

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

Appeal No. 156 of 2007

Dated: 5th August, 2009

**Present : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. A.A. Khan, Technical Member**

IN THE MATTER OF:

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

... Appellant

Versus

Uttarakhand Electricity Regulatory Commission
80, Vasant Vihar
Dehradun – 248006
Uttarakhand

... Respondent

Counsel for the appellant : Mr. M.G. Ramachandaran, Mr. Anand K. Ganeshan
Ms. Swapna Seshadri

Counsel for the Respondent : Mr. Suresh Tripathy, Mr. N.K. Sahoo

JUDGEMENT

Per Hon'ble Mr. A.A. Khan, Technical Member

1. The Appellant, Mr. B. M. Verma, is the former Chairman and Managing Director of Uttarakhand Power Corporation Limited (UPCL, in short) and retired from the said post on 19th August 2007. UPCL is a distribution licensee under the provisions of the Electricity Act, 2003 (the Act). The license has been granted by the Uttarakhand Electricity Regulatory Commission (UERC or the Commission).

2. The Commission vide its Order dated 17th August 2007 held the Appellant herein guilty of violation of provisions of the Act and orders/directions of the State Commission and imposed a fine of Rs. 20,000 to be paid by the Appellant in his personal capacity failing which the Appellant would pay additional fine of Rs. 500 per day for contravention of the said Order dated 17th August 2007. Aggrieved by the said Order is this appeal.

Facts of the Case

3. To appreciate the issue at hand, we may briefly touch upon the facts of the case.
 - (a). UERC vide letter dated 07.12.2006 advised UPCL under Section 23 of the Act, to send a comprehensive plan **indicating the availability of power in the deficit months** (December, January and March 2007), **demand in these months and the plan for scheduled roistering** (sic outages), if required so, **area wise and category wise**. It also refers to some directions passed by the Commission that licensee must not carry on the scheduled load shedding without the approval of the Commission under Section 23 of the Electricity Act, 2003 and distribution of power among the different consumers be made on **a transparent and in equitable manner**. Section 23 of the Act is reproduced below:

“23. Directions to licensees - If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.”
 - (b). In response, UPCL through its letter dated 03.01.2007 submitted **a comprehensive plan of roistering** to UERC for load shedding under three

different scenarios depending upon the quantum of shortage of availability of power including the order of priorities for maintaining the power supply under acute power shortage. Thereafter, a meeting was taken by UERC on the subject on 03.01.2007. As a follow up to the discussions in the said meeting, UPCL vide its letter dated 08.01.2007 submitted that *'there is no intention on part of UPCL to ignore any directives of Hon'ble UERC. Load shedding is primarily being done by SLDC, Most of the rostering is arising out of uncertainties in availability of power and therefore long-term planning is not possible...As per Hon'ble Commission's direction issued in the meeting held on 03.01.2007, we are once again submitting a scheduled load shedding program ..for approval of the Hon'ble Commission.....As such keeping in view the worst scenario, we have prepared this Load shedding plan for the coming months to the best of our efforts.'* The State Commission vide its letter dated 09.01.2007 communicated that *'the Commission after considering the UPCL's proposal on load shedding, has accorded its consent on it under section 23 of the Electricity Act, 2003'* and directed UPCL to publish load shedding schedule in leading newspapers.

- (c). Then, UPCL vide its letter dated 19.01.2007 informed the Commission that the load shedding program approved by UERC has been implemented in the whole state. UPCL further stated that *'as per the schedule, all the industries fed by industrial feeders emanating from 132 kV, 33 kV substations are not being supplied power during 1700 hours to 2200 hours daily and such feeders are being opened from substations but HT/LT industries fed by mixed, town & rural feeders are using electricity in this period. Besides this, some industries,*

