

Judgment

Per Justice P.S. Datta, Judicial Member

1. The Appellant in appeal No. 07/2008 seeks to have a review under Section 120 of the Electricity Act, 2003 of the order of this Tribunal dated 20/11/2009 on the grounds as will be evident in the succeeding paragraphs.

2. The Respondent No. 1, Kerala State Electricity Board filed two truing up Petitions being No. 20/2006 and 22/2006 dated 20.6.2006 and 19/10/2006 respectively before the Respondent No. 2 herein Kerala State Electricity Regulatory Commission. In the Petition No. 20/2006 Respondent No. 1 prayed for truing up of all expenses and revenues in terms of the annual statement of accounts for the year 2003-04 to bridge the gap in revenue and expenses amounting to Rs.450.97 crores, while in the 2nd truing up Petition relating to the year 2004-05, the truing up of was in respect of bridging the gap of Rs. 46.31 crores leading to a total gap of Rs. 497.28 crores. The Commission by order dated 24.11.2007 disposed of the two truing up petitions upon hearing the Respondent No. 1 and the present Appellant-Petitioner who had filed the objections before the Commission.

3. The commission upon hearing the parties disposed of the two truing up petitions holding that an amount of Rs. 360.06 crores could be recognized as the total revenue requirement gap for the year 2003-04 and 2004-05 and the same should be carried in the ARR and ERC of the Board for the year 2007-08.

4. Against the said order, the Appellant Petitioner preferred an Appeal before this Tribunal, being Appeal No. 7/2008 which was dismissed on

20.11.2009 observing *inter-alia* that the same is without substance with a cost of Rs. 5 lacs payable to Respondent No. 1(wrongly mentioned as respondent No. 2 in the order).

5. The Appellant- Petitioner in appeal before this Tribunal raised number of points, namely, that the Commission did not carry out prudence check taking into consideration several factors such as efficiency, economical usage of the resources, that it did not follow the principle of natural justice in as much as the requisite information were not furnished before the Commission by the Respondent No.1, that the Commission did not make the cost benefit assessment before allowing premium paid on swapping of loans, that it was not right in double counting of the interest cost, that the Commission did not consider the interest costs due to capital investment or efficiency in the investment and that it did not consider that carrying cost of delay in subsidy payments were to be borne by the Government. Respondent No. 2 filed a reply to the appeal of the Appellant Petitioner and after hearing the parties, this Tribunal examined the following issues:

- A. Is the Commission right in not carrying out the prudence check and in haste approving the 2003-04 and 04-05 Truing up order to ensure that surplus is not passed to consumers?
- B. Is the Commission right in assuming government subsidy without any specific request from the State Government and not approving tariffs without considering subsidies?
- C. Is the Commission right in including the loss or cost on account of non-payment of subsidies to subsidizing consumers?
- D. Is the Commission right in double counting the interest cost?

- E. Is the Commission right in not analyzing the impact of delay or non-payment of government subsidies so as to give appropriate treatment?
- F. Is the Commission right in passing the carrying cost of delay or non-payment of subsidy payments indirectly to subsidizing consumers by including in the expenditure in true-up order?
- G. Is the Commission right in not analyzing the interest costs before passing implicit savings as incentive to the Licensee?

6. On the first point, the Tribunal upon discussion held that the ground of violation of natural justice was not tenable and that the Commission negated the contentions and carried out the prudence check in haste or that the order has the effect of depriving the consumers of surplus. It was observed that there was nothing on record from which it could be said that the Respondent No. 1 was in surplus and in fact, the Respondent No. 1 had a net revenue gap which was required to be recovered through revenue. It was further observed that the Commission allowed the true-up to the Respondent No. 1 on the basis of audited financial statements in respect of which no objection was put before the Commission by the Appellant Petitioner and it was not that the true-up was allowed in the manner as was desired by Respondent No.1 but it was critically examined and the figure of true-up was reduced to sum of Rs.360.60 Crores to be carried in the ARR and ERC of the Respondent No. 1 for the year 2007-08.

