

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Misc. Application No.: 96 of 2018

In the matter of:

Review petition filed under Regulation 54 of the UERC (Conduct of Business Regulations), 2014 for review of the order dated 16.03.2017 passed by the Commission in the matter of determination of Project specific Tariff for 10.5 MW SHP (Sarju-III) on Sarju river at Kapkote, Bageshwar district, Uttarakhand u/s 62 & 86(1)(b) and 86(1)(e) of the Electricity Act, 2003 read with Regulation 13 of UERC (Tariff and other Terms for Supply of Electricity from Non-Conventional and Renewable Energy Sources) Regulations, 2013.

In the matter of:

Uttarakhand Power Corporation Ltd.

... Petitioner

AND

In the matter of:

Uttar Bharat Hydro Power Pvt. Ltd.

... Respondent

CORAM

Shri Subhash Kumar Chairman

Date of Hearing: January 22, 2019

Date of Order: April 02, 2019

The Petition was filed by Uttarakhand Power Corporation Ltd. (herein after referred to as "UPCL" or "the Petitioner"), for review of the order dated 16.03.2017 passed by the Commission in the matter of determination of Project specific Tariff for 10.5 MW Sarju III SHP of M/s Uttar Bharat Hydro Power Pvt. Ltd. (herein after referred to as "M/S UBHP" or "the generator" or "the Respondent"), on Sarju river at Kapkote, Bageshwar district, Uttarakhand u/s 62 & 86 (1)(b) and 86 (1)(e) of the Electricity Act, 2003 read with Regulation 13 of UERC (Tariff and other Terms for Supply of Electricity from Non - Conventional and Renewable

Energy Sources) Regulations, 2013. The Petitioner in the above Petition had prayed the following:

- a. Take the petition on record and admit the same.
- b. Reconsider/Review the order dated 16.03.2017 passed by the Commission in the matter of determination of project specific Tariff of Sarju-III SHP.
- c. To condone the delay in filing the review petition.
- d. Pass such other order(s) that may be deemed fit and proper in the facts and circumstances of the case.

1. Background

- 1.1 M/s UBHP filed a Petition seeking determination of project specific tariff for its 10.5 MW Sarju III Small Hydro Power Project, on Sarju River at Kapkote, Bageshwar District, Uttarakhand and the Commission vide its Order dated 16.03.2017 determined the project specific tariff for the 10.5 MW Sarju III SHP of M/s UBHP.
- 1.2 UPCL on 05.12.2018 filed a Petition seeking review of the above referred Order dated 16.03.2017. Copy of the petition was forwarded to M/s UBHP (Respondent) for submission of comments. In response, M/s UBHP vide its letter dated 28.12.2018 submitted its comments in the matter. Hearing was also conducted in the matter on 22.01.2019 at the Commission's office.
- 1.3 The Commission has considered the replies/information submitted by the Petitioner as well as contentions raised by the Respondent and the same have been discussed at appropriate places in the Order alongwith the Commission's views on the same.

2. Petitioner's Submissions

- 2.1 The Petitioner submitted that the Commission in its Order dated 21.08.2018 in the matter of determination of project specific Tariff of Sarju II SHP observed as follows:

"Based on the above, the Commission observes that in the reports of the Petitioner submitted to the Government there is mention of cloud burst on 18.08.2010, 12.09.2012 and June 2013, whereas there is no mention of cloud burst in July 2011. Further, in the report of DM although there is mention of cloud burst on 18.08.2010 and September 2012, however, it has been

categorically mentioned that there has been no loss to the project due to cloud burst in 2011 and 2013. Therefore, the claim of the Petitioner that time overrun from year 2011 to 2015 was on account of cloud burst/natural calamities in the year 2011, 2012 and 2013 could not be established as fully attributable on account of reasons beyond the control of the Petitioner or reasons fully attributable to the Petitioner. Hence, in accordance with the principles laid down in the Hon'ble ATE's above referred Order and in the absence of any satisfactory justification of the Petitioner, the Commission disallows 50% of the average interest cost for 48 months, i.e. from August, 2011 to July, 2015.

Accordingly, the Commission disallows 50% of the average interest cost for the period August, 2009 to July, 2015 covering almost 72 months which works out to Rs. 2732.16 Lakh."

The Petitioner submitted that the Commission could not consider this relevant evidence while determining the tariff of Sarju-III SHP as the report of the DM was not available then, hence, the Commission was constrained to consider the submission of the generator and only exercised its prudence by considering the controllable and uncontrollable factors thereby affording benefit to the generator for the period which now has been established to show that no damage to the plant due to cloud burst occurred during this period, hence, there are justifiable reasons and available evidences that were not available earlier which will affect the earlier determination of tariff. The Petitioner, accordingly, requested that the order dated 16.03.2017 passed in the matter of determination of project specific Tariff of Sarju-III SHP may be reviewed/reconsidered.