which are of continuous and other non-continuous but have critical operations, have approached us to supply them electricity in this peak period.....Hence, it is proposed that all industries may be restricted to use only 15% of their sanctioned load up to 15.03.2007.... So kindly permit us to impose restriction in usage for all industries during evening peak hours from 1700 Hrs to 2200 Hrs till further review'. Firstly, the letter indicate that due to operation of the approved schedule for load shedding, certain continuous and non-continuous industries having critical operation have approached for exemption even if they are charged at peak power rate of Rs. 8 per Kwhr. Secondly, the proposal for supplying such industries only 15% of their sanctioned load. This was approved by the UERC subject to conditions, as stated in UERC letter of 25.01.2007, *inter-alia* that a) such increase of 15% demand should not result in load shedding for other consumers and b) restrictions shall be closely monitored and that all meters shall be read through MRI. UPCL vide its letter dated 01.20.2007 wrote to UERC that to accommodate such 15% drawl by industrial consumers, load shedding would be done on other consumers depending upon power availability, on which UPCL has no control. As regards MRI, UPCL had certain difficulties in implementation and submitted that this issue needs full resolution to avoid any confusion.

- (d).UERC, through letter dated 25.01.2007 to UPCL, stated that one of the consumers in a letter to UERC, has alleged that UPCL has exempted certain industries from load shedding and directed UPCL ***'to convey factual position in the matter by today evening and along with reasons for deviation from***

scheduled load shedding plan approved by the Commission'. On 31.01.2007, UPCL wrote to UERC, giving reference to a meeting held on 29.01.2007 in UERC, that it was agreed that list of Continuous Process Industries as defined by UPSEB will hold good till any new rules are framed and that keeping in mind the criticality of chemical and Glass Industries, UPCL had decided to give power to these industries.

(e). On 01.02.2007, UPCL responded to UERC's letter dated 25.01.2007, explaining that the process of Glass industry is such where any stoppage of supply leads to solidification of molten glass and that the process is so designed if furnace once started, is kept going for years together necessitating two sources of electricity supplies and the furnace is never allowed to shutdown. Similar is the case with other continuous process industries too. All the continuous industries need to be given a minimum load to keep the process going and that for the balance, they shall be asked to make their own captive power arrangements. UPCL also stated the names of industries, in addition to those alleged to have been given supply during scheduled load shedding period in the letter of UERC, which were exempted from the scheduled load shedding program. It is observed that names of these industries are appearing in the details given by UPCL in its letter dated 03.01.2007 to UERC.

(f). Thereafter on 07.02.2007, UPCL wrote to UERC that many industries are approaching UPCL for exemption from load shedding. As the power requirement of these industries was more than 15% of their contracted load,

UPCL sought permission of the UERC to allow exemption from load shedding to selected industries on the basis of their need. UERC vide its letter dated 08.02.2007 informed UPCL that *'it is being made clear that the Commission has not allowed any such exemptions to the approved schedule of power cuts...Commission's position is being clarified in view of the misleading impression being conveyed in your letter...and all conditions stipulated in Commission's letter dated 25.01.2007 shall be strictly adhered to'*.

(g).As the existing load shedding program was for the period January to 15.03.2007, UPCL sought UERC's approval to the load-shedding program, with exemption to certain continuous process industries, for the period from 16.03.2007 to 31.05.2007. The State Commission, stating that it has been receiving reports that UPCL is not adopting a uniform and transparent procedure while imposing the power cuts, sought details, inter-alia, about industries exempt from power cuts, which were submitted by UPCL on 30.03.2007.

(h).UERC issued a Show Cause Notice dated 13.04.2007 addressed to Shri B.M. Verma, CMD, UPCL. In the Notice, it was stated that *'you have admitted having allowed supply of electricity to some such consumers when the same was restricted or denied to others and have tried to justify your action based on the process followed by such consumers. **This plea does not stand scrutiny as you, the licensee, have never been authorized by the Commission to make exceptions....It is established from your own submission that you have***

deliberately and consciously violated both these directions and have discriminated between industrial consumers based on your own views and judgments that you have done so without any authority, in spite of Commission's categorical directions for not doing so....For the above violations of commission's specific directions, the Commission proposes to take action against you under sections 142 & 146 of the Act...You are required to show cause why the contemplated action should not be taken against you. Your reply...should reach the Commission latest by 20th April 2007. In view of the urgency and seriousness of the matter no extension of time will be allowed for whatever reasons and if you fail to file your reply within stipulated period, it will be presumed that you have nothing to say in the matter and further action will be taken as per law against you personally'.

