Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 53 of 2009

Dated: 31 July, 2009

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member

IN THE MATTER OF:

Bihar State Electricity Board
Vidyut Bhawan
Baily Road
Patna – 800 021 **……. Appellant 1**

Shri Swapan Mukherjee
Chairman
Bihar State Electricity Board
Vidyut Bhawan
Baily Road
Patna – 800 021 **……. Appellant 2**

Versus

Central Electricity Regulatory Commission
3rd & 4th Floor
36, Chanderlok Building
Janpath
New Delhi – 110 001

……. Respondent

Counsel for the Appellants(s) : Mr. Suresh Tripathy
Mr. Miskhat Ali Khan

Counsel for the Respondent(s): : Mr. Nikhil Nayyar
Mr. Ambuj Agarwal
Mr. Parag P. Tripathi

Per Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson

JUDGMENT

1. The Bihar State Electricity Board (BSEB) and its Chairman are the Appellants herein.

2. Both of them have filed this Appeal, challenging the Order dated 15.3.2009 passed by the Central Commission (CERC) holding both the Appellants guilty of contravention of non-compliance of the directions of the Central Commission dated 4.6.2008 and imposing a penalty of Rs. 1.0 lakh on the first Appellant BSEB and Rs. 5,000/- on the second Appellant, the Chairman of BSEB under Sections 142 and 149 of the Electricity Act. The necessary facts are as follows:

3. The Central Commission notified the Indian Grid Electricity Code envisaging that all the original constituents were to pay the Unscheduled Interchange (UI) charges for the energy drawn by them in excess of their respective drawal schedules. If the payments were not made by the regional constituents within ten days from the report made by Secretariats of the Regional Power Committees (RPCs), the constituents shall pay the UI charges with simple interest. If there are persistent payment defaults, the Regional Load

Despatch Centers (RLDCs) shall report the matter to the Secretary of the Member, RPC Secretariat for taking necessary action.

4. Bihar State Electricity Board, the 1st Appellant, did not make the payment of UI charges in time. This was reported by the RLDC. The Central Commission on receipt of the report took up the matter as a suo moto petition and on 6.5.2008 and issued a show cause notice to the Bihar State Electricity Board as to why the action be not initiated for recovery of outstanding dues of UI charges along with interest.

5. On receipt of the notice, on 26.5.2008 the Bihar State Electricity Board, the 1st Appellant, filed a reply giving various reasons for not making the payment of UI charges in time and requesting the Central Commission to permit it to make the payment of dues of UI charges in ten equal monthly installments.

6. Having considered the explanation and request made in the reply, the Central Commission passed an Order dated 4.6.2008 directing the Bihar State Electricity Board to make the payment of entire outstanding UI charges as on 24.3.2008 by paying not less than Rs. 20 crores per month starting from June 2008 till all dues including the interest for late payment are liquidated and further directing for the payment of current dues as well.

7. Though one portion of the Order was complied with, the other portion was not complied with. As there was no full compliance of the said Order, the Regional Load Despatch Center thereafter complained through the report dated 8.1.2009 to the Central Commission that the Bihar State Electricity Board, though paid the arrears of UI charges, has not made payment of current dues during the months of October, November and December 2008 as well as towards the interest for late payment as per the order dated 4.6.2008.

8. On the basis of this report, the Central Commission issued a show cause notice on 21.1.2009 directing the Bihar State Electricity Board, the 1st Appellant to show cause as to why penalty under Section 142 of the Act be not imposed on it for the non-compliance of the direction. In the same Order, the Central Commission issued show cause notice to the 2nd Appellant, the Chairman of the Bihar State Electricity Board also under Section 149 of the Act to show cause as to why he should not be held guilty of the act of non-compliance of the Commission's directions dated 4.6.2008.

9. The Bihar State Electricity Board on receipt of the said notice sent the reply to the Commission in the month of February stating that it had made regular payments for the period 2007-08 and due to the unavoidable circumstances it did not make the payment of Rs. 32.56 crores being current

dues in 3 months as well as the interest for the delayed payment and seeking further time to make the said payment in ten equal monthly instalments.

10. Having found that the explanation was not satisfactory, the Central Commission passed the impugned Order dated 15.3.2009 rejecting the explanation made by the Bihar State Electricity Board for non-compliance of the Order and imposed a penalty of Rs. 1.0 lakh on Bihar State Electricity Board under Section 142 of the Act. In the very same Order, the Commission found the Chairman of the Bihar State Electricity Board also guilty for non-compliance of the directions of the Central Commission under Section 149 of the Act and imposed a penalty of Rs. 5,000/-. Aggrieved by this Order, both the Bihar State Electricity Board and the Chairman of the Board have filed this Appeal.