3. Commission's Views & Decisions

- 3.1 Before considering the Petitioner's contentions on the merits of the case, it is necessary to see the scope of the power of the Commission for review of its order. Review of an Order of the Commission can only be done if the Petitioner fulfils one of the grounds for review in accordance with the provisions of the Code of Civil Procedure, 1908. Section 114 of the Code of Civil Procedure (in short CPC) provides for a substantive power of review by a civil court and consequently by the appellate courts. Section 114 of the code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47, Rule 1 of the CPC.

The grounds on which review can be sought are enumerated in Order 47, Rule

1 of CPC, which reads as under:

"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.

3.2 The Respondent vide its letter dated 28.12.2018 submitted its comments in the matter claiming that the present review Petition is not maintainable on the grounds stated below:

- a) That the Review Petition filed by the UPCL is barred by time. The Respondent submitted that the Impugned Order was issued on 16.03.2017 and the Review Petitioner has filed the present Review Petition after more than one and half years. In such circumstances, great prejudice would be caused to the Respondent if such

reconsideration of an order is permitted.

- b) The Respondent submitted that the relief sought by the Petitioner is outside the scope of the Review jurisdiction as per settled principles and UPCL is seeking a rehearing of the matter under the guise of the Review Petition which is not permissible. The Respondent in support of its contention cited out the decision of Hon'ble Supreme Court in Kerala SEB v. Hitech Electrothermics & Hydropower Ltd., (2005) 6 SCC 651 as below:

"10. This Court has referred to several documents on record and also considered the documentary evidence brought on record. This Court on a consideration of the evidence on record concluded that the respondent had been denied power supply by the Board in appropriate time which prevented the respondent from starting the commercial production by 31-12-1996. This is a finding of fact recorded by this Court on the basis of the appreciation of evidence produced before the Court. In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible....."

- 3.3 The Respondent submitted that the Petitioner has sought to rely on Order dated 21.08.2018 passed by the Commission in case of Sarju II Project, which has been challenged by the Respondent before the Hon'ble Tribunal including on the issue of consideration of delays due to cloud bursts, and accordingly, may not be considered in the current review Petition.

- 3.4 Several judgments have been cited on this aspect which reiterates the same principles. The principles laid down by the Hon'ble Supreme Court in **Kamlesh Verma Vs. Mayawati & Ors** in this regard 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."*

3.5 While going into the merits of the Petitioner's contentions, the Commission is guided by the principles as aforesaid. It is clear from the nature of issues raised by the Petitioner at this stage in the review petition and also in its submissions before the Commission during the course of the hearing that the Petitioner wants to reopen the already concluded matter and wants the Commission to re-consider the issue. This Commission has given detailed reasons in its Order dated 16.03.2017 in support of the views on the determination of tariff for Sarju III SHP, in accordance with the provisions of the Act/Regulations and after taking into consideration the submissions of the Petitioner. Reconsideration of the entire matter cannot be undertaken by the Commission in as much as it is only material error or errors manifest on the face of the record or patent error which can be considered in a review petition. The Petitioner has tried to equate the review proceedings with the original proceedings. Concluded decision on initiation of

adjudication proceedings cannot be reopened in this manner. Even if it is assumed for the sake of argument that the judgment of this Commission is erroneous, as held by the Hon'ble Supreme Court in **Kamlesh Verma Vs. Mayawati & Ors**, a review is by no means an appeal in disguise whereby erroneous decision is reheard and corrected. Review lies only for correcting patent error or discovery of new and important matter or evidence which could not be produced by the parties at the time of the earlier proceedings or mistake or error apparent on the face of the record. Keeping the above discussion in view, the Commission has dealt accordingly with the Petitioners contention as detailed in the following paras.

- 3.6 The Commission analysed the submissions of the Petitioner and the Respondent in the matter and observed that the instant review petition filed by UPCL against the order dated 16.03.2017 is barred by time. Regulation 54 of the UERC Conduct of Business Regulations, 2014 requires that the Review Petition to be filed within 60 days, which, admittedly the Review Petitioner has not done. Moreover, the Review Petitioner has not referred to any law which permits it to file the Review Petition with delay.
- 3.7 The report of DM Bageshwar with respect to damages to the Sarju III project of the generator due to cloud burst and heavy rainfall was received by the Commission on 08.06.2017, i.e. almost after a period of 3 months from the date of issue of the impugned Order dated 16.03.2017, therefore could not be taken into consideration then in the said Order of the Commission.
- 3.8 The Petitioner in its instant review petition relied on the views expressed by the Commission in the Order dated 21.08.2018 wherein the Commission took cognizance of the aforesaid report of DM Bageshwar to establish the issue of time overrun allowable/disallowable to the generator. In this regard it is to be noted that, even though the Petitioner was well aware that the period for review for Commission's Order dated 16.03.2017 has already lapsed, still it did not act promptly, and took further three and a half months from the Commission's Order dated 21.08.2018 to file the current review Petition without any proper justification for the delay.
- 3.9 Various courts on the issue of delay in filing the appeal have held as under:

The Hon'ble Tribunal in the case of Rajasthan Vidyut Prasaran Nigam Ltd v. Rajasthan Electricity Regulatory Commission dated 10.01.2014 in I A No. 416 of 2013 in DFR No. 2309 of 2013 has held that the time taken for opinion and drafting of appeal is not a sufficient cause for condonation of delay.