- (i). UPCL filed its submissions before the Commission on 20.04.2007. The matter was finally disposed of by UERC on 17.08. 2007, holding the Appellant herein, personally liable for violating the provisions of the Act, the Tariff Order dated 12.07.2006 of the Commission and UERC's repeated directions to follow a non-discriminatory, transparent and objective approach. The Commission also held that the Appellant has unduly favoured some consumers and discriminated against some others. Accordingly, the Commission in exercise of the powers under Section 142 of the Act imposed a fine of Rs. 20,000 to be deposited within 10 days of the Order failing which he shall pay additional penalty of Rs. 500 per day for contravention of the order. **(Emphasis in paragraph 3 are supplied).**

4. The appellant has made following main contentions:

(a). There is no specific direction from the State Commission till date holding that all industries including the continuous process industries should necessarily be subjected to load shedding. The State Commission did not take any action against continuous supply of power to such industries for the period from 09.01.2007 till 19.01.2007. These industries were subjected to power cuts on 20.01.2007, when the power supply was given to these industries at the instance of the Appellant. Even after 20.01.2007 the State Commission has not directed power to be disconnected for such continuous process industries. So, whether the UERC is justified in holding that the directions to UPCL was to undertake load shedding in an uniform manner, thereby disconnecting electricity load to all continuous process industries and other critical establishments without any regard to their importance or nature of damage likely to be caused due to disconnection of electricity. It is the universally accepted practice followed in the electricity industry that some of the installations vital for the economy and specified continuous process industries will continue to be supplied uninterrupted power at least to maintain the minimum essential critical load; (emphasis in paragraph 3 are supplied)

(b). Whether the State Commission had passed order under Section 23 of the Electricity Act, 2003 directing that the electricity to all industries in the state had to be disconnected?

- (c). Whether under section 142 of the Electricity Act, 2003 a penalty can be imposed upon an individual officer or the licensee for violation of the directions issued by the State Commission under Section 23 of the Electricity Act, 2003 when the direction is issued by the State Commission to the licensee and more so without taking any action against the licensee?
- (d). Even assuming there is a contravention of the directions issued by the State Commission, there has to be an element of *mens rea* to impose penalty under Section 142 of the Act;
- (e). UERC has acted with bias against the Appellant. The State Commission after concluding the hearing on 24.05.2007 passed the impugned order only on 17.08.2007 (Friday) when the Appellant's tenure with UPCL was ending on 19.08.2007 (Sunday) and that not enough time was given for personal appearance and response by the Appellant citing urgency of the matter but the Commission itself took a very long time for issue of the Order.

Discussion

5. The main issue in the appeal before us is whether there was violation of directions/orders of the State Commission by the Appellant so that the Appellant can be held personally responsible for his actions taken in his capacity as Chairman and Managing Director of UPCL.

We have heard the learned counsel for the Appellant and the respondent-commission over a number of sittings and have given our thoughtful consideration.

6. Before we proceed further, we may have a look at the provisions of sections 142 of the Act, which are reproduced below:

142. 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 provisions of this Act or 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.

7. The above provisions of the Act are in the nature of penal provisions and penal provisions must be strictly construed. In the case of T. Ashok Pai v. CIT (2007 (7) SCC 162), the Supreme Court observed that

“The order imposing penalty is quasi criminal in nature and, thus burden lies on the Department to establish that the assessee had concealed his income....it is now a well-settled principle of law that the more stringent is the law, more strict construction thereof would be necessary.”