11. The Learned Counsel for the Appellant would make the following contentions:

i) In view of the explanation furnished by the 1st Appellant through its reply for the notice dated 21.1.2009 giving reasons for the non-payment of current dues and the interest in time, the Commission ought not to have penalized the 1st Appellant under Section 142 of the Act in the absence of any *mens rea*. The Commission has no power to proceed under Section 142 of the Act merely because there was a default of making the payment of UI charges. There is nothing on record to establish that the

1st Appellant has persistently defaulted in making the UI payments as envisaged under Clause 7 of the Grid Code. Further, the Grid Code itself provides a self-correcting mechanism to the effect that if the UI payments are delayed beyond 12 days, the interest @ 0.4% for each day delay is liable to be paid. This itself is a penalty. There cannot be any other penalty under Section 142 of the Act. Hence, the penalty on the 1st Appellant is liable to be set aside.

ii) Section 149 of the Act under which the penalty has been imposed on the Chairman of the Board, the 2nd Appellant herein, would not apply to the present case because Section 149 deals with the offences committed by the company whereas Section 142 deals with any violation of directions and not an offence. Since Section 142 does not relate to an offence, Section 149 dealing with offences by the company cannot be linked to Section 142 which merely refers to violation of the directions. To invoke Section 149, it is incumbent on the part of the Commission to file complaint before the Criminal Court under Section 151 of the Act as it is triable by the said Court. Without following this procedure, the Commission cannot invoke Section 149 of the Act. Therefore, the penalty imposed on the 2nd Appellant being the Chairman of the Board under Section 149 of the Act is not valid in law.

12. The reply by the Learned Counsel for the Commission is as follows:

i) For the imposition of the penalty under Section 142 of the Act, there is no necessity to prove the intention “mens rea” once a contravention of any of the rules or violation of the directions is established. Unless the language contained in the Section indicates the need to establish the *mens rea,* it is not necessary to ascertain as to whether such a violation was intentional or not. Section 142 of the Act does not indicate any such *mens rea*. This point is supported by the judgment rendered by the Supreme Court in *2006 Vol.5 SCC 361 [Chairman SEBI Vs. Shriram Mutual Funds]* and in *2008 Vol.13 SCALE 233 [UOI & Ors. Vs. Dharmendra Textile Processors]*. Further, the Central Commission was not satisfied with explanation by giving reasons for the same. In regard to the double penalty alleged by the Learned Counsel for the Appellant, it has to be stated that already this Tribunal in Appeal No. 88 of 2006 in *UPPCL Vs. NRLDC* dated 28.9.2006 has held that the procedure prescribed under the Grid Code cannot control the exercise of the statutory power by the Commission under Section 142 as the power conferred under Section 142 cannot be made subject to the Grid Code and moreover the payment of interest as provided in Clause 7 of Complementary Commercial Mechanism for the delayed payment of UI charges cannot be construed to be penalty.

ii) In regard to the action under Section 149 of the Act, it is to be stated that it is permissible to invoke Section 149 of the Act in this case. The word `offence' contained in Section 149 of the Act does not connote criminal offence alone. The contravention of the rules or directions which is penalized under Section 142 would also fall within the ambit of the word `offence'. The term `offence' is not defined under the Electricity Act. Section 3(38) of the General Clauses Act defines an offence as "offence shall mean any act or omission made punishable by any law for the time being in force". Therefore, Section 149 would encompass Section 142 also as the word `contravention' contained in Section 142 would also mean an offence. The Supreme Court in decision 2006 Vol. 4 SCC 278 - The Standard Chartered Bank case has held that the word `offence' which is not defined in the FERA would include the contravention of law also. Therefore, the Commission is empowered to invoke Section 149 and impose penalty on the Chairman who is in charge of the Board, being a company for the offence committed by the Board under Section 142 of the Act. Even assuming that the power under Section 149 of the Act which deals with the offences is not applicable to the Commission to proceed against the officials of the Board for violation of the direction issued by the Commission, the Commission still has got the powers to proceed under Section 142 of the Act itself against the Board as well as the Chairman i.e. the person in charge of the Board. The word `company'

is defined under Section 2(49) of the Act as a `person'. Therefore, the order impugned passed by the Commission imposing penalty on the Chairman representing the company i.e. the Board under Section 149 of the Act can be construed to be the order passed under Section 142 of the Act.

13. In the light of the rival submissions made by the Learned Counsel for the parties, two questions would emerge in this matter:

i) Whether the Central Commission has the power to proceed under Section 142 of the Act as against the 1st Appellant merely because there was a default of making the payment of UI charges and was it not obligatory for the Commission in the light of the explanation to ascertain the *mens rea* of the 1st Appellant before imposing the penalty under Section 142 of the Act?

ii) Whether an action under Section 149 of the Act could be taken by the Central Commission which deals with offences by the company for the violation of direction under Section 142 of the Act when Section 151 of the Act would provide specific procedure for initiating proceedings as against the offences in the criminal court through a complaint made by the Central Commission?

14. Let us deal with the first question now.

15. According to the Learned Counsel for the Appellant, the *mens rea* for violation of direction has not been established. According to the Learned Counsel for the Respondent, there is no necessity to establish intention or *mens rea* to invoke Section 142 of the Act and once a violation of a direction is established the imposition of penalty would follow. To substantiate this plea, he has cited two decisions.

i) *2006 Vol.5 SCC 361 - Chairman SEBI Vs. Shriram Mutual Funds*

Let us quote the relevant portions of the observation made by the Supreme Court with reference to the *mens rea* in regard to violation or contravention while dealing with the SEBI Act.

