

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the Matter of:

Petition filed by Uttarakhand Power Corporation Limited seeking review of the Order dated April 10, 2014 passed by the Commission determining the tariff of Vanala SHP having capacity of 15 MW.

In the matter of:

Uttarakhand Power Corporation Ltd. ...Petitioner

AND

In the matter of:

M/s. Him Urja Pvt. Ltd. ...Respondent

CORAM

Shri C.S. Sharma Member-Chairman

Shri K.P. Singh Member

Date of Hearing: August 19, 2014

Date of Order: September 09, 2014

This Order relates to the review petition filed by Uttarakhand Power Corporation Limited (hereinafter referred to as "the Petitioner" or "Distribution Licensee" or "UPCL") against the Commission's Order 10.04.2014 determining the tariff of M/s. Him Urja Pvt. Ltd.'s Vanala SHP having an installed capacity of 15 MW (hereinafter referred to as "the Respondent" or "the generator").

1. Background and Procedural History

- 1.1. M/s Him Urja Pvt. Ltd. had set up a 15 MW Vanala Small Hydro Project at District Chamoli in the State of Uttarakhand which was commissioned on 05.12.2009 and it had approached the Commission for determination of tariff of the aforesaid SHP vide its application dated 09.03.2010.
- 1.2. The Commission after considering all the submissions made by the generator as well as UPCL in the matter issued an order on 10.04.2014 whereby the Commission determined the project specific tariff for the SHP, in accordance with UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) Regulations 2010 (hereinafter referred to as "UERC RE Tariff Regulations, 2010"), for sale of power to the distribution licensee in the State.
- 1.3. Subsequently, UPCL filed a review petition dated 08.07.2014 against the Commission's order dated 10.04.2014 on the following grounds:
 - 1.3.1 The Order violated the specific provisions of the UERC (Tariff and other terms for Supply of Electricity from Renewable Energy Sources and Non Fossil fuel based Co-Generating Stations) Regulations, 2010 (RE Regulations, 2010).
 - 1.3.2 The Commission approved increase in capital cost of over capacity designed by the respondent without applying due prudence.
 - 1.3.3 The Commission approved full amount of interest during Construction (IDC) and pre operative expenses claimed by the respondent.
 - 1.3.4 The Commission approved Operative and maintenance (O&M) expenses of the respondent power plant on normative basis without considering the actual O&M expenses.
- 1.4. Meanwhile, M/s. Him Urja Pvt. Ltd. filed an Appeal against the Order dated 10.04.2014 of the Commission before Hon'ble ATE on 30.06.2014 , i.e. even before the filing of the review Petition by UPCL and the appeal was admitted by the Hon'ble ATE on 11.08.2014.

1.5. On the review petition filed by UPCL, the Commission held a hearing on admissibility of the Review Petition on 19.08.2014 wherein, the Commission heard the petitioner and the respondent and directed them for making written submissions on whether or not the Commission can proceed with this Petition in view of the pending appeal filed in the Hon'ble ATE by the respondent.

2. Submissions by Parties on Admissibility

2.1. Petitioner's Submissions

2.1.1 The petitioner contended that the review petition can be heard and taken up for further proceedings even if it is subsequent to the filing of the appeal by the respondent in the Hon'ble ATE as the grounds for review are not common to those of the Appeal. The scope of appeal filed by the Respondent in Hon'ble ATE is completely different from the scope of review filed by the petitioner.

2.1.2 The Petitioner further stated as follows:

"the filing of appeal by the respondent does not in any manner affect the maintainability of the review petition".

In this context, reference was made by the Petitioner to Order XLVII rule 1(2) of the Code of Civil Procedure, 1908, which provides as follows:

" 1. Application for review of judgment:

(1)

(2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review..."

2.1.3 In light of the above, the Petitioner contended that it was necessary to appreciate the scope of appeal filed by the respondent which was entirely different from the

scope of the present review petition filed before the Commission. The petitioner, further, contended that the review petition, inter alia, raises issues, which are in the nature of error apparent on the face of record. In support of its contention, the petitioner also cited the following judgments of Higher Courts as references:

- BehariLal and Anr. vs. M.M. GobardhanLal and Ors. AIR 1948 All 353
- Velegapudi Savitramma vs. Kambhampati Satyanarayanamurthy AIR1960 AP 81.
- Thungabhadra Industries Ltd. vs. The Government of Andhra Pradesh, AIR1964SC1372

2.2. Respondent's Submissions

2.2.1 On maintainability of the review petition filed by the petitioner, the Respondent referred to Order 47 Rule 1 of Code of Civil Procedure which states as follows:

"a judgment may be open to review inter alia if there is a mistake or error apparent on the face of record."

2.2.2 Further the respondent contended as under:

"In exercise of O47:R1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise.""

