

**BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi**

Appeal 115 of 2007

Dated this 13th day of September, 2007

**Coram: Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Mrs. Justice Manju Goel, Judicial Member**

IN THE MATTER OF:

B. M. Verma

Chairman & Managing Director,
Uttarakhand power Corporation Ltd.
Urja Bhavan, Kanwali Road,
Dehradun – 248 001
Uttarakhand

... Appellant

Versus

Uttarakhand Electricity Regulatory Commission

80, Vasant Vihar,
Dehradun – 248 006
Uttarakhand.

... Respondent

Counsel for the appellant : Mr. M. G. Ramachandran, Advocate
along with Mr. Anand K. Ganesan &
Ms. Swapna Seshadri, Advocates

Counsel for respondents : Mr. Suresh Tripathy, Advocate for
along with Mr. A. S. Chahal,
Advocate

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

The appeal is directed against the order of 01.12.2006 passed by the Uttarakhand Electricity Regulatory Commission, (herein after referred to as the Commission) holding the appellant guilty under Section 142 read with 149 of The Electricity Act 2003 for contravention of Commission's directions and punishing him with fine of Rs.5,000/- and with further fine of Rs.100/- for each day of continued default. The IA No. 136 of 2007 is for stay of the impugned order.

The notice:

2. The penal action was taken against the appellant pursuant to a notice dated 01.12.2006 since the notice is vital to the proceedings leading to the impugned order the relevant portion of the notice is extracted below:

“NOTICE

Subject: Notice under section 142, 149 of Electricity Act, 2003 (Act No. 36 of 2003, as amended by Act no. 57 of 2003) for non-compliance of Commission's directions with regard to ToD meter reading by MRI

Whereas this Commission has passed orders giving directions with regard to reading of ToD meters through meter reading instrument (MRI) on 08.09.2003, 25.04.2005 and again on 12.07.2006. The said directions were not compiled with and therefore, a notice bearing letter no. 462/UERC/06

dated 07.09.2006 was issued to you for appearance before the Commission on 12.09.06.Commission has warned you to comply with the directions issued by the Commission in the aforesaid matter forthwith vide its letter no. 503/UERC/06 dated 22.09.06.

... The Executive Engineers of UDD (S), Dehradun and UDD (N), Dehradun, have stated in writing that Commission's directives are not being complied with, due to shortage of meter reading instruments. Continued non-availability of requisite equipments establishes beyond doubt that you have not taken effective steps for compliance of these directions of the Commission, notwithstanding repeated warnings by the Commission and your own undertakings given to the Commission in this regard.

....

....

It has, therefore, been decided to take appropriate action against you,

You, the addressee are hereby required to show cause, by 18.12.2006 why the Commission should not proceed against you in person as well as person holding the post under section 142 and 149 of the Electricity Act, 2003. You are further required to appear before the Commission on 18.12.2006 at 3:30 PM at 24, Vasant Vihar, Phase-II, Dehradun in person and make your oral submissions, if any.

.....

.....

*(Anand Kumar)
Secretary”*

3. Thus the notice relates to non-compliance with three order viz. those dated 08.09.03, 25.04.05 & 12.07.06. The relevant parts of the three orders are extracted below:

Order of 08.09.03:

“..... The Commission is, therefore, of the view that Time of Day tariffs need to be introduced immediately so that consumption during peak periods is avoided or paid for at a premium while consumption during off-peak hours could be encouraged through properly designed discounts. To this effect, the Commission directs the licensee to meter (having provision for ToD and to be read through MRI) all HT industry consumers (above 100BHP) with time of day meters from the date of installation of TOD meters or by 1st January 2004 whichever is earlier.

In the first phase the Commission approves levy of Time of Day tariffs from the date of installation of ToD meters or by 1st January 2004 whichever is earlier on HT Industries (above 100BHP) which consist of 200 odd consumers.

The Commission, therefore, directs the Petitioner to maintain a time-differentiated hourly data for consumers with ToD metering facility and submit it, along with its analysis, to the Commission by 31st March 2004 to facilitate further fine-tuning of ToD rates”

Order of 25.04.05:

“16. Other provisions

i) Meter reading of all HT consumers shall be made by Meter Reading Instrument (MRI) and bills shall be raised accordingly as per TOD rate of charge 15(iii).

ii) The licensee shall keep the records of Monthly MRI report for each HT consumer and shall also make it available to the consumer.....”