> "**In our opinion *mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. In our view, the penalty is attracted as soon as contravention of the statutory obligation as contemplated by the Act is established and therefore the intention of the parties committing such a violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract levy of the penalty irrespective of the fact that whether the contravention is made by a defaulter with any guilty intention or not. This apart, unless the language of statute indicates the need to establish the element of *mens rea*, it is generally sufficient to prove that a default in complying with the statute has occurred. Hence, we are of the view that once a contravention is established then the**

penalty has to follow and only the quantum of penalty is discretionary."

ii) *2008 Vol.13 SCALE 233 - UOI & Ors. Vs. Dharmendra Textile Processors*

In this case, the Supreme Court gave the proposition in regard to *mens rea* while dealing with the FERA. The following is the observation.

"The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as in the case in the matter of prosecution under Section 276C of the I.T. Act.

The breach of a civil obligation which attracts penalty under Section 23(a) of FERA 1947 and the finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 would immediately attract the levy of penalty under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any `guilty intention' or not. Therefore, unlike in a criminal case, where it is essential for the `prosecution' to establish that the accused had the necessary guilty intention or *mens rea* to commit the alleged offence with which he is charged before recording his conviction in cases of contravention of the provisions of Section 10 of FERA, the obligation on the part of the Director of Enforcement would be discharged when it is shown that the blame on the conduct of the delinquent had been established."

16. From the above two judgments rendered by the Supreme Court, it is clear that the following ratios have been decided.

i) The penalty is attracted as soon as the contravention of the statutory obligation or the violation of the direction issued under the regulation

is established. In these cases, the intention of the parties committing such a violation becomes wholly irrelevant.

ii) A breach of civil obligation attracts penalty in the nature of fine under the provisions of the Act. The regulations would immediately attract levy of penalty irrespective of the fact whether contravention is made by the defaulter with guilty intention or not. Unless the language in the statute indicates the need to establish the presence of *mens rea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not.

iii) In regard to the violation of the direction or the contravention, it is generally sufficient to prove that the default in complying with the said directions or rules has occurred. Once the violation or contravention is established then the penalty has to follow and only the quantum of penalty is discretionary.

iv) The penalty is imposed by an adjudicating officer in the adjudication proceedings. The said penalty is not by way of fine as a result of the prosecution and the conviction of the accused of an offence in a criminal proceeding. Prosecution and conviction would involve the offences whereas penalty imposed by the adjudicating officer would involve only the violations of directions or the contraventions of rules.

v) In respect of the offences in a criminal case, it is essential for the prosecution to establish that the accused had necessary guilty intention to commit the same, but in case of contravention of provisions or violation of the directions, the obligation of the adjudicating authority to impose penalty would be discharged the moment it is shown that the blame on the conduct of the delinquent had been established.

17. Let us now quote Section 142 of the Act to ascertain the ingredients of the Section. Section 142 of the Act vests powers in the Commission to impose penalty on any person contravening the provisions of the Act or rules or regulations or directions issued by the Commission. The said Section is extracted as below:

> **"Section 142. Punishment for non-compliance of directions by Appropriate Commission: In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction."**

18. The reading of the above Section would indicate the following elements are contained in Section 142 of the Act:

i) There must be a complaint or report about contravention or violation of rules or directions issued by the Appropriate Commission by any person.

ii) The Commission on being satisfied with the contents of the complaint may initiate suo moto proceedings on such contravention against the said person by issuing a show cause notice.

iii) The Commission should also give such person an opportunity of being heard to explain his case.

iv) In spite of the reply and explanation, if the Commission found that he has committed the contravention, it may impose a penalty on such person to pay penalty not exceeding Rs. 1.0 lakh for each contravention and in case of continued failure, to pay additional penalty of Rs. 6,000/- per day during which the failure continues after first contravention.

v) This penalty is without prejudice to any other penalty to which such person is liable under the Act.

19. The perusal of Section 142 of the Act as well as the ratio decided by the Supreme Court with reference to the violation of the directions or contravention of the rules would make it clear that once it is shown that the contravention or the violation of the directions of the Commission has taken place, the imposition of penalty by the Commission on such person is a natural consequence. In other words, the power to impose penalty gets invoked as soon as the contravention of rules and directions as contemplated under Section 142 of the Act is established.

20. In the light of the dictum laid down by the Supreme Court and the ingredients of Section 142 of the Act, let us evaluate the present facts of this case. In this case, the Central Commission through the report of RLDC came to know that the UI charges have not been paid in time by the Bihar State Electricity Board in contravention of the rules. So it took up the matter as suo moto petition and issued show cause notice dated 6.5.2008 to the Bihar State Electricity Board as to why the action be not initiated for the recovery of UI charges along with interest. The Electricity Board sent a reply dated 26.5.2008 giving various reasons for non-payment and requesting permission to make

the payment of dues in 10 monthly instalments. The Central Commission without taking further action in the matter thought it fit to give further time for payment. Accordingly, by the Order dated 4.6.2008, the Central Commission directed the 1st Appellant to make the payment of outstanding UI charges by paying not less than Rs. 20 crores per month starting from June 2008 till all the dues are liquidated and further directed to pay the current dues including interest for late payment. In accordance with the said directions, the entire amount of arrears along with interest for late payment was to be liquidated by 31.12.2008 in addition to payment of the current dues.