7. With respect to the 2nd point whether the Commission's alleged assumption of Government subsidy caused any prejudice to the appellant, it was held that assumption had not caused any prejudice to the appellant. The contention of the appellant that the entire sum of Rs.296 crores should be

recovered from the Government by way of subsidy was not accepted by the Tribunal, and held that the Commission rightly recommended that out of the said amount of Rs.296 crores, a sum of Rs.200 Crores could be adjusted against the duty payable to the Government and the balance of Rs.96 crores be recovered through tariff. The plea of the appellant was contended to be without any force since the Electricity Act, 2003 does not give the Commission any authority to demand Government subsidy

8. The tribunal with respect to the third point that the Commission was not right in including the loss or costs on account of non payment of subsidies to the subsidized consumers held that the utility was not entitled to government subsidy as a matter of right because the utility has to meet its requirement of fund by borrowing and accordingly, the utility is entitled to carrying cost which is not the same as the cost for non payment of subsidies.

9. With respect to the 4th point, argument was advanced that the Commission was not justified in double counting the interest cost. The Tribunal held that appellant could not show as to how there could have been really double counting on account of interest cost. On the other hand, the utility had a grievance that the interest and financial charges were not fully recovered through revenue. The contention of the appellant-petitioner could not be upheld by the Tribunal on the ground that the accuracy of the account could not be questioned by the appellant. Furthermore, the Board made efforts to reduce the interest cost by swapping of high loans for cheaper ones on account of which the Commission allowed the premium of Rs. 31.90 Crores. The Respondent contended that the Commission has not admitted the interest on borrowing to meet the revenue deficit and has allowed an amount of Rs.679.26 Crores only

towards interest and financial charges. The Commission has partly allowed the interest. Thus, there was no double counting.

10. As regards the point No.5, to the effect the Commission was not right in analyzing the impact on delay of non-payment of government subsidy, it was held by the Tribunal that the point has no merit for consideration because the respondents are without any jurisdiction to demand government subsidy. Similarly, the 6th point that Commission is not right for passing the carrying cost of delay or non payment of subsidy payments indirectly to subsidizing consumers by including in the expenditure in trueing order was held to be without any merit.

11. On the last issue that the Commission was not right in not analyzing the interest costs before passing the implicit savings as incentive to the licensee, it was held that Respondent No.1 did not have any revenue surplus and the swapping of loan resulted in annual saving of Rs.35 crores. The Tribunal held that the point does not lead to any destination because all loan liabilities are reflected in the ARR and the interest element in the subsequent ARR will be lower and the benefit will go to consumers.

12. The present review petition filed on 18.1.2010 raised the following points:

- a. The appellant's contention that the Commission did not carry out the prudence check was not considered in order dated 20.11.2009.
- b. The issue of interest cost implications on account of government subsidy was specifically raised but was not considered.

- c. The Tribunal missed to take cognizance of the fact that the Commission in its tariff order recognized that the subsidy due from the government is serious for the Board and there has been a steady increase of debt burden on KSEB but the impact of cost on non payment of government subsidy were not at all considered. The point that the Commission should review the capital investment was also put before the Tribunal which, according to the petitioner, did not find berth in the order of the Tribunal.
- d. The contention that the Commission should have reduced the interest cost with respect to additional borrowing beyond the capital project was not considered by the Tribunal.
- e. The aspect of the interest cost in the year 2004-05 has not been considered by the Tribunal

13. Before proceeding to consider the application for review it must be said at the outset that we must not depart from the well settled principle of review. Review of judgment or order against which an appeal lies but no appeal has been preferred is only permissible when some important or new matter is produced but which could not be produced earlier despite diligence or there is some mistake or error apparent on the face of the record. Unquestionably, the judgment and order which is sought to be reviewed is an appealable order and the learned counsel for the Appellant/Petitioner submitted that though an appeal was drafted to be presented before the Supreme Court under Section 125 of the