8. Unless there are specific directions from the Commission, penal action under the above provisions of the Act cannot be taken by the State Commission. From the submissions made before us, we observe that UPCL (and its predecessor UPSEB) had been giving preference in supply of uninterrupted power to industries having continuous process. In our view, the notification providing the aforesaid facility will continue to be in operation in state of Jharkhand even after division of the

erstwhile state of U.P. till such time it is altered, modified or rescinded by the UERC. We do not find any comments from the Commission on this aspect. UPCL in its letter dated 03.01.2007 had submitted names of various industries, which were exempt from the load shedding program. While the Commission discussed in the meeting called by the Commission to ascertain reasons of power cuts but the Commission in the impugned order failed to take cognizance of the said communication dated 03.01.2007 of UPCL. The Commission in its submissions before this Tribunal has stated that the content of letter dated 03.01.2007 was not a plan and what was approved by the Commission was the proposal of 08.01.2007 of UPCL.

9. We have seen UPCL letter dated 08.01.2007 which contains reference to the earlier letter dated 03.01.2007. The letter of 08.01.2007 nowhere suggests that earlier plan of 03.01.2007 has been abandoned. The letter dated 08.01.2007 also states that *'we have prepared this Load Shedding plan for the coming months to the best of our efforts for meeting the demand of the various consumers'*. These submissions of UPCL indicate uncertainty about the plan.
10. In order to answer this it is necessary to analyze the tentative comprehensive plan submitted by UPCL to UERC by its letter dated 03.01.2007 in response to the direction of UERC conveyed by its letter dated 07.12.2006 issued under Section 23 of the Act. As pointed out in para 3(a) above, the comprehensive plan asked by the UERC was required to indicate the availability of power in the deficit months (December, January, March, 2007); the projected demands in these months and the plan for scheduled rostering. Further, it specified that if required,

the scheduled rostering for load shedding was to be given area-wise, category-wise. We observe that UPCL's comprehensive plan indicated the projected availability of the power in different scenario in the deficit months viz-a-viz off peak/peak demand in the required deficit months. The plan for scheduled rostering indicated load shedding in MWs according to area-wise, category-wise for each scenario alongwith exempted areas and categories of consumers to be exempted from the load shedding. It also contained the order of priority for emergency load shedding. The proposal for load shedding appears to have been developed considering the criteria laid down by the UERC's letter dated 07.12.20.06 and for ensuring the equitable distribution of electricity to the consumers and not on the basis of equal or uniform distribution. Without commenting on the quality or adequacy of the Plan, we find it compliant to the criteria laid down by the UERC.

11. On the other hand, the schedule of load shedding for the months of January, February and March, 2007 as submitted by the UPCL vide its letter dated 08.01.2007 only contained affected areas and the time period of load shedding in which all consumers in the industrial group irrespective of categories to which they belonged, were given equal and uniform treatment. This plan, therefore, does not match the specified requirements based on which load shedding plan was to be drawn as required in UERC's letter dated 07.12.2006. Moreover, it is not in conformance with the requirement of equitable distribution specified under Section 23 of the Act as power supply to *all consumers connected to all industrial feeders emanating from 132 KV and 33 KV Sub-stations, SIDCUL Haridwar, SIDCUL Pant Nagar, Muni Ki Reti, etc.,* were included without any

differentiation for load shedding during the specified time-period. Further the Commission has by letter dated 08.02.2007 has particularly highlighted that “*the Commission has all along been emphasizing on a transparent and uniform treatment for all consumers.....*”