2.2.3 The respondent also referred to Order 47(1)(a) which clearly states as follows:

"(I) Application for review of judgment - Any person considering himself aggrieved:

(a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred",

2.2.4 The Respondent has also cited the following judgments of Higher Courts to support its contentions:

- Kunhayammed&Ors. Vs. State of Kerela and Anr., AIR 2000 SC 2587

- Thungabhadra industries Ltd. Vs. The Government of A.P., [1964]5 SCR 174
- Hari Singh vs. Seth, AIR 1996 Delhi 21
- Union of India vs. Sandur Manganese & Iron Ores Ltd. (2003)8SCC337
- Parsion Devi &ors. Vs. Sumitri Devi (1997)8SCC715 (SCC p.719, para9) ;
- Kamleshverma vs. Mayawati and Ors. (2013) 8 SCC 320.

Relying on the above decisions, the Respondent stated that the present petition was not maintainable and had therefore, requested the Commission to dismiss the Petition with costs.

3. Commission's View & Analysis

3.1 Order 47 of the Civil Procedure Code (CPC), lays down the provisions for review of an Order which are reproduced hereunder:

“Application for review of judgment.- (1) Any person considering himself aggrieved, –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(C) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation : The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

Hence, from the reading of Rule 1(a) of Order 47, it is amply clear that any person considering himself aggrieved by a decree or order against which an appeal is allowed, can prefer a review provided no appeal had already been preferred on same or similar grounds.

3.2 The Respondent in its Appeal before the Hon'ble ATE has raised the issue of disallowance of capital cost by the Commission amongst other issues. The issue of capital cost and resultant costs has also been agitated upon by the Petitioner in this review petition. Hence, the issue pending before the Hon'ble ATE is on grounds common to that agitated by UPCL. Accordingly, as per Rule 2 Order 47 as reproduced above, since the ground of appeal before the Hon'ble ATE is similar to that agitated by UPCL, the review on the same cannot be taken up for processing.

3.3 Further, in the present case an appeal had already been preferred on 30.06.2014 before Hon'ble ATE which was admitted on 11.08.2014. Subsequent to the filing of the appeal, an application for review was filed before the Commission on 08.07.2014. Therefore, the petition cannot be entertained by the Commission in accordance with Rule 1(a) Order 47 of CPC already reproduced above. In this regard, Hon'ble Supreme Court in its Judgment on Kunhayammed & Ors v. State of Kerela and Ors; AIR 2000 SC 2587 reiterating its earlier view in ThunughaBhatra industries Ltd v. Government of A.P. [1964]5 SCR174, stated as follows:

"the crucial date for determining whether or not the terms of order 47 rule 1(a) CPC are satisfied, is the date when the review is filed. If on that date no appeal has been filed, it is competent for the court hearing the petition for review to dispose of the application on the merit notwithstanding the pendency of the appeal. However, if the appeal itself is disposed off pending disposal of the review, subject only to this, that if before the application for

review has finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition will come to an end."

- 3.4 In the matter of Hari Singh vs. S. Seth, AIR 1996 Delhi 21, the Hon'ble Delhi High Court has taken the same view of the Hon'ble Supreme Court and held as under: *"Under Order 47 rule 1(a) of the CPC, an application for review of a judgment lies by any person aggrieved by a decree or order "from which an appeal is allowed but from which no appeal has been preferred."*

Accordingly, on an appeal having been preferred by the respondent before the Hon'ble ATE prior to the filing of the review petition by the petitioner and also prior to the date when the review petitioner came up for hearing before the Commission, the Commission cannot, entertain the review petition as provided for by Order 47: Rule 1(1) of the CPC. More so, as the issue agitated in review being common to those of Appeal.

- 3.5 The Commission is of the view that since an appeal has been preferred in the Hon'ble ATE, the Commission shall not go into the merits of the review petition filed by the petitioner and will limit itself in enquiring whether or not the review can be heard. As already discussed in Para 3.2 above, the issues raised by the Petitioner in its Review Petition and that by the Appellant in its Appeal are common except for the issue of Limitation and tariff determination by the Commission, which are being dealt in the subsequent Paragraphs.

- 3.6 On the issue of Limitation and tariff determination, UPCL has submitted that Vanala SHP was commissioned on 05.12.2009 and it had filed a petition seeking determination of "Project Specific Tariff" on 09.03.2010 under Regulation 33 read with regulation 49 of the RE Regulations, 2008. Since, there was no Power Purchase Agreement between the respondent and the petitioner and, hence, there was no legal consequence to the petition filed for determination of project specific tariff. UPCL

further submitted that the RE Regulations, 2010 were notified on 06.07.2010 and were made effective from 01.07.2010 for projects commissioned on or after 01.04.2009, and hence, the supplementary Petition filed by the generator on 22.11.2012 was beyond the period prescribed in the RE Regulations, 2010 and has, accordingly, contended that the observations of the Commission with regard to keeping the Petition filed by M/s Him Urja Pvt. Ltd. for Vanala SHP on 09.03.2010, in abeyance was an error apparent on the face of the record.