21. But despite these directions, the Bihar State Electricity Board has neither paid current dues during the months of October, November and December, 2008 nor paid the interest for late payment on or before 31.12.2008 in violation of the Order dated 4.6.2008. This was again reported by RLDC.

22. On the basis of this report, the Central Commission by way of giving an opportunity to the Appellant again issued show cause notice on 21.1.2009 as to why penalty under Section 142 of the Act be not imposed as against the 1st Appellant, the Bihar State Electricity Board. The Commission issued another show cause notice on the same date to the 2nd Appellant, the Chairman of the Board as to why he should not be found guilty under Section 149 of the Act. On receipt of this notice, the Bihar State Electricity Board, the 1st Appellant made a reply admitting that though it paid arrears of UI charges, it did not make the said payment of current dues and the interest to the tune of Rs. 32.56 crores due to unavoidable circumstances and requesting for further time to make the said payment in 10 equal monthly instalments. The Appellant was also given the opportunity of being heard. Being not satisfied with the reply and its submission in the personal hearing, the Central Commission by the impugned Order dated 15.3.2009 imposed a penalty of Rs. 1.0 lakh on Bihar State Electricity Board

after rejecting the explanation for non-compliance of the directions dated 4.6.2008 under Section 142 of the Act.

23. It is not in dispute that the direction which had been issued on 4.6.2008 to the 1st Appellant directing it to make the payment of current dues as well as the interest within the time frame has not been complied with. It is also not in dispute that even though the Appellant did not make the payment of current dues for the months of October, November and December 2008 as well as the interest for the late payment, the Board, 1st Appellant, never approached the Commission on his own seeking for extension of time by explaining the reasons for the non-compliance of the order in time. On the other hand, it waited till the receipt of show cause notice that was issued on 21.1.2009 in pursuance of the report of RLDC and only thereafter the Board came forward with some explanation for the delay and sought for further time. This conduct of the 1st Appellant does not sound good. If they had filed any application even before the issuance of show cause notice showing the circumstances under which the delay was caused for payment of the said dues in time and also requesting for the extension of time, then we can understand that they are bona fide. That was not done in this case. Only in the reply to the second show cause notice which was issued on 21.1.2009, the Appellant requested further time. These things would indicate that despite the indulgence shown by the Central Commission earlier by the Order dated 4.6.2008 giving further time for making payment, as requested, the 1st Appellant admittedly did not make the payment of current dues as well as the interest for the delayed payment as per the order dated 4.6.2008 in time. Thus it is established that the specific direction which had been issued by the Central Commission on 4.6.2008 by giving the time frame has not been complied with.

24. In the light of the above facts, let us now come to the question as to whether the Commission can impose penalty whenever there is a contravention under Section 142 of the Act in the absence of the *mens rea*. *Mens rea* in the matter of violation means the criminal intent to violate i.e. deliberate intention to violate or dishonest intention to violate. As per Section 142 of the Act, the Commission, if it is satisfied that any person has violated the direction issued by it, shall give opportunity by seeking for explanation from that person regarding the said violation through show cause notice and by giving personal hearing. In spite of the explanation, if the Commission takes the view that the explanation is not satisfactory and forms a definite opinion that the contravention has been committed, it may impose the penalty. Thus, it is evident that the language in Section 142 of the Act does not indicate the need to establish the presence of dishonest intent namely *mens rea* to commit that contravention or violation as in the prosecution of an offence in the criminal proceedings. *Mens rea* namely the deliberate, dishonest and wanton violation is one thing. The violation due to lack of diligence and lack of bona fide is entirely a different thing. Therefore, *mens rea* in these cases is immaterial as this involves civil liability. It is enough to establish the contravention and there need not be the criminal intent or dishonest intent to commit it. At the same time, we should not lose sight of the ground realities.

25. The very fact that Section 142 of the Act mandates the Commission to issue show cause notice would indicate that even though the Commission finds that there is contravention on the basis of the materials given in the complaint, it has to take final decision only after considering the explanation from the person concerned. If the explanation is satisfactory, it need not impose penalty. The words “may impose” contained in Section 142 convey this. In other words, even when there is some contravention of a direction which warranted the issuance of show cause notice, the Commission is not duty bound to impose

penalty in those cases where it is found that such a contravention has been committed bona fide and due to the circumstances beyond his control. If the Commission found that the conduct of the person on whom show cause notice was served was bona fide or if the person has satisfied the Commission that the circumstances were beyond his control due to which he was unable to comply with the direction of the Commission, then the Commission may accept the said explanation and discharge a person without imposing any penalty. It is entirely depending upon the facts and circumstances of the case.