12. We observe that the purported letter of approval of schedule of load shedding for the period January-March, 2007 explicitly indicated “*you are hereby directed to prominently publish load shedding schedule for January-March, 2007 (as proposed in your letter and return herewith with some minor corrections) any leading newspapers of Uttranchal.....*” This indicated that this schedule of load shedding is directed only for publishing in the newspapers etc. and is to be considered, at best, an abridged versions of the comprehensive schedule submitted on 03.01.2007 as it is bereft of the details required by UERC’s letter dated 07.12.2006 seeking a comprehensive schedule. If the plan of 08.01.2007 is considered independent of the comprehensive schedule then it conveys that all the affected areas of load shedding inclusive of “*all industrial feeders emanating from 132 KVA and 33 KVA sub-stations of SIDUCL Haridwar, SIDUCL Pant Nagar, Muni Ki Reti, etc.*” would be subjected to complete and uniform load shedding (either full power is supplied or no power) for five hours daily from 10th January, to 15th March, 2007. The aforesaid approved plan lacks credibility if not read with plan submitted on 03.01.2007. We are not inclined to believe that the State Commission would not have been conscious of the fact that its aforesaid direction was not only in conflict with the notification issued by the erstwhile UPSEB but also may cause disastrous effect on certain process industries leading to adverse impact on State economy. It, therefore, gives strength to the

Appellant's version that the schedule of rostering submitted on 08.01.2007 was approved only for publishing to inform the consumers through public notice and since it meant to inform to the consumers who were subjected to load shedding, the consumers in exempted category were not included in it. However, such details could be found from the comprehensive schedule submitted on 03.01.2007. The schedule rostering submitted on 08.01.2007, therefore, appears to be an adjunct to the comprehensive schedule submitted on 03.01.2007. The published schedule of rostering approved by the Commission will receive some validity only if it is read with comprehensive schedule submitted on 03.01.2007.

13. Under the circumstances, in our opinion the letter dated 03.01.2007 should have received due consideration of the Commission as the letter contained list of exempted industries and other details necessary for full appreciation. We observe that there have been other instances of consumers (e.g. BHEL, IIT Roorkee, Dehradun Town, etc.), which had been exempted from load shedding schedule presumably considering the nature of activities undertaken by these consumers. This indicates that imposition of load shedding program is not a mechanical exercise but takes into consideration nature of the connected load, type of consumers, etc. Moreover, from the continuous correspondence between UPCL and UERC, we observe that UPCL had been bringing out the operational challenges faced by UPCL and also about exemptions given to various industries from load shedding program. Realizing a vacuum in the availability of necessary directions/regulations in the matter of load shedding programme, the Commission has perhaps, come out with a 'concept paper on power cuts' in May 2007, which,

we are informed, is yet to be finalized. In our view, unless the Commission receive comments and hold open interactions with the stake holders, the range and depth of the grievances resulting out of the load shedding specified for industrial and commercial consumers could not be estimated. To invoke penal provisions, it is essential that the liability is established in clear terms and not by adopting any circuitous route or by necessary implication. Under the circumstances, we feel that clear directions were not available to warrant invocation of penal provisions against the Appellant.

14. The Commission does not dispute that the letter dated 03.01.2007 containing the exempted industries was not filed with the State Commission. There is no reference to this letter in the impugned order also. If the Appellant is to be proceeded against for violation of any direction as mentioned above there has to be specific direction that UPCL shall not give any exemption as per the letter dated 03.01.2007. If the State Commission had given such specific direction and UPCL did not follow it, there could be a violation of the direction. In the absence of any such specific direction, it is not understandable as to what direction the Appellant can be said to have violated.

15. Further, equitable distribution of electricity does not mean supply of electricity or disconnection of electricity equally to all consumers. A sense of fairness or reasonableness is inevitably attached to equitable distribution. In this case, according to the case put forward by the Commission it is either to switch on full power supply or totally disconnect the Supply to the consumers. Such action is in itself inequitable as it is without examining the need and nature of the load

affected. The concept of equitable distribution itself includes giving preference to some consumers over the others depending upon the nature, process, importance, reasonableness, etc. It is also a well settled principle that treating unequals equally is in itself a form of discrimination. Thus treating all consumers irrespective of nature, process, etc. equally for load shedding would in itself be discriminatory and inequitable and is against the principles set out under Section 23 of the Electricity Act 2003.

