

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Misc. Application No. 102 of 2018

In the matter of:

Review Petition filed by M/s Bhilangana Hydro Power Ltd. under section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 54 of UERC (Conduct of Business) Regulations, 2014 seeking review of the Order dated 22.11.2018 passed by the Commission in Petition No. 45 of 2018 in the matter of late Payment Surcharge against payment of Transmission Charges for the alleged dedicated Transmission Network.

And

In the matter of:

M/s Bhilangana Hydro Power Limited

..... Petitioner

And

In the matter of:

Power Transmission Corporation of Uttarakhand Ltd. (PTCUL)

.....Respondent

CORAM

Shri Subhash Kumar Chairman

Date of Hearing: December 28, 2018

Date of Order: January 24, 2019

This Order relates to the Review Petition filed by M/s Bhilangana Hydro Power Ltd. (hereinafter referred to as "Petitioner") seeking review of the Order dated 22.11.2018 passed by the Commission in Petition No. 45 of 2018 in the matter of dispute between the Petitioner and Power Transmission Corporation of Uttarakhand (hereinafter referred to as the 'Respondent' or 'PTCUL') regarding Late Payment Surcharge against payment of Transmission Charges for the alleged dedicated Transmission Network, under section 94(1) (f) of the Electricity Act, 2003 read with Regulation 54 of UERC (Conduct of Business) Regulations, 2014.

1. Background

- 1.1. M/s Bhilangana Hydro Power Ltd. has filed the Review Petition vide letter dated 15.12.2018, before the Commission against the Order dated 22.11.2018 in Petition No. 45 of 2018.
- 1.2. In the said Petition, the Petitioner has sought limited review of the said order i.e. the Petitioner has requested review of para 26 of the aforesaid Order wherein the Commission has made the Petitioner liable for payment of all charges including Transmission Charges and losses along with Late Payment Surcharge to the Respondent for use of its intra-State transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line during the period when the Petitioner was supplying power to the distribution licensee i.e. UPCL through a trader i.e. TPTCL.
- 1.3. The Petitioner in its petition has prayed the following:
 - a. Allow review of the Order dated 22.11.2018
 - b. Hold and direct that no charges including transmission charges are payable when the Petitioner is supplying power to UPCL (through Tata Power Trading Company Ltd.)
 - c. Pass such further order(s) as it may deem just, fit and proper in the facts and circumstances of the case.
- 1.4. On the aforesaid date of hearing for Admissibility, both parties were present and the counsels of the parties vehemently argued on each side reiterating the submissions made by them earlier.

2. Petitioner's Submissions

- 2.1. The Petitioner submitted that the Commission vide para 26 of the order under review has erroneously made the Petitioner, a renewable energy generator, liable for payment of all charges including Transmission Charges and losses along with Late Payment Surcharge, to the Respondent i.e. PTCUL, a transmission licensee in the State, during the period when it was supplying power to UPCL through TPTCL, which has resulted in violation of express provision of Regulation 36(1), 38(1) and 40(1) of UERC (Tariff and other Terms for Supply of Electricity from Renewable

Energy Sources and non-fossil; fuel based Co-generating Stations) Regulations, 2010, 2013 and presently 2018 (Hereinafter referred to as “UERC RE Regulations”) respectively.

In continuation to this, the Petitioner has submitted that the Petitioner is entitled to claim exemption from payment of aforesaid charges as per the “UERC RE Regulations” and the Commission has erroneously failed to apply the said Regulations on the Review Petitioner.

- 2.2. Further, the Petitioner submitted that the Petitioner being aggrieved by para 26 of the aforesaid Commission’s Order dated 22.11.2018 has filed the present Petition seeking limited review on the ground of non-application of the first proviso of “UERC RE Regulations” which has resulted in error apparent on the face of the record.
- 2.3. With regard to sale of power to UPCL, the Petitioner submitted that on 26.12.2011 and 29.05.2012, Power Purchase Agreement (PPA) were entered into between the Petitioner and UPCL wherein Petitioner agreed to sell and UPCL agreed to purchase power from 20.11.2011 to 29.02.2012 and from 01.03.2012 to 30.04.2012. Petitioner further stated that, in addition to the above, it has also been supplying power to UPCL through Tata Power Trading Company, an inter-State power trader. According to the Petitioner, even when it was supplying power to UPCL through a trader, intra-state transmission network was being utilised therefore, it is liable to be exempted from paying transmission charges in accordance with the aforesaid provisions of the “UERC RE Regulations.
- 2.4. Elaborating upon the aforesaid Regulations, the Petitioner submitted that the Regulations merely provides for a test whether the intra-state transmission network is being utilised (a) for carrying the electricity generated by the RE Based Generating Stations (b) for sale to Distribution Licensee or to local rural grid situated (c) within the State of Uttarakhand. The aforesaid Regulation does not differentiate between whether the electricity is being carried or sold directly by the generator or through a Trading Licensee i.e. TPTCL herein. As per UERC RE Regulations, transmission and wheeling charges are payable by renewable energy generators only for supply of electricity to other than local grid/State Distribution Licensee.