26. In this context, it would be worthwhile to refer to the relevant observation made in the judgment rendered by the Hon'ble Supreme Court in *1969 Vol.2 SCC 627 Hindustan Steel Ltd. Vs. State of Orissa*, which are as under:

> *"Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for the failure to perform the statutory obligation, is a matter of discretion of the authority to be exercised judicially and on consideration of the relevant circumstances."*

The above observation and the wordings contained in Section 142 which mandates the Commission to impose penalty only after giving opportunity to the person concerned to explain his stand would reveal that the Commission has to exercise its authority judicially and judiciously by taking into the consideration all the relevant circumstances explained by the person concerned before deciding the necessity to impose penalty.

27. We are constrained to make this observation in order to impress upon the Commissions that merely because we have found that no *mens rea* is necessary to impose the penalty for violation of direction, the same should not

be taken by the Commissions that whenever there is a contravention, there shall be an imposition of penalty. We make it clear that if the Commission feels satisfied with the circumstances or the explanation given by the person concerned, the Commission either may accept the explanation and close the proceedings or discharge the person by giving a mere warning so as to ensure that the said violation does not recur. In other words, the Commissions have to exercise its statutory powers by taking into consideration the various circumstances before coming to the conclusion regarding the imposition of penalty.

28. In this case, the Central Commission has considered the explanation given by the Appellant threadbare and has given detailed reasons for rejecting the said explanation. The conclusion arrived at by the Commission for imposition of penalty in our view is perfectly valid and acceptable.

29. In view of the above analysis, we reject the contention of the Learned Counsel for the Appellant that the *mens rea* namely the dishonest intention to violate has to be established in these cases.

30. It is incidentally contended by the Learned Counsel for the Appellant that the Central Commission cannot exercise its power under Section 142 of the Act without following the procedure as provided under the Indian Electricity Grid Code. This contention is contrary to the law laid down by this Tribunal in Appeal No. 86/06 dated 28.9.2006 – UP Power Corporation Ltd. Vs. Northern Region Load Despatch Center. It has been specifically held in this decision that the procedure prescribed under the Grid Code cannot control the exercise of the statutory power conferred on the Central Commission under Section 142 of the Act. The power conferred on the Central Commission by Section 142 of the Act has not been made subject to the Grid Code. In other words, the original power

of the Commission conferred on it under Section 142 of the Act cannot be diluted by any clause of the Grid Code as the said provision of the Grid Code is merely having a statutory flavour which cannot replace the statute itself. Therefore, this contention also is to be rejected.

31. It is also contended that already there is a rule for payment of interest prescribed for the delayed payment and that itself is a penalty and as such the Appellant cannot be imposed with any other penalty as it amounts to double penalty. This argument also does not merit acceptance as the levy of interest for late payment as per the rule cannot be termed as penalty as interest is levied to compensate the person who is deprived of the use of his legitimately due to him. Penalty under Section 142 of the Act has been imposed in this case for violation of the direction given by the Commission. As such the liability to pay interest on late payment of outstanding UI charges itself does not render the Appellant immuned from liability for penalty under Section 142 of the Act.

32. Even though we reject the contentions urged by the Learned Counsel for the Appellant in regard to the imposition of penalty under Section 142 of the Act for the reasons mentioned in the above paragraphs, we feel that the discretion which has been exercised by the Commission in this case with regard to the quantum of penalty has not been exercised properly.

33. As referred to above, the facts in the instant case would indicate that the Order has been passed by the Commission directing the Appellant BSEB on 4.6.2008 to make the payment of the entire outstanding UI arrears as on 24.3.2008 by paying not less than Rs. 20 crores per month from June 2008 and

also to make the payment of current dues as well as the interest for late payment. Admittedly, the Appellant has made the payment of outstanding UI charges, as directed by the Commission, but has failed to make the payment towards the current dues as well as the interest for late payment. Thus, it is clear that one portion of the Order has been complied with. This factual position also should have been considered by the Commission, while deciding about the quantum of penalty. In this case, however, the Commission has imposed a penalty of Rs. 1.0 lakh, which is the maximum as incorporated in Section 142 of the EA.

34. In view of the foregoing, and taking into consideration the fact that one portion of the said Order has been complied with by the 1st Appellant, we think it fit to impose a penalty of Rs. 50,000/- (Rupees Fifty Thousand only) instead of Rs. 1.0 lakh as imposed by the Central Commission. Accordingly, while we confirm the finding with reference to the contravention, which is liable to attract penalty, we modify the quantum of the penalty by reducing it to Rs. 50,000/-. Accordingly ordered.

35. Let us now come to the second question. The question is whether an action under Section 149 of the Act which is an offence could be taken by the Central Commission as against the 2nd Appellant, the Chairman of the Board for the violation of a direction under Section 142 of the Act?

36. The Learned Counsel for the Appellant while assailing the Order of the Central Commission with reference to the finding as against the 2nd Appellant under Section 149 of the Act would contend that Section 149 of the Act deals with an offence committed by the company which are triable and punishable by the criminal court on the complaint given by the Appropriate Commission under Section 151 of the Act whereas Section 142 of the Act deals with mere violation of the directions of the Commission which are liable for penalty that may be imposed by the Central Commission. In brief, the contention urged by the Learned Counsel for the Appellant is that Section 149 of the Act cannot be linked with Section 142 of the Act for imposition of penalty on the Chairman of the Board, the 2nd Appellant herein, since Section 142 of the Act deals with the non-compliance of the directions issued by the Commission which may lead to the penalty by the Commission whereas Section 149 of the Act deals with the offence committed by the company which may lead to the conviction by the criminal court.