Order of 12.07.06:

“..... It has come to Commission’s notice that while a large number of ToD meters have been installed, their readings are still being recorded manually. This is against specific direction given by the Commission in its Order dated 25-0402005. Such an arrangement is open to misuse and manipulation, results in revenue loss to the Petitioner and defeats the very purpose of introducing ToD Tariff in the State. The Commission, therefore, reiterates its earlier direction that reading of all ToD meters shall be made by Meter Reading Instrument (MRI) and bills shall be raised accordingly. The Commission hereby cautions the licensee and its officers against violations of this directive which would invite personal punitive action on individuals guilty of misdemeanor on this account.....”

The impugned order:

4. The impugned order recalls an earlier notice issued to the appellant on 12.09.06 to show cause why punitive action should not be issued to him for non-compliance with these directions. The order also recalls that those proceedings ended in the warning to the appellant following his undertaking to ensure ToD meter

reading through MRI in respect of all LT industrial consumers having load of more than 25 BHP & all HT industrial consumers.

5. In response to the notice in question dated 01.12.06 the appellant submitted a status report. The Commission examined the status report and concluded as under :

*“7. During the course of hearing Shri Verma submitted a status report which shows that in the month of November 2006 out of 2970 ToD meters installed in UPCL system, only 1402 (i.e. 47%) were read using MRI and balance 53% were read manually. Even in case of large number of consumers whose meter readings had been taken with MRI, bills were still not being made on the basis of these readings. For instance in Kumaon Zone during this month the total number of meter readings recorded through MRIs is claimed to be 429 whereas the number of bills that were prepared on the basis of these readings was only 176. **Further data submitted by Shri Verma revealed that out of 2970 consumers with ToD meters only 258 consumers (i.e. 8.68%) were issued computerized bills based on MRI reading and bills of rest of consumers were made or read manually.** Shri Verma was unable to offer any satisfactory explanation for this. He was given an opportunity to file his explanation through an affidavit by 21.12.2006, the same has not been done.*

8. Shri Verma tried to explain the non compliance of these directions due to time required in procuring MRIs. However, on questioning he did admit that action in this connection was started only few months back. Considering that the Commission has been

issuing directions in this regard right from 2003, the Commission is unable to accept the contention that the UPCL's officers have been serious or earnest about the issue and have been unable to implement these directions for more than three years only on account of unavoidable procedural delays. Further, Shri Verma was unable to explain why even the consumers whose meter readings have been taken through MRI are not being billed on this basis as stated in the preceding para. Shri Verma also tried to evade his responsibility in the matter by claiming that he has been working as CMD only for few months. However, he was working as Joint Managing Director and as Director (Operations) in UPCL. In both these capacities Shri Verma was equally responsible for ensuring timely and sincere implementation of Commission's directions and can not take the plea that he is new to the job. Commission is, accordingly, unable to appreciate or accept this plea.

9. The Commission has carefully considered all aspects of this matter including the explanation offered by Shri Verma and has come to the conclusion that both as JMD & Director Operations earlier and then as CMD and Director Operations he was in charge of and responsible for conduct of business of UPCL. Further that Shri Verma has made no serious attempt to implement Commission's repeated directions pertaining to charging of ToD tariff and has consciously been flouting them. Failure to raise bills on the basis of MRI readings, even when available, raises serious questions about the motive behind continued slow pedaling of this matter. It is a matter of serious concern that even after Shri Verma was given a notice regarding non-compliance of this direction, he continued to treat the matter lightly and in a non serious manner. Having himself undertaken to comply with these directions by 01.10.2006 and

having been warned in advance against failure to do so, Shri Verma continued to take the matter lightly and did not deem it necessary to even approach the Commission for extension of this time. During the hearing before the Commission on 20.12.2006, Shri Verma submitted a progress report to the Commission but himself was not even aware that as per this report itself, even consumers whose meters had been read through MRI were not billed on the basis of these readings. In short Shri Verma who apart from being the Chairman and Managing Director of the UPCL now was its Joint Managing Director since August 2004 and is, and has all along been it's the Director (Operations), has knowingly failed to implement Commission's directions regarding recording of consumptions in ToD meters only through Meter Reading Instruments. This is in spite of the Commission repeatedly reiterating its directions and warning the concerned officer in this regard. The Commission, is therefore, satisfied that Shri Verma is guilty of continuously contravening Commission's directions and has not been able to offer any satisfactory explanation for his conduct. Accordingly, in exercise of powers under section 142 of the Electricity Act, 2003 the Commission hereby imposes a token fine of Rupees Five Thousand only on Shri B. M. Verma S/o Late Shri Walaiti Ram R/o 220, Vasant Vihar, Phase-II, Dehradun. He will be also liable to pay a further fine of Rupees One Hundred per day, till such time that the Commission is satisfied that all consumers of UPCL covered by the ToD tariff are being billed on the basis of consumption downloaded from their meters through MRI. If Shri Verma still fails to implement these directions to Commission's satisfaction till 31.03.2007, further action u/s 146 of The Electricity Act, 2003 will be taken against him. This penalty is being imposed on Shri Verma in his personal capacity and will therefore not be paid or reimbursed to him by the licensee."

