

BEFORE THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

Quorum

Shri Desh Deepak Verma, Chairman

Smt. Meenakshi Singh, Member

Shri I. B. Pandey, Member

In the matter of:

Sub: Petition No. 488 of 2007 "Maintainability of recall application.

M/s Parmarath Iron Pvt. Ltd., B-23, Nai Basti, Near Small Power House, Bijnor - 246701

Petitioner

Versus

1. Managing Director, Paschimanchal Vidyut Vitran Nigam Ltd., Victoria Park, Meerut.

2. Executive Engineer, Electricity Distribution Division, Paschimanchal Vidyut Vitran Nigam, Bijnor.

Respondents

Present in the Hearing:

1. Shri Lalit Agarwal
2. Shri S. C. Rai, Advocate
3. Shri Amarjeet Singh, Rakhra, Advocate, UPPCL

ORDER

(Hearing on 8.7.2014)

Brief History of the Case

Parmarth Iron had filed petition no. 488 & 489 / 2007 before the Commission. The Commission in its order dated 18.1.2008 observed that

“ petition no. 488 / 2007 being the case of theft of electricity by a consumer, should be dealt by the Special Court and the petition no. 489 / 2007 is in regarding to billing matter, in view of aforesaid decision of Aptel is not maintainable before the Commission and therefore both these petitions are dismissed without going into their merit.”

The petitioner filed application on 24.1.2008 for recall / modification of the Commission order dated 18.1.2008, citing that petition no. 488/2007 was dismissed by mistake along with petition No. 489/2007. Commission had issued an order on 18.1.2008 in Petition No. 488/2007 that being a case of theft of electricity by consumer, should be dealt by the special courts, and therefore dismissed the petition.

In the mean time petitioner approached Hon'ble High Court vide petition no. 538 of 2008 and Hon'ble High Court vide order dated 30.1.2008 directed:

“UPERC to decide the recall application moved by the petitioner expeditiously, say, within fifteen days. He is also directed that no adjournment will be sought by either of the parties before the Regulatory Commission.”

Commission in it's hearing dated 14.2.2008 allowed additional time for filing some additional points on the request made by the petitioner on which the respondents had no objection.

The petitioner submitted a supplementary application dated 24.2.2008 in support of application dated 24.01.08 before the hearing. The order of Hon'ble Supreme Court dated 29.2.2008 was brought to the knowledge of the Commission during the hearing.

Hon'ble Supreme Court in its order directed:

“ Issue notice.

In the meantime, the direction of the High Court with regard to the deposit of Rs. 2 crores by its order dated 7.2.2008 shall be suspended.

Mr. Pradeep Misra, learned counsel waives notice on behalf of respondent Nos.1 and 2”

Commission in its order dated 28.5.2008 directed :

“Commission finds that the matter is subjudice before the Hon'ble Supreme Court, therefore, the Commission would not prefer to pass any order on the recall application, till the case is pending in the Hon'ble Supreme Court.”

The petitioner filled writ petition no. 57384 of 2010 against the general order issued by way of public notice on 16.2.2010 whereby it has been stated that all matters relating to certain provisions of Electricity Act would be disposed of and consumers would be free to file their grievances for redressal before the appropriate forum as provided under the

Electricity Act, 2003. It is this order/public notice, which is under challenge in this petition.

The Hon'ble High Court in its order dated 20.9.2010 directed:

“The order of the public notice dated 16.2.2010 does not disposed off the case of the petitioner.”

The petitioner filled an application dated 18.4.2011 with the request to decide the case in view of the Hon'ble High Court order dated 30.1.2008 and 20.9.2010.

The hearing was held on 28.3.2012 where the petitioner requested for adjournment of hearing for 15 days and the same was granted by the Commission in its order dated 30.3.2012.

The hearing in the same matter was held on 28.5.2012 and the Commission in its order dated 12.6.2012 directed :

“In view of the absence of the petitioner and the respondents, the Commission adjourns the hearing.

The next date of hearing shall be intimated separately.”

The petitioner submitted an supplementary application along with the order dated 20.7.2013 of the Special Court Bijnor received on 4.3.2014 stating the following :

1. That the matter is pending before the Hon'ble Commission. The Special Court vide order dated 20.7.2013 acquitted the petitioner from theft of electricity as the charges of theft could not be proved by the respondents. The Special Court did not impose any civil liability.
2. That the officers of the distribution licensee have falsely implicated the petitioner in theft case. The petitioner has made to suffer irreparably. It is submitted that on account of false and fabricated case of theft of electricity, the Central Excise Department issued show cause notice thereby imposing huge liability of excise duty. The petitioner is facing the aforesaid case since long.