16. It is an admitted fact that the industries to whom continuous supply was given by UPCL were given such supply even prior to the Appellant taking over as the Chairman and Managing Director of UPCL and also after the date on which the alleged violation was committed by the Appellant. There is a specific averment made by the Appellant which is not denied by the State Commission. It is also not the case of the State Commission that it has at any point of time enforced uniform load shedding on all consumers in the state without there being any exemption given to particular consumers based on the continuous process, their national importance, etc. In such circumstances we find that there was no occasion for the State Commission to take any penal action against a particular officer on the alleged ground of not disconnecting electricity to all consumers in the State.

17. The show cause notice appears to have been issued to the Appellant in his official capacity, as it was sent to his official address, addressed as Shri B.M. Verma, CMD, UPCL. The language of the notice indicated that the Commission desired to proceed against UPCL. The language of the notice, particularly the words that

'this plea does not stand scrutiny as you, the licensee, have never been authorized by the Commission to make exceptions' convey that alleged unauthorized act was by the licensee (UPCL) and that would mean that the proposed action is against the licensee (UPCL). This becomes more clear when in the last few lines of the notice, the Commission states that *'in view of the urgency and seriousness of the matter no extension of time will be allowed for whatever reasons and if you fail to file your reply within stipulated period, it will be presumed that you have nothing to say in the matter and further action will be taken as per law against you personally'*. This gives indication that if the reply is not filed within the stipulated time, then only, the action will be taken in the personal capacity of the Appellant. This is understandable as the Commission might have wished timely filing of the reply keeping in view the urgency of the matter. Therefore, we find that the Appellant was not informed about the allegations for which actions were proposed in his personal capacity. **(Emphasis supplied)**

18. In any case, the State Commission in the present case could not have issued a show cause notice to the Appellant in his personal capacity for the contravention alleged. The violation of the direction can be only by a person to whom the direction is issued. When the direction under Section 23 of the Electricity Act can be issued by the State Commission only to a licensee, the State Commission can proceed only against the licensee for any violation of such direction. Thus, the Commission could have issued show cause notice for violation of direction under Section 23 only to the licensee and not to other person.

19. In the case of *Hindustan Steel Ltd. v. State of Orissa* (1969 (2) SCC 627), the Supreme Court has observed that **‘an order imposing penalty for failure to carry out a statutory obligations is the result of a quasi-criminal proceeding, and the penalty will not be ordinarily be imposed’**.

20. In case of *M/s Bharjatiya Steel Industries Vs. Commission of Sales Tax* (2008) 4 *SCALE* 345, the Hon’ble Supreme Court after analyzing various previous decisions (including the decision in **SEBI Vs. Shriram Mutual Fund** cited by the learned counsel for the Commission) with regard to imposition of penalty and the requirement of *mens rea* has held as under:

“19. A distinction must also be borne in mind between a statute wher no discretion is conferred upon the adjudicatory authority and where such a discretion is conferred. Whereas in the former case the principle of mesne rea will be held to be imperative, in the latter, having regard to the purport and object thereof, it may not be held to be so.

22. *It is, therefore, difficult to accede to the contention of Mr. Banerjee that under no circumstances absence of mens rea would not be a plea for levy of penalty. An assessing authority has been conferred with a discretionary jurisdiction to levy penalty. By necessary implication, the authority may not levy penalty. If it has the discretion not to levy penalty, existence of mense rea becomes a relevant factor.”*

The decision relied upon by the learned counsel for the State Commission in the case of **Chairman, SEBI Vs. Shriram Mutual Fund (2006) 5 SCC 361**, is a case where Adjudicating Authority does not have any discretion to impose or not to impose the penalty. The penalty is attracted as soon as the contravention is established. However, under Section 142 of the Electricity Act, the State Commission having the discretion to impose or not to impose the penalty, the State Commission has to consider *mens rea* before the imposition of the penalty.

