passed by the Commission.

These orders and letters dated 25.1.2007; 8.2.2007 sent by the Commission would clearly reveal that Commission has sufficiently indicated that it is a violation on the part of the Corporation by making deviation by giving exemption without approval of the Commission. Thus, it is clear that there was a specific direction by the Commission to enforce load shedding schedule for all consumers without any discrimination.

**C. Question No. 3. Whether the direction issued by the Commission was to the Corporation or to the Appellant and whether such direction can be issued to any individual besides the Corporation?**

**Answer:-** It is true that the Commission issued show cause notice to him in the capacity of Chairman & Managing Director of

the Corporation who acted on behalf of the Corporation. But it is to be pointed out that in the show cause notice it is specifically mentioned that the Appellant also be personally liable for any act committed by him in violation of the Commission's order. It is not disputed that on receipt of the letter dated 25.1.2007 sent by the Commission regarding the complaint against the Corporation, the Appellant sent a reply on 31.1.2007, 1.2.2007 and 7.2.2007 admitting that the Appellant has given exemption to those industries as a special case. It is not the case of the Appellant that the exemption has not been given by him but by the Board of the Corporation on whose behalf he gave exemption. On the other hand in the reply letter which has been sent by the Appellant to the Commission on 30.3.2007 and also in the reply sent by him to the show cause notice dated 20.4.2007 he made it clear that he only gave direction to the Transmission Corporation not to disconnect the supply to these industries by using his executive discretionary power. It is also to be noted that there is no specific reply to the letter dated 25.1.2007 sent by the Commission with reference to the complaint made by M/s Khatima Fibres Limited. On the other hand in the reply of letter dated 1.2.2007 and 7.2.2007 the

Appellant wrote to the Commission specifically admitting that these industries were given exemption by him as a special case. Further, even after the intimation by the Commission dated 8.2.2007 that no such exemption could be granted by the Appellant and it could only be granted by the Commission, the Appellant did not take steps to correct himself by giving the appropriate orders to follow the load shedding schedule which applies to all the industries without any discrimination. For the first time, the Appellant asked for the Commission's approval for continuous process industries on 15.3.2007. When the Commission called for the explanation by its letter dated on 21.3.2007, the Appellant has sent a reply on 30.3.2007 justifying his act of giving exemption. Thus, these letters would certainly show that he only had taken this decision to give exemption to some industries as a special case without approval of the Commission on his own discretion thereby violating the orders of the Commission. Therefore, he alone has to be held responsible for the violation of the order passed under Section 23 of the Act.

**D. Question No. 4. Whether or not the Commission has the jurisdiction of imposing personal penalty on the Appellant**

**under Section 142 of the Act for violation of any direction issued by the Commission under \section 23 of the Act?**

**Answer:-** The answer for this question has been given in the earlier paragraph. As indicated above he himself stated clearly not in one letter but in several letters including the reply to show cause notice on 20.4.2007 that he only gave direction on receipt of telephone call while he was attending a marriage and he has not obtained any permission from the Board. To make the matters worse, he further stated that the said reply he has used his executive discretion and issued such exemption direction to the Transmission Company not to disconnect the electric supply to the selective industries. Then he himself took his own decision as admitted by him. So, he alone can be held responsible.

**E. Question No. 5. Whether or not the show cause issued by the Commission was to the Appellant and if it was to the Appellant whether such a show cause notice could be issued separately?**

**Answer:-** In this case the show cause notice had been issued to the Appellant on the basis of his letters dated 30.1.2007, 7.2.2007 and 30.3.2007 admitting that the exemption had been

granted by him in his capacity as CMD of the Corporation. Therefore, the show cause notice was issued by the Commission on 13.4.2007 to the Appellant in the capacity of CMD of the Corporation. Therefore, the Commission is well within his right to issue show cause notice to the Appellant in the light of the fact that he himself has admitted having granted exemption to the selective industries without the approval of the Commission.