- 3.7 Consequent to the filing of the supplementary Petition dated 22/11/2012 by the generator before the Commission, the Commission vide its letter dated 04.12.2012 directed UPCL to enter into a long term PPA with the Respondent within three days and to pay it a provisional tariff of Rs. 3.50/kWh after execution of the long term PPA, pending determination of project specific tariff of the Respondent's SHP. The Commission taking note of the non-compliance of its directions by UPCL, directed UPCL vide its Order dated 21.12.2012 to execute the PPA on the same day itself and also to release the pending payments to the Respondent within 3 days. Accordingly, UPCL entered into a long term PPA with the generator on 21.12.2012 in which the rate of sale of power by the generator was stipulated to be the project specific tariff to be determined by the Commission under RE Regulations, 2010.

UPCL preferred a review Petition against the Commission's Order dated 21.12.2012 stating that the tariff should not be applicable prior to the execution of the PPA. However, the Commission dismissed the Review Petition as devoid of any merit vide its Order dated January 08, 2013.

Furthermore, UPCL while responding to the Petition seeking tariff determination filed by M/s Him Urja Pvt. Ltd., had given its submissions vide letter dated 19.03.2013 wherein it did not raise the issue of Petition being bound by any limitation or being time barred with respect to project specific tariff and confined its submissions to the tariff principles including the normative parameters as specified by the Commission in RE Regulations, 2010 and used by the generator in its Petition.

Thus, as is evident from the above, UPCL had agitated this issue before the Commission and their contention was not accepted by the Commission. In fact, it even went ahead and signed a long term PPA with the Respondent's plant wherein the tariff was stipulated to be the project specific tariff as determined by the Commission in accordance with RE Regulations, 2010. UPCL in its review petition submitted as under:

3.8 Notwithstanding the above stand of the petitioner in the above tariff proceeding conducted earlier by the Commission, UPCL in its petition had raised the following issues :

- M/s Him Urja Pvt. Ltd. had filed a petition seeking determination of "Project Specific Tariff" on 09.03.2010 under the RE Regulations, 2008 and since, there was no Power Purchase Agreement between the respondent and the petitioner, hence, there was no legal consequence to the petition filed for determination of project specific tariff.
- UPCL further submitted that the RE Regulations, 2010 were notified on 06.07.2010 and were made effective from 01.07.2010 for projects commissioned on or after 01.04.2009, and hence, the supplementary Petition filed by the generator on 22.11.2012 was beyond the period prescribed in the RE Regulations, 2010. Hence, these Regulations were not applicable on the Respondent and the Commission erred in determining the project specific tariff is unwarranted.
- UPCL has submitted that Vanala SHP was commissioned on 05.12.2009 and it had filed a petition seeking determination of "Project Specific Tariff" on 09.03.2010 under Regulation 33 read with regulation 49 of the RE Regulations, 2008. Since, there was no Power Purchase Agreement between the respondent and the petitioner and, hence, there was no legal consequence to the petition filed for determination of project specific tariff. UPCL further submitted that

the RE Regulations, 2010 were notified on 06.07.2010 and were made effective from 01.07.2010 for projects commissioned on or after 01.04.2009, and hence, the supplementary Petition filed by the generator on 22.11.2012 was beyond the period prescribed in the RE Regulations, 2010 therefore time-barred.

3.9 The Petitioner, prior to tariff determination proceedings, had raised the above mentioned issues on limitation and tariff determination. The Commission had decided these issues after hearing both the Petitioner and the Respondent and hence, the issues mentioned above and raised by UPCL cannot be construed as an error. If the Petitioner was aggrieved by the question of law it should have preferred to go in an Appeal. In fact, the Review Petition filed by UPCL appears to be an appeal in disguise and can in no way be construed as an error and hence, this issue has no merit and cannot be sustained.

3.10 The Commission refers to Hon'ble Supreme Court's Judgment in the case of Parison Devi & ors. Vs. Sumitri Devi (1997)8SCC715, wherein the Hon'ble Apex Court held as follows:

"It has been held time and again that that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view.

Under Order 47 Rule 1 CPC a judgment may be open to review inter-alia if there is a mistake or error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected." A review petition, it must be remembered has a limited purpose and can not be allowed to be "an appeal in disguise."

(Emphasis added)

3.11 The Commission further refers to another judgment of, the Hon'ble Supreme Court in Kamlesh Verma vs. Mayawati and Ors (2013) 8 SCC 320 wherein the Hon'ble Apex Court has decided that:

“Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 of CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction.”

(Emphasis added)

3.12 To summarize :

- a) As the issue of Capital Cost allowed in the impugned order is the subject matter of Appeal pending in Hon'ble ATE, the Commission declines to hear the Review on the same matter during the pendency of the Appeal. More so as it would create multiplicity of suits.
- b) The other issues relating to limitation and determination of project specific tariff have already been decided long back by the Commission and are not valid grounds for review.

3.13 Accordingly, the Review Petition filed by the Petitioner is not being proceeded as of now. If any issue relating to Capital Cost raised in the review petition survive after the appeal is disposed off by the Hon'ble ATE, the petitioner would be at liberty to approach the Commission for redressal of the same.

3.14 Ordered Accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member-Chairman