3. That the respondent authorities have initiated theft case in order to fulfill their personal vendetta and ego. The petitioner is suffering huge loss as the huge liquidated money is lying with the department for no fault of the petitioner.

During the hearing on 19.3.2014 the petitioner had submitted that the Special Court has absolved him from the charges of theft and no civil liability has been imposed. They have been falsely implicated in theft case which caused them huge financial losses and irreparable losses. This act of licensee needs to be investigated so they have requested the Commission to constitute the Investigating Authority u/s 128 of Electricity Act 2003. This Investigation is very necessary so that the licensee can not implicate the others in false case of theft of electricity.

The respondent requested that the copy of recall application should be provided to him so that he can file the reply. He further submitted that the licensee has filed an appeal in the Hon'ble High Court against the orders of Special Court and if at this juncture enquiry is constituted by the Commission it will adversely effect the judgment so in interest of justice Investigating Authority should not be constituted under section 128 of Electricity Act 2003.

The Commission's order dated 6.6.2014 is as follows:-

"The Commission directs that the copy of the recall application should be provided to the respondent counsel and the respondent counsel is directed to file the reply within next 10 days."

The copy of the recall application was sent to the counsel of the respondent vide letter no. UPERC/Secy/VCA/2014-177 dated 29.4.2014.

The matter was finally heard on 8.7.2014.

The Respondent filed written arguments against the maintainability of the recall application on 21st July, 2014. They reasoned that the Commission did not have the powers to review or recall its order. Further they submitted that there was no provision of law whereby filing of such a recall application is permissible. They also reasoned that

the effect and operation of order dt. 30.01.2008 passed in Writ Petition No. 538 (M/S) of 2008 was lost due to the default of the consumer. They also quoted the Hon'ble Supreme Court Order in the matter of MERC Vs. Reliance Energy Ltd. wherein it was ordered that the Commissions cannot adjudicate disputes relating to individual consumers. Further they argued that under Section 128, the Commission has the power to investigate into the affairs of the generating company or licensee upon being satisfied that the licensee has failed to comply with the conditions of the licensee or the provisions of the Electricity Act, 2003 or the Rules and Regulations made there under. The nature of penalties contemplated in Section 128 (6) of the Electricity Act, 2003 are self-indicative of the fact that the investigation contemplated under Section 128 of the Electricity Act, 2003 is not to be launched in individual cases or in stray cases where there are allegations of breach of procedures. Such an investigation is meant to prove those acts of the licensee which have wide spread effect and which have a bearing on a large cross section of the consumers. Also similarly the powers under Section 129 of the Electricity Act, 2003 vested with the Hon'ble Commission are of a preventive nature and the same cannot be deployed for probing the acts of the licensee, conducted in the past.

Further they informed that against the Judgment and Order dated 20.7.2013 passed by the Special Judge, Bijnor, acquitting the petitioner of offence under Section 135 of the Electricity Act, 2003 the respondent licensee has preferred Criminal Appeal No. 315 of 2013 before the Hon'ble High Court under the provisions of the Code of Criminal Procedure and the same is pending adjudication before the Hon'ble Court. They submitted that it is a settled legal proposition that Appeal is a continuation of Trial and for this reason also, the Hon'ble Commission should abstain from proceeding to adjudicate the case of the consumer on merits. And that in view of the forgoing facts it is clear that the Recall Application filed by the Applicant is liable to be dismissed by the Hon'ble Commission.

The written submission made by the petitioner on 25th August, 2014, brings out that the aforesaid matter does not fail under Section 86 (1) (f) of the Electricity Act, 2003 and hence the ratio laid down by the Supreme Court in Para 12 of MERC Vs. Reliance Energy Ltd. is not applicable in the present case. However, the aforesaid matter is

squarely covered by Para 16 and 17 of the said judgment. Also the subject matter of assessment cannot be excluded from the purview of Section 128 and 129 of the Electricity Act, 2003. The assessment as well as investigation falls under the same chapter and thus, Section 128 and 129 of the Electricity Act, 2003 must be construed in relation to other provisions covered by same chapter to which it is incorporated. The Central Legislature has deliberately placed the provisions of Section 128 and 129 of the Electricity Act, 2003 along with the provisions of assessment and appeal under Section 126 and 127 of the Electricity Act, 2003.