- 2.5. Supplementing the above, the Petitioner submitted that the Commission vide its impugned Order has discriminated against the supply of power by the Petitioner to UPCL through a trader and wrongly made it liable to pay transmission charges as above in contravention to the aforesaid provisions of “UERC RE Regulations”.
- 2.6. Further, the Petitioner stated that the Commission vide its Order has failed to provide a speaking order or a reasoned order on the issue of liability of Review Petitioner to pay all charges including transmission as above to the Respondent Licensee.
- 2.7. On the grounds and essentials of Review, the Petitioner has submitted that it is a settled principle of law that an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of record but also if the same is necessitated on account of some mistake or for any other sufficient reason. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words ‘sufficient reason’ in Order 47, Rule 1 of the Civil Procedure Code is wide enough to include a misconception of law or fact by a Court to prevent the miscarriage of justice. An application for review maybe necessitated by way of invoking the doctrine “actus curae neminem gravabit”.
- 2.8. In continuation to above, the Petitioner has submitted that the Commission has erroneously assumed that in order to avail the exemption, the generator has to directly sale the electricity to UPCL. This misconception of law has resulted in defeating the objective of UERC RE Regulations. As this stage, if the Commission finds that the error pointed out in the review petition is under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact does not exist and its perpetration shall result in miscarriage of justice, in that case, it is settled principle of law that nothing would preclude the Court from rectifying the error and propagate the justice to the affected party.

3. Respondent’s Submissions

- 3.1. The Respondent submitted that the present Petition in not in accordance with Form 1 of Regulation 10 of the UERC (Conduct of Business) Regulations, 2014 and is liable

to be rejected and does not fall under section 94 (1) (f) of the Electricity Act, 2003 & Regulation 54 of UERC (Conduct of Business) Regulations, 2014 .

- 3.2. With regard to the grounds of Review, the Respondent submitted that the Petitioner in its Petition has not given any grounds of review permissible under law for reviewing an order and has failed to show any error apparent on the face of record. The contention of the Petitioner in the Petition does not qualify as error apparent on the face of the record as for the purpose of ascertaining the error apparent on the face of the record, application of mind should not be required, while Petitioner himself has claimed that Commission has committed misconception /error of law.
- 3.3. Further, the Respondent submitted that the Petitioner is not seeking review of the order but is putting up justifications against findings of the Commission and hence the same is more of an appeal in disguise rather than a review petition.
- 3.4. Furthermore, the Respondent has submitted that the Petition is not maintainable and is liable to be rejected as the same is basically an appeal in the form of a review petition and requires application of mind and reassessment of the issues and facts which have already been adjudicated by the Commission.

4. Commission's View & Decision

- 4.1. For a Review Petition to be admitted, the party raising the said Petition must prove that the grounds raised in the Petition qualify the grounds of Review provided in Section 114 read with Order 47, Rule 1 of the Code of Civil Procedure (in short CPC). Therefore, the present Petition shall be dealt in light of the grounds of review as provided in the aforesaid section and Order of the CPC and the same are reproduced hereunder:

"1. 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.

...”

Hence, the circumstances when review lies are:

- (a) cases in which appeal lies but not preferred,
- (b) cases in which no appeal lies,
- (c) decisions on reference from Court of Small Causes; and

The grounds for review are:-

- (i) discovery of new and important matter or evidence, or
- (ii) mistake or error apparent on the face of the record, or
- (iii) any other sufficient reason.

4.2. In the present Review Petition the Petitioner has sought review of para 26 of the Order of the Commission. The said para is reproduced hereunder,

“26. With regard to the 3rd issue, the Commission would like to clarify that during the period when the Petitioner, a generator located in the State, is supplying power to the distribution license, i.e. UPCL through a trader, i.e. TPTCL, it is liable to pay all the charges including transmission charges and losses along with late payment surcharge, if any, to the Respondent licensee for use of its intra-state transmission system and the dedicated line i.e. 220 kV D/C Ghuttu-Ghansali line in accordance with the Open Access Regulations, 2015 as well as the (then prevalent) RE Regulations.”

Seeking review on the said para, the Petitioner has stated that the same is in violation of Regulation 36(1),38(1) and 40(1) of “UERC RE Regulations” and that the Petitioner is entitled to claim exemption from payment of charges as above. In this regard, relevant extract from the referred provision 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, reproduced hereunder:

“36. Transmission Charges, Wheeling Charges and Losses

(1) Transmission Charges: For non-discriminatory ‘open access’ to the intra-State transmission system for carrying the electricity generated by the RE Based Generating Stations or Co-generating Stations to the destination of use, the RE generator or the consumer, as the case may be, shall have to pay the transmission charges and wheeling charges for use of intra-state transmission system and distribution system as given below ...

Provided that no Transmission and Wheeling Charges are payable for sale of electricity to distribution licensee or to local rural grid within the State.”