**F. Question No. 6:- Whether or not the Appellant acted with mensrea?**

**Answer:-** Though it has been held by the Tribunal and Supreme Court as well as by this Tribunal, the question of mensrea will not arise in the penalty proceedings, this question will not arise in this case because the materials available on record in the form of reply letters sent by the Appellant would candidly show that he did not take immediate steps to ask for the exemption for those industries from the Commission nor took any efforts to stop the electricity supply to those exempted industries even after the receipt of letter dated 8.2.2007 from the Commission stating that the Commission has not granted any exemption to any industry. On the other hand, the Appellant on 15.3.2007 has asked for the

exemption for the other industries. Instead of taking any efforts to stop the supply of electricity to those industries he justified his at stating that the exemption was given as a special case. In fact, the reply dated 13.4.2007 would fully indicate that he has given the exemption to those industries even though he received the letter dated 8.2.2007 by the Commission indicating that no such exemption could be granted by the Corporation without approval of the Commission. Besides this, it is noticed that the Appellant has not replied to this letter dated 08.02.2007. On the other hand on 15.3.2007 he sent a letter asking for the exemption of the other industries without referring to the said letter dated 8.2.2007 which is a warning letter. In the reply dated 30.3.2007 the Appellant has never given any explanation as to why suitable action has not been taken by the Appellant even though the letter dated 8.2.2007 was received by him. So these things would indicate that he was not willing to comply with the orders of the Commission and on the contrary he bent upon informing the Commission that already exemption had been given to those industries by him by using his executive discretion. This conduct of the Appellant would clearly show that this is a deliberate violation.

**G. Question No. 7:- Whether or not the Appellant in his capacity as Chairman & Managing Director of the Corporation had the discretion to prevent immediate disconnection of electricity to certain selective industries in view of the emergency despite the schedule of load shedding deemed to have been approved? If so, what is the discretion exercise power?**

**Answer:-** Admittedly, the Power Corporation is being managed by the Board of Directors. The decision with reference to the policy and with reference to the implementation of the order passed by the Commission has to be taken only by the Board of Directors or by the CMD on the basis of the authorization given by the Board that too in respect an important issue like this. In this case, as indicated in the earlier paragraph, the Corporation has taken a stand that the Appellant did not get any authorization from the Board of Directors to give the exemption that too in violation of the order of the Commission. There is no provision neither in the MOU nor in the relevant rules that the CMD has got the discretion to give direction to the Transmission Company not to stop the electricity supply to certain selective industries

contravening the load shedding programme. Once the load shedding programme has been issued by the Commission, it is the Commission and Commission alone can change the load shedding programme. There is no executive discretion for the CMD to change the said schedule which has been finalized, published and implemented as per the letter dated 19.1.2007. So admittedly, there is neither the authorization from the Board of the Directors to give exemption in violation of the order of the Commission nor was there any approval from the Commission to give exemption to these industries. Therefore, the Appellant has to be held liable personally for the act committed by him especially in the light of the fact that the Board of Directors has never been consulted by the Appellant before taking such decision. In fact, it was pointed out by the learned counsel for Power Corporation that the Appellant took the said decision against the advice of the officials of the Corporation. Therefore, the Appellant has to be held personally liable for the penalty.

**H. Question No. 8. Whether or not the Appellant acted in the bonafide manner in the interest of the Corporation of the State?**

**Answer:-** The conduct of the Appellant would not be construed as a bonafide act as stated above. Several letters were received by the Appellant from the Commission indicating that the Corporation should not show any discrimination to any industry and they should follow only the load shedding schedule as fixed by the Commission. Despite the commitment made by his Appellant by the letter dated 19.1.2007 stating that they would not give any exemption to any continuous process industry till the tariff order is revised despite the receipt of the warning letter dated 08.02.2007, the Appellant had been continuously committing the violation by allowing the continuous supply to the selective industries. This conduct would not be considered to be a bonafide nor could it be considered as an act committed by the Appellant in the interest of the Corporation.

**I. Question No. 9:- Was the Commission required to give any instruction other than asking the Appellant not to give any selective treatment to any consumer?**

**Answer:-** This question has arisen in view of the fact that the learned counsel for the Appellant has urged the contention that Commission has not specifically directed him to stop the supply of

electricity. This contention has no basis. The order which had been passed by the Commission on 9.1.2007 has sufficiently indicated that the Power Corporation has to follow the load shedding programme which has been finalized on 9.1.2007. As per this load shedding programme, no exemption can be granted to any of the industries by the Corporation. Even on 25.1.2007 on the complaint of one private company the Commission asked for the explanation from the Appellant as to why there was such deviation. In the reply given by the Appellant on 31.1.2007, 1.2.2007 and 7.2.2007, the Appellant admitted having given such exemption as a special case. Is it a proper explanation? The question which would arise in this context is as to how the Appellant could grant such an exemption to selective industries as a special case? Once it is concluded that the Appellant has no authority to give such exemption then it goes to show that in violation of the order he has granted the same as admitted by him in various letter. Despite the receipt of these letters the Commission did not rush to initiate 142 proceedings. On the other hand, a letter has been issued on 8.2.2007 warning and intimating the Appellant that no approval had been granted by the Commission for such exception and the