Act the Petitioner has chosen to apply for review on the ground that there has been an error apparent on the face of the record and that the Tribunal while rendering the decision on 20th November, 2009 did not consider or articulate the grounds that were advanced at the time of hearing of the Appeal No. 7 of 2008. Though the HT & EHT Consumers Association was not a party to the Appeal nor is it so in the present Review Application Mr. Amarjit Singh Bedi appeared for the said Association and made his submissions.

14. The learned counsel for the Respondent No. 1 and Respondent No. 2 submitted that ex-facie the appeal is not maintainable and the only intention of the Appellant/Petitioner is to kill time so as to prevent any possible revision of tariff in future. It has been submitted by the learned counsel for the two Respondents that since the year of 2002 there has not been any increase in the tariff and in terms of the law the present Appellant/Petitioner was actually having no locus to prefer the Appeal No. 7 of 2008 or to prefer a review of the order as said above because the Appellant does not suffer any tariff order. It has been submitted by the learned counsel for the Respondents that the Appellant/Petitioner is a habitual litigator litigating in different Courts and at the threshold of the Review Application/Petition it deserves rejection

particularly, when there has been in fact no error apparent on the face of the record.

15. The contention of the learned counsel for the Appellant is that it was agitated in no uncertain terms that the Commission did not have a prudence check especially with reference to the capital investment, and figures exhibited before the Commission, if compared with the corresponding figures for the year 2003-04, would reveal that they are full of inconsistencies. The Tribunal unfortunately missed to note the discrepancies, which according to the counsel, are apparent on the face of the record. It is submitted that the Board in the truing up petitions stated that the licensee incurred only Rs. 461.92 crores for capital investments and not Rs. 500 crores as approved by the Commission so that the actual capital investment is Rs. 357 crores and instead of repaying Rs. 839.82 crores they repaid Rs. 1396.46 crores in respect of which the source of funds was not disclosed. Thus prudence check was not undertaken by the Commission with respect to the capital investment and the Commission should have disallowed the interest cost of borrowings over and above the actual investments. It was contended that it was only after the completion of the tariff for the year 2007-08 that the two truing up petitions were filed with the oblique motive of depriving the consumers of benefits of passing to them the surplus for

the year 2007-08. It is contended that the issue of interest cost implication on account of government subsidy has been specifically raised but not considered and the Appellant/Petitioner made specific mention that Commission has not analyzed the impact of delay i.e. receivables from the Government or non-payment of Government subsidies on the interest costs and the Tribunal has not dealt with the matter. It is contended that the Tribunal jumbled up issue Nos. 2, 5 and 6 together although issue Nos. 5 and 6 are not the same as issue No 2.

16. Having heard the learned counsel for the parties we find that the points canvassed before the Tribunal at the time of hearing of the Appeal have been re-canvassed in the guise of a review which is not permissible. It is fair enough to say at the threshold of the discussion that not a single new or any important point of fact or evidence has been introduced in the Review Petition so that it does not merit any consideration. The law is well settled that wrong appreciation of facts, if any, does not call for a review. In the decision in *Passion Devi V. Sumitri Devi*, reported in (1997) 2 SCC 715, it has been held that an error which is not self evident and has to be detected by a process of reasoning can hardly be an error apparent on the face of the record, thus, not justifying the Courts' exercise of the power of review. The question of natural

justice has been given good bye because it could not be established that the Appellant/Petitioner was denied any such opportunity.

17. It was agitated at the time of hearing of the appeal and has also been agitated here in this Review Application/Petition that the Commission asked the Board to file relevant data which the Board could not do, and if the relevant data were given the Commission would have an opportunity to examine the same meticulously. We find no substance in the argument primarily because of the fact that what was presented before the Commission by the Board was audited statements of accounts on the basis of which the Commission arrived at the figure of Rs. 360.06 as net gap to be passed on to the consumers after rejection of many other arguments by the Board.