37. While refuting this contention, the Learned Counsel for the Central Commission would strenuously contend that both Section 142 and Section 149 of the Act can be considered to be the offences and all the offences need not be construed to be the crimes which are punishable under the criminal court and so the Central Commission has got power to impose penalty on 2nd Appellant under both the Sections. To substantiate his plea, he has cited Supreme Court judgment reported in *2006 Vol. 4 SCC 278 - The Standard Chartered Bank Vs. Directorate of Enforcement.*

38. Let us now refer to both provisions under Sections 142 and 149 of the Act for comparison. Though we have quoted Section 142 in the earlier paragraphs with reference to the first point, we are to refer to the same again to deal with this issue.

Section 142 provides as follows:

"Punishment for non-compliance of directions by Appropriate Commission.- In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made thereunder, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction."

39. The above provision would contain three ingredients:

i) Any person can file a complaint before the Commission regarding the contravention of directions, rules and regulations as against any person.

ii) If on the said complaint the Commission is satisfied that prima facie he has committed contravention or violation, it can issue show cause notice to the said person and also can give such person an opportunity of being heard.

iii) After receiving the reply and hearing the person, if the Commission is not satisfied with the explanation given by such person for the said violation or contravention, the Commission may impose penalty which shall not exceed one lakh rupees for each

contravention and in case of a continuing failure, it can impose additional penalty which may extend to six thousand rupees for every day during which the failure continues.

40. The above ingredients would make it evident that the Central Commission before issuing show cause notice has to be satisfied that a contravention has been committed and before imposing penalty, it has to be again satisfied with reference to the said contravention after considering the reply. Thus, it is clear that Section 142 deals with the penalty that may be imposed by the Central Commission for the contravention of the direction or rules of the Commission i.e it relates to the contravention only not to the offences.

41. Section 149 provides as follows:

"Offences by companies. – (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of having committed the offence and shall be liable to be proceeded against and punished accordingly."

The reading of the above provision would make it clear that the requirement of three ingredients are to be established to invoke Section 149 of the Act.

i) It must be proved that an offence under this Act has been committed.

ii) It shall also be proved that the said offence under this Act has been committed by a company.

iii) When the above two ingredients are established then every person who is in charge of and responsible to the affairs of the company as well as the company shall be deemed to be guilty of having committed the said offence under this Act.

42. The conjoint reading of both Sections 142 and 149 of the Act would reveal that Section 142 deals with the penalty that may be imposed by the Commission on any person who committed the contravention of the direction or the regulations, whereas Section 149 deals with the deeming provision by which the persons in charge of the company as well as the company are deemed to be guilty of having committed an offence punishable under law. In other words, the Commission when it is satisfied that its directions or regulations have been contravened by any person can impose penalty on such person under Section 142 of the Act. But Section 149 which deals with an offence under this Act committed by the company provides for the deeming provision where the company and the persons in charge of the company are liable to be proceeded and punished for the said offence.

43. So the main requirement for invoking Section 149 of the Act is to find out the nature of the offence which has been committed under this Act by the person who happens to be the company to hold it liable under Section 149 of the Act as well. As stated earlier, Section 149 is only a deeming provision and it is not by itself an offence simpliciter. It is made clear that the person cannot be punished under Section 149 of the Act alone as it is not a substantive offence. In other words, no person or a company can be punished under Section 149 of the Act unless he is found guilty of any other substantive offence under this Act.

44. So the first duty cast upon the competent authority is to find out as to what is a substantive offence which has been committed by the company. Only when it is established that some substantive offence under this Act has been committed by the company, then Section 149 of the Act can be added along with the said substantive offence under this Act. Therefore, there must be materials available before the competent authority to be evaluated for finding out as to what was the offence committed by the company under this Act and only after finding out that particular substantive offence, then the company who has committed that said offence as well as the others who are in charge of the company can be deemed to have committed the said offence under Section 149 of the Act.

45. In the context of this analysis, the question arises who is the competent authority who can deal with substantive offences prescribed under the Act. As mentioned earlier, the said competent authority has to find out three things as contemplated under Section 149 of the Act.

i) Which offence under this Act has been committed by the person?

ii) Whether such person who commits the said offence can be a company?

iv) If it is so, who are all the persons who are in charge of the said company so as to punish them along with the company for the said offence?

46. Let us now see the Chapter under the Act which prescribes the offences to find out what are all the Sections which deal with the substantive offences. Part XIV of the Act deals with the offences and penalty. It contains Section 135 to Section 152. Under this Part there are some Sections which deal with the offences punishable by the criminal court with fine or imprisonment and there are some other Sections which deal with mere penalty.