Appellant on behalf of the Corporation should not give such exemption. Such being the case, it is strange to contend that no specific direction had been given by the Commission to stop the supply. The meaning of the contents of all the letters sent by the Commission specifically on 25.1.2007 and on 8.2.2007 is that the Appellant on behalf of the Corporation should not deviate or violate the order of the Commission by granting exemption to selective industries as the said power only lies with Commission. It means that this is a specific direction given by the Commission to the Appellant, that the Appellant on any cost should not allow such violation to be continued. In other words, through these letters the Appellant was directed to follow the order of the Commission and if the same is not followed, the same would amount to the contravention of the order passed by the Commission.

**J. Question No. 10:- What is the effect of the Commission not requiring the disconnection to be given effect in case of all the consumers at any time after 20.1.2007 and after the instant complaint of the violation of the orders of the Commission?**

**Answer:-** As indicated above, the directions which were issued by the Commission on 8.2.2007 and 21.3.2007 would amount to specific order directing the Appellant to not to continue the supply by way of exemption. The very fact that the Appellant in all the letters referred to above had admitted that he gave an oral direction to the Transmission Company not to stop the supply to these continuous industries would clearly show that he took his decision under the garb of his execution discretion to grant exemption in spite of the fact that he was given sufficient warning by the Commission. Even assuming such an emergent situation has arisen on 20.1.2007, the moment he received the letters from the Commission on 25.1.2007 and 8.2.2007 he must have taken immediate action to carry out the orders of the load shedding programme by stopping the supply to the exempted industries during the peak hours. Admittedly, this was not done.

Thus all the points of reference are answered accordingly.

18. This apart, I would like to discuss further about the core issues arise in this case comprehensively and also deal with the other fresh grounds raised by the learned counsel for the Appellant. The discussion is as follows:

19. As indicated above it cannot be contended that there is no order passed under Section 23 of the Act. The plan of load shedding was sent on 08.01.2007 and was approved on 09.01.2007. This approval is as a result of the earlier communication dated 07.12.2006, asking the Corporation to submit the plan to pass an order under Section 23 of the Act. Accordingly, plan was submitted on 08.01.2007 and the approval was for publication was given on 09.01.2007. This should be construed as the order under Section 23 of the Act.
20. As referred to in the earlier paragraph the Appellant himself asked for the permission from the State Commission for granting exemption to some selected continuous industries. But it is now argued that he has asked for exemption to other industries except those selected continuous industries to which already exemption has been granted.
21. When the Appellant felt that the exemption has to be granted to other industries by the State Commission there is no logic in contending that he has already given exemption to some selective industries. When it is the case of the appellant that he sent a letter dated 15.3.2007 to the Commission asking for the exemption for

other industries, then it goes without saying that he was not empowered to grant any such exemption to those selected continuous industries. Therefore, the stand taken by the Appellant before this Bench is quite contrary to the stand taken by him before the Commission as well as before the other bench of this Tribunal.

22. There was a specific communication by the State Commission through the letter dated 08.02.2007 that the Commission had never given any exemption to any industry. All the correspondence and affidavits filed by the Appellant before the State Commission would show that the Appellant himself had admitted in those letters that the exemption was granted to those specified industries by him even though there is no approval from the Commission by exercising his executive discretion. As a matter of fact the Appellant admitted in his reply to show cause notice that he would take the entire responsibility for granting the selective exemption to those industries.

23. As admitted by the Appellant he directed on 20.01.2007 the transmission company not to disconnect the supply of the electricity to some industries. On 21.01.2007 he himself sent a letter to the transmission company not to disconnect supply to

those industries. There is no explanation under what authority, he could give such oral and written direction.

24. The Appellant placed reliance on the resolution dated 26.06.2001 by the Board Directors delegating power to Chairman and Managing Director to take all decisions. This shows on the strength of the resolution, he has acted in violation of the order. This is not his case earlier. Even assuming that there was a resolution the decisions regarding the compliance of the order of the Commission cannot be taken by the Appellant under the garb of the executive direction when such power has not been vested with him.

