

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

**Review Petition 8 of 2010**

**In**

**Appeal Nos. 160 of 2009 and 193 of 2009**

**Dated: 24<sup>th</sup> November, 2010.**

PRESENT: HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER  
HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

**In the matter of:**

Kanan Devan Hill Plantation Company Pvt. Ltd.  
KDHP House, Munnar-685612

...Review Petitioner /  
Appellant

Versus

1. Kerala State Electricity Regulatory Commission  
C.V. Raman Pillai Road  
Vellayambalam  
Thiruananthapuram-695010, Kerala

2. The Kerala State Electricity Board,  
Vidhyuthi Bhavan, Pattom,  
Thiruananthapuram-695010, Kerala

...Respondents

Counsels for the Appellant: Mr. Joseph Kodianthera, Sr. Advocate  
Mr. M.P. Vinod, Advocate  
Ms. Usha Nandini & Mr. Biju Raman  
Advocates

Counsels for the Respondents: Mr. M.T. George, Advocate for the  
Respondent No. 2  
Mr. Ramesh Babu M.R. Advocate for  
Respondent No. 1  
Ms. Smitha Rani, Advocate

**JUDGMENT**

**PER HON'BLE MR. JUSTICE PARTHA SAKHA DATTA'**

This Review Petition filed by the Appellant-Petitioner M/s. Kanan Devan Hills Plantations Co. Pvt. Ltd. , the Sole Distribution Licensee under Section 14 of the Electricity Act 2003 for distributing electricity in Munnar and its neighboring areas in the State of Kerala arises out of the judgment and order of this Tribunal dated 18.5.2010 (Coram: Messrs H.L. Bajaj and P.S. Datta) passed in Appeal No. 160 of 2009 and Appeal no. 193 of 2009 which was preferred against order dated 21.1.2009 passed in Petition No. TP 63/2009 and order dated 21.1.2009 passed in TP No. 53(a) of 2008 by the Kerala State Electricity Regulatory Commission, the Respondent No. 1. The Petitioner-Appellant filed a combined application before the Commission for approval of ARR and ERC for the years 2008-09, 2009-10 and 2010-11. The Commission decided to consider the ARR and ERC separately for the year 2008-09 and 2009-10. Many a points were raised before the Commission but the Appellant-Petitioner before this Tribunal in course of hearing of appeals confined itself to certain specific

issues of which only the two are relevant for the purpose of disposal of the review application filed in connection with the Tribunal's order dated 18.5.2010. The issues are :

a) Was the Regulatory Commission right in fixing the Appellant's maximum demand for own consumption on the basis of the meter readings at various consumption points ignoring the actual figures available based on over all maximum demand less maximum demand of other consumers of the Appellant as a distribution licensee?

b) Whether the commission was justified in disallowing the claim for penal charges which was estimated by them at Rs.6.10 lakhs on the assumption that there would be excess demand.

2. The Tribunal dealt with both the issues amongst the other issues all of which it is not necessary to dwell upon but on the first issue it was the Appellant's contention that since the Appellant is a Distribution Licensee distributing electricity to its

own operation as well as to other consumers, the maximum demand with respect to its own operation was required to be computed on actual basis on the total MD purchased less the MD relating to other consumers, but the Commission held that the stand of the Appellant that as their consumption is less than 50% of its total purchase, they should be given exemption from the provision of the Electricity Act is not tenable as it would entail using costlier power through own generators and to impose cost on the other consumers. The Commission was of the view that the stand taken by assessing the MD of own consumption by hypothetical principle instead of on the basis of metered value would be contrary to the provisions of the Act. According to the Appellant, fixation of MD on the basis of meter readings on various consumption points would not give realistic and true figures. The Tribunal in its Judgment and Order observed inter alia that no differential treatment can be given to the consumers at large notwithstanding the fact that the Appellant is itself a consumer. It was held that in the absence of the MD meters actual maximum demand of the Appellant cannot be determined and only an approximation can be made. However, considering the fact that

the Appellant has its own captive diesel generators at its own cost during the peak hours, it would be fair and equitable to use the Appellant's method so as to determine the maximum demand for the time being. But such methodology would be an interim measure and as an exceptional case. The Tribunal directed the Appellant-Petitioner to ensure installation of meters within 6 months.

3. With respect to disallowing the claim for penal charges, the Appellant-Petitioner projected a cost of power purchase including sum of Rs.6.10 lakhs as penal charges on account of excess demand on the assumption that there would be a rise in excess demand which the Commission negated on the ground that there would be no basis of the assumption specially when the Appellant itself is using its own generator for meeting excess demand. The argument of the learned Counsel for the Commission was to the effect that the excess demand charges can be based on actual charges rather than estimated values. The Tribunal accepted the Commission's argument that in case there is a increase in demand, the Appellant-Petitioner can execute a

Power Purchase Agreement on account of increase in demand instead of paying the penal charges that would be due on account of such excess demand. In this connection, the Tribunal directed the Appellant to enter into Power Purchase Agreement with Respondent No. 2, Kerala State Electricity Board within 6 months.