"8. The learned Counsel for the Applicant/Appellant reiterated the averments contained in the Application to condone the delay contending that some time was taken for getting the opinion from the Counsel and after that in drafting the Appeal. This explanation, in our view, would not be construed to be a sufficient cause shown to condone this inordinate delay.

9. As indicated above, even subsequent to the receipt of the Review Order on 16.8.2013; there was a further delay in filing the Appeal since the Appeal has been filed only on 22.10.2013.

10. The explanation given by the Applicant/Appellant that it took some time for getting the opinion and drafting the Appeal which ultimately was filed on 22.10.2013, cannot be accepted as a satisfactory explanation.

11. In the absence of any satisfactory explanation, we cannot brush aside the objections raised by the Respondent that there was a delay due to lack of bona fide and diligence on the part of the Applicant/Appellant."

In Vellaithai, K. Thnagavedivel and K. Valarmathi -v- V.Duraisami (2010) 1 MLJ1092, the Hon'ble High Court held that:

"4. In dealing with the question of condoning the delay under Section 5 of the Limitation Act, a party seeking relief, has to satisfy the court that he had sufficient cause for not making an application within the prescribed time and this has always been understood to mean that the explanation has to cover the whole period. This apply to the delay in representation also. The delay should not be attributable to negligence, inaction or want of bona fide on the part of the defaulting party. In other words, if there is material to indicate the party's negligence in not taking necessary steps, which he would have or should have taken, the rule of liberal approach to such a party cannot be extended."

The Review Petitioner was aware that it has already delayed in filing the review against the order dated 16.03.2017 and should have acted diligently, but chose to further delay the matter. Therefore the Review Petitioner has not shown bona fide reason for

delay and appears to be negligent and accordingly delay in filing the review cannot be condoned.

3.10 The Petitioner is relying on subsequent order dated 21.08.2018 passed by the Commission for reviewing an earlier order being Impugned Order dated 16.03.2017. It is a well settled principle that subsequent decision cannot be a ground for review. This is also specifically recognized in the Code of Civil Procedure which has been made applicable for review by the Commission under Section 94 of the Electricity Act, 2003. The Apex Court in case of the State of West Bengal and Others Vs. Kamal Sengupta and Another (2008) 8 SCC 612 affirmed the aforesaid principle, the relevant portion of which is being reproduced hereunder:

“(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger bench of the tribunal or of a superior court.”

As discussed above, a subsequent Order cannot be a basis for review of an earlier Order, and accordingly the review filed by the Petitioner cannot be accepted and is liable to be rejected as there are no ground of review that are being fulfilled.

3.11 Further, the Respondent submitted, that the Commission’s Order dated 21.08.2018 in the matter of determination of project specific Tariff of Sarju II SHP is under challenge by the Respondent before the Hon’ble Tribunal including on the issue of consideration of delays due to cloud bursts and accordingly the current review filed by UPCL against the impugned Order dated 16.03.2017 may not be considered.

3.12 The Respondent submitted that the Report of District Magistrate, Bageshwar does not state that there was no impact rather it only stated that there was no evidence available and since the District Magistrate was considering the issue of an event which had happened in the past, it cannot be that merely because no evidence was available in 2017, the damage was not there in 2013. The Respondent further submitted that, UJVNL which was monitoring the progress of the Respondent’s project, had also certified the events/damage/delays, and, as such there was no obligation on the part of the Respondent to report to District Magistrate about the progress of the project.

3.13 In this regard, as discussed above, the Commission does not find any bonafide reason to

accept the review filed by UPCL for the reason that first of all it is barred by limitation, and, secondly and more importantly as held by various courts there cannot be any ground for review based on subsequent Orders. Moreover, the Order dated 21.08.2018 which has been considered as a basis for current review Petition by UPCL has already been contested by the Respondent before the Hon'ble APTEL, therefore, the Commission is abstaining from expressing any views on the issues raised by the Petitioner at this stage.

- 3.14 Therefore, in light of the provisions in the Statutes, the facts of the case, the submissions of the Petitioner & the Respondent and precedents set by the Hon'ble Courts and the Hon'ble ATE, 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 on the face of record or any new facts which could not be presented at the time of the proceedings. Further, the review Petition is barred by limitation and no bonafide reason has been produced to prove to the contrary. The Commission disallows the Review on the grounds raised in the Petition.
4. The Commission disposes off the Petition as rejected.
5. Ordered accordingly.

(Subhash Kumar)
Chairman