25. As noted earlier the file noting reveals that the Appellant was bent upon to violate the order of the Commission despite the advice given by the officers to comply with the orders of the Commission. The contention that the letter dated 08.02.2007 was noticed by him only on 15.03.2007, has been for the first time raised before this Bench. Further, it cannot be correct to contend the same since the letter was received by his office on 08.02.2007 itself. He pleaded before this Bench as if it was noticed by him only 15.03.2007. If it is so, he would have sent immediate reply to the Commission with

reference to the letter dated 08.02.2007 at least subsequent to 15.03.2997. This was not done. If there was any doubt or confusion with regard to the letter dated 08.02.2007 he must have requested for the clarification from the Commission. That was also not done.

26. It is contended by the learned counsel for the Appellant that even assuming that the act of violation was committed by the Appellant and he is personally liable, it cannot be said that he committed the same with mensrea and when the mensrea has not been established he cannot be penalized. This aspect has already been discussed. Now, some more reasons could be given to reject this contention.
- i. The Supreme Court in 2006(V) SCC 361 in SEBI case and this Tribunal in BSES case in Appeal No. 53 of 2009 held that mensrea need not be established in the penalty proceeding and once there is a violation the persons responsible for violation can be penalized.
  - ii. In this case as mentioned earlier the lack of mensrea does not arise as there are number of materials available on record, to show that the Appellant was never inclined to comply with the orders of the Commission even after the

receipt of the warning letter by the Commission and despite the advise of he officers of the Corporation not to violate the orders of the Commission.

iii. Alternatively, the learned counsel for the Appellant has contended that the Appellant has subsequently passed order on 26.03.2007 in line with the order passed by the Commission on 08.02.2007 communicating the selective industries that it is proposed to withdraw the continuous supply to those industries in accordance with the load shedding schedule by the Commission. Admittedly, this contention was never raised either before the State Commission or before the other Bench. However, this reason cannot be the ground to set aside the order of the State Commission which held that the Appellant is personally responsible for the Act of violation.

27. Further it is to be pointed out in this context that the Appellant never decided to issue such communication to selective industries to withdraw the supply earlier. He has never given any explanation before this Bench as to why such action was not taken immediately after the receipt of the letter dated 25.01.2007 and

08.02.2007 from the Commission. The fact that the Appellant passed orders subsequently on 26.03.2007 in the light of the Commission's direction which has now been brought to the notice of this Bench for the first time cannot be considered as a valid point to absolve the Appellant from the liability. However, it may be considered as one of the mitigating circumstances for considering the question of sentence.

28. At the conclusion of the arguments, the learned counsel for the Appellant requested this Bench to give permission to the Appellant who is present before the Bench to make his own submissions with reference to the issues. Accordingly, he was permitted. The Appellant narrated various practical difficulties in stopping the supply to the continuous process industries. At the end, he prayed that if this Bench has concluded that the act of violation has been committed by the Appellant and the Appellant is personally liable, he may be pardoned by accepting his apologies as the said act was done by him in order to avoid irreparable damage and hardship that may be caused to the continuous process industries. Of course this

plea also may be considered as one of the mitigating circumstances for the reduction of sentence.

29. In the result, the points of references referred to above have been answered holding that the view of the Hon'ble Judicial Member Ms. Justice Manju Goel with clear reasonings is accepted, as correct and reasonable. With the due respect, this Bench begs to differ from the view of the Hon'ble Technical Member Mr. A. A. Khan as I am not inclined to concur with his reasonings.
  
30. Before parting with this case it shall be stated that as there are mitigating circumstances to consider the question of the sentence and the quantum of penalty it would be appropriate for the First Bench which is to pass the final order in the matter to hear the Appellant with reference to these circumstances to come to the proper conclusion for passing appropriate orders with regard to the quantum of penalty to be imposed by giving opportunity of hearing to the Appellant.

31. Post the matter before the First Bench consisting of Chairperson and Judicial Member, Ms. Justice Manju Goel for passing further orders under Section 123 of the Act on Friday the 18<sup>th</sup> December, 2009 at 2.00 p.m.

**(Mr. Justice M. Karpaga Vinayagam)**  
Chairperson

Dated : 17<sup>th</sup> December, 2009

REPORTABLE