Emphasis Added

Thus, from reading the above regulation it becomes clear that the Regulation obligates the RE generator and the consumers to pay Transmission Charges and Wheeling Charges for use of transmission system and distribution system. However, exception from payment of these charges is only allowed in cases where sale of electricity is made to the distribution licensee or to a local rural grid within the State. On hearing the submission made by the Petitioner it is clear that the Petitioner has attempted to draw an interpretation of the aforesaid Regulations for its own benefit.

On simple interpretation of the above Regulations, it becomes clear that if any person, i.e. RE Generator in this case, sells electricity to a person other than a distribution licensee or a local rural grid, then he shall be liable to pay charges as specified in the Regulations. In contrary to this plain literal understanding, the contention of the Petitioner that his selling of power to a trader, which eventually is being purchased by UPCL, for the consumers of the State tantamount to his selling power to UPCL, is incorrect. Here it is important to emphasise the connotation of the word ‘sale’ mentioned in the 1st proviso to the aforesaid Regulations, which, here implies a sale made to a distribution licensee or to a local grid only through a legal Power Purchase Agreement (PPA) and not otherwise. In the instant case UPCL has a legal PPA with the electricity trader and not with the Petitioner. Therefore, the understanding as purported by the Petitioner is neither reasonable nor legal. It is only a

matter of coincidence that the trader who bought power from the Petitioner further sold it to UPCL. Regulatory policies and law cannot be subject to such coincidences. Therefore, the whole premise on which the arguments challenging the validity of para 26 of the impugned Order is a mere figment.

- 4.3. Further, on the submission of the Petitioner that the Commission has erroneously failed to apply the said Regulations on the Review Petitioner which has resulted error apparent on face of record, in this regard, there are plethora of judgment of the Hon'ble Supreme Court where the Court has considered as to what an error apparent on the face of record is. In *Satyanarayan Laxminarayan Hegde v. Malikarjun Bhavanappa Tirumule*, AIR 1960 SC 137, (1960) 62 BOMLR 146, 1960 1 SCR 890 the Supreme Court has held thus:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

From the above judgement it is clear that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. Furthermore, the Hon'ble Supreme Court in *Kamlesh Verma Vs. Mayawati & Ors*, 2012 8 SCC 106 (Writ Petition (Crl.) No. 135 of 2008) has elaborated on the cases where review can be allowed or disallowed. The relevant extracts of the said case are being reproduced hereunder:

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him; (ii) Mistake or error apparent on the face of the record; (iii) Any other sufficient reason.

The words “any other sufficient reason” have been interpreted in *Chhajju Ram v. Neki*, AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius & Ors.* (1955) 1 SCR 520, to mean “a reason sufficient on grounds at least analogous to those specified in the rule”. The same principles have been reiterated in *Union of India v. Sandur Manganese & Iron Ores Ltd. & Ors.*

20.2. When the review will not be maintainable:

- i. A repetition of old and overruled argument is not enough to reopen concluded adjudications.
- ii. Minor mistakes of inconsequential import.
- iii. Review proceedings cannot be equated with the original hearing of the case.
- iv. Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
- v. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
- vi. The mere possibility of two views on the subject cannot be a ground for review.
- vii. The error apparent on the face of the record should not be an error which has to be fished out and searched.
- viii. The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
- ix. Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.”

4.4. In the present case, the Petitioner is disputing the interpretation of the aforesaid Regulations, framed by the Commission, after due public process and has stated that an error is committed by the Commission in the said Order by erroneously assuming that in order to avail the exemption, the generator has to directly sell the electricity to UPCL thereby committing misconception of law or fact. The Commission in the para 26 of the impugned Order has elaborated upon the interpretation of the 1st proviso to the aforesaid Regulations and the view of the Commission taken in the Order under Review is very much in line with the prevailing law. Considering the aforesaid principles on review by the Hon’ble

Supreme Court the present petition does not stand firm with its arguments as the same fails to establish that an error exists on face of record. The Petitioner has come up with its own twisted & incorrect interpretation of aforesaid Regulations and is presenting it as an erroneous assumption or error committed by the Commission thereby, trying to open up arguments on the views which the Commission has already taken in the original matter. The Respondent has rightly pointed out that the Petitioner is putting up justifications against findings of the Commission and hence the same is more of an appeal in disguise rather than a review petition.

- 4.5. Further, on the submission of the Petitioner that the Commission vide the Order under Review has failed to provide a speaking order or a reasoned order on the issue of liability of Review Petitioner to pay the aforesaid charges, the Commission under the said Order has held the Petitioner liable to pay the aforesaid charges under the prevailing Regulations which are explicit and clear. When the regulations itself are speaking/loud & clear, direction to ensure its compliance does not call for any supplementary reasoning. Moreover, the argument tendered by the Petitioner, challenging the Order itself, is not a ground for Review.
- 4.6. Therefore, in light of the provisions in the Statutes, the facts of the case, the submissions of the Petitioner and precedents set by the Hon'ble Supreme Court, it is clear that the grounds stated by the Petitioner for review do not satisfy the grounds for review under the Code of Civil Procedure as there is no error apparent or mistake in the impugned Order. Therefore, the instant Review Petition brought before the Commission is rejected and disposed off.

Ordered accordingly.

(Subhash Kumar)
Chairman