47. Let us see those Sections which deal with offences. Section 135 relates to the theft of electricity. As per this Section whoever dishonestly commits theft of electricity shall be convicted and sentenced to imprisonment for a term which may extend to three years or with fine or both. The quantum of punishment given for the first conviction is lesser but if a person is convicted for a second time, there is not only minimum imprisonment of six months but which may extend to five years and with fine.

48. Section 136 deals with the theft of electric lines and materials. According to this Section, whoever dishonestly commit a theft of electric line and material is punishable for a term with imprisonment which may extend up to three years and fine or with both for the first conviction and for the second and subsequent conviction there is a minimum imprisonment of six months and also the term of imprisonment which may extend to five years and with fine.

49. Section 137 deals with punishment for receiving stolen property. As per this Section, whoever dishonestly receives any stolen electric line or material shall be punishable with imprisonment which may extend to three years or with fine or with both.

50. Section 138 relates to the interference with meters or works of licensee. As per this Section, whoever unauthorisedly or maliciously tampers with the meter, he shall be punishable with imprisonment with a term which may extend to three years or with fine or with both.

51. Section 139 deals with negligently breaking or damaging works. According to this Section, whoever negligently breaks, injures, throws down or

damage any material connected with the supply of electricity is punishable with fine which may extend to ten thousand rupees.

52. Section 140 which deals with the penalty for intentional injuring works provides that whoever with intent to cut off the supply of electricity cuts or injures any electric supply line is punishable with a fine which may extend to ten thousand rupees.

53. Section 141 provides that whoever maliciously extinguishes any public lamp shall be punishable with a fine which may extend to two thousand rupees.

54. Section 146 relates to the punishment for non-compliance of orders or directions. According to this Section, whoever fails to comply with any order or direction given under this Act shall be punishable with imprisonment which may extend to three months or find which may extend to one lakh rupees or with both. In the case of a continuing failure, the additional fine of five thousand rupees may be imposed for every day during which the failure continues after conviction of the first such offence.

55. Section 149, as we mentioned earlier, relates to the offences by companies. It does not provide the punishment. It only envisages that if the person who committed an offence happens to be the company, the persons in charge of the company are deemed to be guilty and they also can be punished for the said offence under the Act which was committed.

56. Section 150 deals with abetment. Under this Section, whoever abets an offence under this Act can be punished with imprisonment of term which may extend to three years or with fine or with both.

57. The above would indicate that various offences are provided under Sections 135, 136, 137, 138, 139, 140, 141, 146, 149 and 150.

58. There are some other Sections which provide for the penalty that can be imposed by the Commission for the non-compliance of the directions or contravention of the rules and regulations. We shall now see those Sections. Section 142 provides the power to the Commission to impose penalty on the person who committed violation or contravention of the directions or the regulations. Section 143 deals with the power of adjudication. It provides the manner of inquiry which has to be conducted before imposing any penalty for the non-compliance of the provisions of Sections 29, 33 and 43 of the Act. Section 144 also deals with the same aspect.

59. Thus, we have seen two sets of provisions i.e. one set deals with offences and another set deals with penalties. Let us now see the procedure of enquiry or trial with regard to the offences mentioned earlier.

60. Under Section 151 of the Act, the cognizance of the offences can be taken only by the criminal court provided that the complaint must be made before that court by the Appropriate Commission or the Appropriate Authority. If such a complaint has not been made by the appropriate authority, the court is not empowered to take cognizance of the offences and conduct trial for prosecution of those offences. Section 151B prescribes that out of the offences referred to above, only Sections 135 to 140 and Section 150 are treated to be cognizable and non-bailable offences.

61. So the above Sections would clearly provide that the offences could be dealt with only by the criminal court and the said criminal court can take cognizance of those offences only when a complaint in writing made by the

appropriate authority before it. They also indicate that the offences which were committed by the person with *mens rea* i.e. dishonestly or maliciously have to be inquired and tried only by the criminal court and not by the Commission which is empowered to deal with the non-compliance or contravention of the directions or regulations which does not require *mens rea*. In other words, wherever the offences are mentioned as provided in various Sections referred to above, the criminal court alone is competent to try those offences in order to find out whether the offence has been committed intentionally or with *mens rea*.

62. One more aspect is to be noticed at this juncture. The Legislature thought it fit to provide for the constitution of special courts to deal with the offences as provided under Section 153 in Part XV of the Act. Under this Section, the State Government with the concurrence of the High Court shall constitute Special Court and appoint a Judge of the Special Court who is an Additional District and Sessions Judge to conduct trial in respect of the offences under Sections 135 to 140 and Section 150 of the Act. It is also noticed from Section 154 that there is a special procedure provided conferring the power to Special Court in accordance with the procedure prescribed under Code of Criminal Procedure for conducting trial for the offences referred to in Sections 135 to 140 and Section 150. Under Section 155 of the Act, the Special Court will have all the powers of Court of Session. The appeal against the judgment of the Special Court will lie only to the High Court under Section 156 of the Act. So the joint reading of Sections 151 and 151B of the Act would clearly envisage that the offences referred to in the various Sections of Part XIV could be taken cognizance only by the criminal court and out of these offences the offences under Section 135 to 140 and Section 150 which are serious in nature could be tried only by the Special Court which has got the powers of Session's Court to convict the offenders.