6. The first two orders dated 08.09.03 & 25.04.05 speaks of ToD metering & meter reading by MRI instrument only for HT industries. The finding in paragraph 7 of the impugned order is conspicuously silent about HT industries. Apparently the Commission was satisfied with the compliance of its orders so far as they relate to HT industries. Specific directions relating to all ToD meters generally came only on 12.07.06. Therefore, non-compliance on account of which the appellant could be proceeded against was limited to the order of 12.07.06. The charge, so to say, survived only to the extent of non-compliance of order of 12.07.06.

Decision with reasons:

7. The question before this Tribunal is whether the Commission has been right in holding the appellant guilty of non-compliance of its direction and in imposing the penalty of fine.

8. The appellant, it appears from the impugned order, attempted to explain the non-compliance by mentioning the time required for procuring the MRIs. He also mentioned procedural delays. "On questioning" he "did admit" that action started a few months back. The Commission says the Commission is unable to "accept the contention that the UPCL's officers have been serious or earnest about the issue" and have been unable to implement the directions only on account of unavoidable delays." The Commission concludes that Mr.Verma has made no serious attempt to implement Commission's repeated directions and "has consciously been

flouting them”. Further the Commission says “Failure to raise bills on the basis of MRI readings, even when available raises serious questions about the motive behind continued slow pedaling of this matter.”

9. We are shocked to see how Commission has totally gone wrong both in the matter of procedure and in the matter of approach. The Commission entirely lost sight of the fact that it was proceeding to take criminal action and accordingly the basic principles of criminal law and procedure should not have been lost sight of. We are not saying that the Commission was required to follow the strict procedure of Criminal Procedure Code. But the basic principles could not have been ignored, a proposition to which the respondent counsel agreed.

10. Firstly, *mens rea* is the basic ingredient of any offence. Mere non-compliance with an order could not be sufficient to take penal action. It was necessary for the Commission to obtain evidence of *mens rea* or culpable state of mind before holding the appellant guilty of a punishable offence. A mere failure to meet a deadline in complying with an order cannot be an offence. Section 142 of The Electricity Act 2003 does not create an absolute offence.

11. Secondly, the burden of proof has to be on prosecution and not on the defense. It appears from the order that it was appellant who was made to prove his innocence rather than the prosecution

made to prove the guilt. Only when *mens rea* was established could the Commission shift the onus on the appellant. But the Commission from the very outset proceeded with a presumption of guilt and put the entire onus on the appellant. This is entirely against all principles of criminal justice.

12. Thirdly, no one can be punished on the basis of sheer suspicion. The guilt has to be proved beyond doubt. The Commission has punished the appellant not on a categorical finding of willful or contumacious default but because it was “unable to accept the contention that UPPCL’s officers have been serious and earnest about the issue” and on that basis concluded that “Mr.Verma had made no serious attempt to implement the Commission’s repeated directions” and that he “has consciously been flouting them”. There is absolutely no analysis of the procedure required to be followed for acquiring MRIs or of availability of MRIs in the market. The Commission could also examine and verify the efforts made by the UPPCL. Only after such an analysis the Commission could have arrived at a finding that the excuse of unavoidable delay was really sham. Similarly the finding that ‘failure to raise bills on the basis of MRI readings, even when available raises serious questions about the motive behind continued slow pedaling of this matter’ is only an expression of suspicion. No conviction or penal action can be justified on this basis.

13. It is true that the orders of the Commission can not be taken lightly. If the utilities defy the Commission with impunity, the very effort for reforms of the electricity sector with the enactment of The Electricity Act, 2003, and the policies formulated thereunder would be reduced to a farce. Nonetheless the impugned order cannot be sustained as the appellant has been condemned without a fair trial. We, therefore, allow the appeal and set aside the impugned order of 22.12.06.

14. The IA No. 136/07 stands disposed of.

Pronounced in open court on this *13th* day of *September*, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End