21. This Tribunal in the case of UPCL v. UERC (Appeal no. 115 of 2007) observed that *‘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 the 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’.*

22. The Commission in its show cause notice stated that *‘it is established from your own submission that you have deliberately and consciously violated’.* This indicates that in the opinion of the Commission the guilt was already established at the time of serving the notice. In the impugned order, the Commission observed that *‘Shri Verma has done all this knowingly and with impunity, betraying an unfortunate and totally unacceptable contempt of law’.* The Delhi High Court, in the case of **Court of Its Own Motion v. State [151 (2008) DLT 695 (Del., DB)]**, dealing with the contempt proceedings involving two senior advocates, observed that

*‘given the wide powers available with a Court exercising contempt jurisdiction, it cannot afford to be hypersensitive and therefore, a trivial misdemeanor would not warrant contempt action. Circumspection is all the more necessary because as observed by the Supreme Court in **Supreme Court Bar Association v. Union of India [(1998) 4 SCC 409]** the Court is in effect the jury, the judge and the hangman; while in **M.R. Parashar H. L. Sehgal** it was observed that the Court is also a prosecutor. **Anil Kumar Sarkar v. Hirak Ghosh [(2002) 4 SCC 21]** reiterates this.’*

23. The above observations emphasize the need for the Commission to prove the guilt of the Appellant after following the principles of criminal jurisprudence. The Appellant has submitted that the industries to which minimum continuous power supply without power cut was granted was prevailing much prior to the joining of the Appellant as the Chairman and Managing Director of UPCL. Such exemptions were extended from the time of UPSEB (Predecessor of UPCL in the undivided State of Uttar Pradesh). It may be possible that earlier the nature or quantum of exemption was different from that extended subsequently. However, continuation of such a practice in the absence of specific directions by the Commission, cannot lead to the conclusion of mala fide on the part of the Appellant. Rather, to us it presents a strong indication of absence of *mens rea* on the part of the Appellant of the alleged violation by extending exemption to some consumers and discriminated against some others.

24. The State Commission has not, either in the show cause notice or in the impugned order specified any particular direction that has been violated by the Appellant. On a specific query put, the learned counsel for the State Commission submitted that the communication dated 07.012.2006 was the direction that is alleged to have been violated by the Appellant. It is submitted by the learned counsel for the State Commission that the letter dated 07.12.2006 was a specific direction and the foundation for the show cause notice dated 13.04.2007 issued by the State Commission. The aforesaid contention is misconceived for the reason that the communication dated 07.12.2006 was only to direct the UPCL to provide a comprehensive plan for schedule load shedding in the state which was complied with by the UPCL on 03.01.2007. It is also relevant to point out that the

impugned order itself categorically states that no such direction was issued by the State Commission prior to 09.01.2007. In such circumstances the contention now put forward on behalf of State Commission that the direction alleged to have been violated was on 07.12.2006 is only an after thought. The learned counsel for the Commission could not explain the aforesaid mismatch.

25. UPCL's letter dated 01.02.2007 states that under the notification issued by the Government/UPSEB there were 22 continuous process industries to which the electricity was supplied without load shedding. It is also stated that it was agreed to follow the said notification of the Government/UPSEB till new rules or regulations are framed by the Commission. The learned counsel for the State Commission has stated that the Appellant has chosen only some industries out of 22 to which load shedding was not exercised under such notification thereby discriminating between such industries. Such contention of the learned counsel for the Commission is misconceived for the very fact that the said notification was issued by the erstwhile UPSEB, i.e. prior to the bifurcation of the state of Uttar Pradesh and formation of the State of Uttrakhand. In any event, the State Commission has not dealt with any such issue in the impugned order which is now sought to be orally put forward by the counsel for the State Commission. It is also not the case of either the State Commission or any industry that the Appellant had directed the disconnection of electricity to such industry despite such industry being granted exemption under UPSEB's notification.