18. The contentions that the two truing up Petitions were filed after the hearing the tariff petition with the sole object of depriving the consumers of the advantage of surplus is bereft of substance on two folds counts, namely, that hearing of the two truing up petitions after hearing of the tariff petition was advantageous to the consumers and secondly because it could not be established that the Board was having any surplus amount or that there was no necessity to

make any order of truing up. The Commission has decided the ARR and ERC strictly in terms of the Electricity Act, 2003 and did not depart therefrom.

19. The Appellant/Petitioner was vocal to agitate that capital investments were not critically examined. It has been contended, as said above, that the Board did not give any disclosure of the source of fund whereby they could repay Rs. 1396.46 crores; and the licensee incurred only Rs. 461.92 crores as capital investments instead of Rs. 500 crores as approved by the Commission. It can be said that in the course of hearing before the Commission the audited statement of accounts was furnished by the Board which was open to inspection and examination by all the objectors but the Tribunal held in its judgment that during hearing of the appeal it could not be shown that the audited statements of accounts were found suffering from defects. So as far as this Review Petition is concerned, we are to observe that no iota of material completely new could be produced before us so as to enable us to hold that there has been any error apparent on the face of the record.

20. Learned counsel repeatedly submitted that there was double accounting of interest. Suffice it to say, the point has been dealt with by the Tribunal's order and it has been held that there has been no double counting of interest. It

has been observed by this Tribunal in the order that the Respondent No. 1 made efforts to reduce the interest costs by swapping the high cost loans for cheaper one on account of which the Commission allowed a premium of Rs. 31.9 crores. Since this is a Petition for review it is not necessary for us to re-examine the issue on merit. The Commission according to the Respondent No. 1 did not admit the interest by borrowing to meet the revenue deficit and the interest on borrowings to meet the regulatory assets and allowed only an amount of Rs. 679.26 crores towards interest and financial charges; as such there was no evidence of double counting of interest.

21. The issue Nos. 2, 5 and 6 were considered by the Tribunal in its order dated 20th November, 2009. In fact they were interlinked with each other. In the Appeal before Tribunal it was argued more than once that the revenue deficit in its entirety must come from the Government by way of subsidy. The Tribunal dealt with the issue threadbare and held that the plea of the Appellant was without any force and that the Commission rightly held that a sum of Rs. 200 crores can be adjusted against the duty payable by the Board to the Government and the balance Rs. 96 crores be recovered through tariff, and though the Commission assumed subsidy from the Government it had no authority to demand so. The utility was not entitled as a matter of right to the

subsidy; and to recover the revenue gap it has to meet its required funds by borrowing and it was entitled to carrying costs which is not same as the one for non-payment of subsidy.

22. The argument of the learned counsel of the Appellant/Petitioner that the Commission should have disallowed certain more interest expenses beyond the margin between Rs. 726.30 crores and Rs. 725.60 crores cannot be entertained in this Review Petition, it being a question of fact which was considered and discussed in the judgment under review. In the Review Petition the Petitioner/Appellant failed to establish that there could have been a net surplus and the Board could be prohibited from making any approach for tariff revision.

23. The Commission considered costs savings due to swapping of loans and took a conscious decision to amortize the premium paid for swapping in a single year so that consumers do not suffer and the Commission allowed carrying cost of 8% for one year. The commission did not provide any carrying cost on account of subsidy which the Commission adjusted against the duty payable to the Government.

24. The matter of the fact is that the Appellant / Petitioner cannot be said to have suffered any set back by the decision of the Tribunal in appeal No. 7 of 2008 and having considered all the aspects we do not find any point of review. We thus dismiss the review petition but without any order as to costs.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Dated : 3rd June, 2010

ZA/PK