63. As indicated earlier, Section 142 of the Act does not deal with the offences. On the other hand, we have mentioned various Sections which deal with the offences like Sections 135 to 141, 146 and 150. Unless it is proved that any of these offences are made out as against a person or a company, Section 149 of the Act cannot be invoked. This exercise of finding out which offence under this Act was committed by the person could be made only by the criminal court through trial and not by the Commission.

64. In brief, it shall be stated that Section 142 which deals with the violation of direction is not an offence and it cannot be linked with Section 149 which relates to the offences mentioned in the above sections in Part XIV.

65. Let us now look into the judgment of the Supreme Court in 2006 Vol. 4 SCC 278 - The Standard Chartered Bank Vs. Directorate of Enforcement cited by the Learned Counsel for the Commission. In this case, the word `contravention' appearing in FERA Act, 1973 was interpreted to include an offence which is contrary to law or forbidden by law. On the strength of this observation it was argued that the Appellants committed something contrary to law under Section 142 and therefore Section 149 is attracted to punish them for the said act.

66. We are unable to accept this argument advanced by the Learned Counsel for the Respondent. The interpretation given by the Hon'ble Supreme Court with reference to Sections 50 and 68 of the FERA would not be applicable to the present case. The relevant observation made by the Supreme Court in the said judgment is as follows:

> **"There does not appear to be any reason to confine the operation of Section 68 only to a prosecution and to exclude its operation from a**

penalty proceeding under Section 50 of the Act, since the essential ingredient of both is the contravention of the provisions of the Act. The contravention makes a person liable both for penalty and for prosecution.“

In this judgment, the Supreme Court while interpreting the Sections 50 and 68 of FERA has held that Section 68 relating to the contravention committed by the company can be invoked both under penalty proceedings as well as criminal proceedings. The said interpretation will not apply to the present case.

67. Section 50 of FERA of course is analogous to Section 142 of the Act, but Section 68 of the FERA is not analogous to Section 149 of the Act. Admittedly, both Sections 50 and 68 refer to the word “contravention” and not “offence”. While interpreting those sections, the Supreme Court held that Section 68 can be invoked for both prosecution and penalty proceedings under Section 50 as both the Sections would refer to the word “contravention”. The opening words of both the Sections namely 50 and 68 of FERA would provide that if any person contravenes any orders etc. Therefore, the word `contravention’ is the basic element for these two Sections. That is not the case here. There is no such word `contravention’ appearing in Section 149 of the Act. Section 142 of the Act deals with the contravention whereas Section 149 of the Act deals with the offences. Therefore, the Supreme Court’s interpretation of the word “contravention” construed as an offence in the context of the wordings contained in Sections 50 and 68 of the FERA would not apply to this case because the scope of Section 68 of the FERA is completely different from that of Section 149 of the Electricity Act. That being the case, the above judgment is not applicable to the facts of the present case.

68. It may be true that under Section 142 of the Act as admitted by the Learned Counsel for both the parties, a person may be an individual or may be a person who is considered to be a company or may be persons who are connected with the company, can be proceeded against, and penalty imposed upon them under Section 142 itself.

69. On this basis, it has been argued by the Learned Counsel for the Respondent that even assuming that the Commission is not empowered to invoke Section 149 of the Act, the Order passed under Section 149 of the Act as against the 2nd Appellant in this case can be construed to be the order passed under Section 142 of the Act especially when there is power already vested with the Commission to punish the Chairman of the Board also under Section 142 of the Act. This argument, in our view, will not apply to the present case and as such does not merit consideration. The reason is this. There is no dispute in the fact that both the Appellants were found guilty for the violation of the order passed on 4.6.2008. Even before passing this said order on 4.6.2008, the show cause notice was issued on 6.5.2008 by the Central Commission with reference to the contravention of the rules only to the 1st Appellant and final Order was passed on 4.6.2008 as against the 1st Appellant only. Admittedly, the 2nd Appellant, the Chairman of the Board was not a party to the earlier proceedings i.e. either in the show cause notice dated 6.5.2008 or in the order dated 4.6.2008. Now the present proceedings initiated by the Central Commission only for non-compliance of the order dated 4.6.2008. Though the show cause notice in the instant proceedings has been issued on 21.1.2009 against both, the 2nd Appellant who is not a party to the earlier proceedings which culminated in the final order dated 4.6.2008 cannot be accused of having violated the order passed on 4.6.2008.

70. Therefore, the finding and the penalty imposed on the 2nd Appellant by the Central Commission is not in accordance with law and the same is liable to be set aside. Accordingly, the order imposing penalty on the 2nd Appellant is set aside. However, the finding with reference to the 1st Appellant under Section 142 of the Act is confirmed but the penalty amount has been reduced to Rs. 50,000/-. Appeal is partly allowed. No costs.

(A.A.Khan)
Technical Member

(Justice M.Karpaga Vinayagam)
Chairperson

Dated: 31st July, 2009

REPORTABLE / NON-REPORTABLE