26. It is of utmost importance to consider the nature and position of a Chairman and Managing Director in a large public utility such as UPCL. He can not obviously

have privy to each and every thing which happens in the organization. At the same time he needs to have certain discretion in the day to day affairs of the organization. When there is a complaint by a continuous processing industry that its power is likely to be disconnected causing damage to the industry, Chairman and Managing Director is expected to react immediately and take action. Not acting in time will amount to dereliction of his duties. Such discretion is inherited in the functions and capacity of the Managing Director. He cannot sit back and take position that he has to take orders from the Regulatory Commission. In such cases there can be irreparable damages caused to industry. This particularly shows in the case of glass industry where the entire process on pipeline would get affected and all material lost if the continuous process is affected. The decision taken by the Appellant on the night of the 20.01.2007 needs to be considered in the above background. However, the possible loss which could have caused by disconnecting the electricity is far greater than action which can be taken subsequently if the decision was wrong. If the Appellant's decision was wrong, it was possible for the State Commission to categorically direct the licensee to implement the load shedding without considering the supply to continuous process industry.

27. The very fact that even after 20.01.2007, the State Commission did not take any step to give specific direction for subjecting the continuous process industry to load shedding during the entire period when they were enquiring into the conduct of Appellant on 20.01.2007 also shows that the State Commission was probably unwilling to subject the continuous process industry to load shedding. In such an event proceedings against the Appellant for violation of the direction of the State

Commission does not seem appropriate. The action is to be taken when there is a violation affecting the functioning of the electricity industry in the state and not only for the reason that the State Commission feels that the Appellant acted not consistent with the orders of the State Commission

28. It is not denied by the State Commission that such industries were being given exemption from load shedding earlier or subsequent to the alleged contravention by the Appellant. The Commission has also not taken any penal action against either UPCL or the transmission licensee for affecting supply of electricity to such industries from 09.01.2007 to 20.01.2007 or for supply of electricity to such industries thereafter. The 33 KV and 132 KVA feeders from which electricity is supplied to such industries, being high tension line, are physically controlled by the transmission licensee/state load dispatch centre.

29. If it was the intention of the State Commission that electricity to all industries irrespective of nature were to be uniformly disconnected, the State Commission apart from issuing specific direction to such effect would have also taken action against the transmission licensee/State Load Dispatch Centre for giving such supply prior to the 20.01.2007 or for the period thereafter. The very fact that no such action was taken by the State Commission for the period prior or after 20.01.2007 or at any point of time thereafter establishes that the State Commission never intended that the electricity to all industries in the state was to be uniformly disconnected. It also establishes the bonafide of the understanding of the Appellant while taking decision on 20.01.2007 not to disconnect the electricity to continuous process industries. Else, these industries would not have

been included in the exempted category of the Comprehensive load shedding plan submitted by him on 03.01.2006.

30. In view of the above, we find that there was no specific order/directions of the Commission or the rules/regulations/provisions of the Act which have been violated by the Appellant and accordingly allow the Appeal and set aside the impugned Order of the State Commission. Under the circumstance, we do not find it necessary to deliberate upon the issue of biasness alleged by the Appellant before us.
31. Before parting with the judgment it would be appropriate to point out that in the interest of natural justice the Commission while invoking Section 23 of the Act to direct licensee to carry out load-shedding for regulating supply of electricity, its distribution, consumption etc. across the board in the State which had the potential of necessarily causing the consumers of different categories to suffer economic losses of varying proportion ought to have been given opportunity of being heard on the proposal of load-shedding before the same was finalized and order for its implementation given. It was more particularly so, when the facility of exemption from load shedding enjoyed by the continuous process industries in the past was intended to be withdrawn. The implementation of the approved load shedding plan by the Commission insofar as the continuous process industries are concerned is not effected till this date as the aforesaid industries continue to enjoy the exemption from load shedding in practice. This situation could have accordingly been formalized by clarifying the schedule for load shedding till such

time the plan, for which the concept paper was circulated in 2007 for comments of stake holders, is finalized.

32. This judgment disposes of the Appeal No. 156 of 2007 with no orders as to costs.

(A.A. Khan)
Technical Member

Dated : 5th August, 2009

INDEX: Reportable / Non-reportable