4. Now, in the Review Petition, the points ventilated are as under:

- a) It was not the case of Appellant-Petitioner that there was no installation of electrical meters at different consumption points. It was contended before the Tribunal that determination of MD on the basis of meter reading should not be adopted as in order to ensure uninterrupted power supply to other consumers, the Appellant was adjusting its own demand as a consumer by operating captive D.G. sets. However, the Tribunal on the other hand proceeded on the footing as if the Appellant has not installed meters at different consumption points.

b) The Tribunal passed an unusual order in the penultimate paragraph thereof directing the Appellant –Petitioner to enter into Power Purchase Agreement with Respondent No. 2 namely, Kerala State Electricity Board which the Tribunal cannot do so as it is the prerogative of the Appellant –Petitioner whether to enter into the Power Purchase Agreement with Kerala State Electricity Board or not. The order of the Tribunal would have far reaching consequences.

5. We have heard Mr. Joseph, learned Senior Advocate (with Mr. M.P. Vinod, Advocate, appearing with him) for the Appellant-Petitioner, and Mr. M.T. George, learned Counsel for Kerala State Electricity Board and Mr. Ramesh Babu M.R., learned Counsel for Kerala State Electricity Regulatory Commission.

6. Before entering into the debate on the issues, we remind ourselves of the century old well settled legal principle that a review application is permissible only when there was discovery of a new and important matter or evidence which after exercising the

due diligence was not within knowledge of the Applicant or could not be provided when the decree or order was passed or when mistake or error, apparent on the face of record, was crept in or when there are other sufficient reasons. In Haridas Vs. Smt. Usha Rani Banik reported in AIR 2006 SC 1634 it was held that a Court or Tribunal exercising the power of the Review has to act with greatest circumspection.

7. It is submitted by the learned counsel for the Appellant-Petitioner that it was not the question before the Tribunal in course of hearing of the Appeals as to whether the Appellant-Petitioner had or had not installed meters at different consumption points. On the contrary, it was the case argued before the Tribunal that meter reading does not reflect the actuals for the purpose of determining the maximum demand, and moreover it was not in the memorandum of appeal that the Appellant has not installed meters. The learned counsel for both the Respondents submitted that this review application is bereft of substance because the Tribunal upheld the finding of the Commission that maximum demand can only be determined on



the basis of the meter readings instead of hypothetical speculation of the Appellant and the order of the Tribunal so far as this point is concerned has attained finality in view of the fact that the said point has not been canvassed again in this review application. We find that in as much as in the review application the Appellant-Petitioner does not cavil once again that meter readings would not reveal the actuals to the extent of determination of maximum demand, the question whether the Appellant has already installed meters or not can no longer be the subject matter of lis in this review application. The Tribunal clearly held that the meter reading of consumption points for own use of electricity would be the proper way of arriving at the maximum demand. If, as the learned counsel for the Appellant-Petitioner submits, it has already installed meters, then the matter ends there and the directions of the Tribunal to that effect has to be read to had stood complied with.

8. On the second point, argument of the leaned Counsel for the Appellant is that the Tribunal cannot give any directions to the Petitioner to enter into the Power Purchase Agreement with Kerala

State Electricity Board as it would not be in consonance with the provisions of the Electricity Act 2003. The submission, on the other hand, of the learned Counsels for the KSEB and the Commission is that direction with which the Petitioner claims to be aggrieved is only in the context of State Commission's contention in the counter affidavit at the time of hearing of the appeals that the Appellant cannot be made to go on paying excess demand charges and pass the same on to the consumers instead of entering into a Power Purchase Agreement for the actual contract demand.

9. On the second point also the Review Petition is misconceived. We have observed that in counter affidavit of the Respondent No. 1 it was ventilated that the Licensee cannot be allowed to go on paying excess demand charges and then passing on to the consumers instead of executing Power Purchase Agreement with reference to actual quantum of demand. It is, therefore, clear that the direction of the Tribunal to the Appellant-Petitioner to enter into Power Purchase Agreement with the Respondent No. 2 was only in the context of the contentions of the Respondents

regarding excess demand charges which could not be said to be unjustified. Therefore, direction so made has to be read in the context as above.

10. Subject to what we have said above, the Review Petition is dismissed without any order to cost.

**(Justice P.S. Datta)**  
**Judicial Member**

**(Rakesh Nath)**  
**Technical Member**

Dated : 24<sup>th</sup> November, 2010

REPORTABLE/~~NON-REPORTABLE~~.

PK