Further they submitted that so far as the allegation of adjudication of individual consumer's case is concerned, it is stated that the action complained of is squarely covered by Sections 128 and 129 of the Electricity Act, 2003 and this fact has been categorically admitted by the Respondent Licensee in Writ Petition No. 57384 of 2010 decided on 20.9.2010. Now the Respondent Licensee cannot deviate from their stand taken in the aforesaid Writ Petition. It is incorrect to say that the Petitioner wanted to adjudicate the individual dispute.

Also that Section 128 of the Electricity Act, 2003 reposes a right on the Commission to make investigation of certain matters where it is satisfied that the licensee has failed to comply with "any of the conditions of license or any of the provisions of the Act or rules or regulation". Section 128 refers any of the provisions of the Act or rules or regulations which includes the provision of Section 126 of the Electricity Act, 2003. The word "certain matters" include the action complained of.

The petitioner has also submitted that the appointment of the Investigating Authority does not cause any prejudice to the respondent licensee. Section 128 merely empowers the Commission to make investigation of the affairs of the licensee.

The Commission after hearing both the parties is of the view that there is a need to order an investigation into the above matter and hence directs an investigation by appointing an 'Investigating Authority' as per the provisions of Section 128 of the Electricity Act, 2003.

The Electricity Act, 2003 provides for investigation and enforcement vide Section 128 and the same empowers the Commission to make investigation of certain matters where it is satisfied that the distribution licensee has failed to comply with any of the conditions of license or any of the provisions of the Act or rules or regulations made there under. Section 128 (6) of the Electricity Act, 2003 further empowers the Commission to take any action against the distribution licensee. Section 142 of the Electricity Act, 2003 provides for punishment for non-compliance with directions issued by the Commission. The Section 128 of the Electricity Act, 2013 is reproduced as below:

“Investigation of certain matters

128. (1) The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of licence or a generating company or a licensee has failed to comply with any of the provisions of this Act or rules or regulations made there under, at any time, by order in writing, direct any person (hereafter in this section referred to as “Investigating Authority”) specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority:

Provided that the Investigating Authority may, wherever necessary, employ any auditor or any other person for the purpose of assisting him in any investigation under this section.

(2) Notwithstanding anything to the contrary contained in section 235 of the Companies Act, 1956, the Investigating Authority may, at any time, and shall, on being directed so to do by the Appropriate Commission, cause an inspection to be made, by one or more of his officers, of any licensee or generating company and his books of account; and the Investigating Authority shall supply to the licensee or generating company, as the case may be, a copy of his report on such inspection.

(3) It shall be the duty of every manager, managing director or other officer of the licensee or generating company, as the case may be, to produce before the Investigating Authority directed to make the investigation under subsection (1), or inspection under sub-section (2), all such books of account, registers and other documents in his custody or power and to furnish him with any statement and

information relating to the affairs of the licensee or generating company, as the case may be, as the said Investigating Authority may require of him within such time as the said Investigating Authority may specify

(4) Any Investigating Authority, directed to make an investigation under subsection (1), or inspection under sub-section (2), may examine on oath any manager, managing director or other officer of the licensee or generating company, as the case may be, in relation to his business and may administer oaths accordingly.

(5) The Investigating Authority, shall, if it has been directed by the Appropriate Commission to cause an inspection to be made, and may, in any other case, report to the Appropriate Commission on any inspection made under this section.

(6) On receipt of any report under sub-section (1) or sub-section (5), the Appropriate Commission may, after giving such opportunity to the licensee or generating company, as the case may be, to make a representation in connection with the report as in the opinion of the Appropriate Commission, seems reasonable, by order in writing-

(a) require the licensee or the generating company to take such action in respect of any matter arising out of the report as the Appropriate Commission may think fit; or

(b) cancel the license; or

(c) direct the generating company to cease to carry on the business of generation of electricity.

(7) The Appropriate Commission may, after giving reasonable notice to the licensee or the generating company, as the case may be, publish the report submitted by the Investigating Authority under sub-section (5) or such portion thereof as may appear to it to be necessary.

(8) The Appropriate Commission may specify the minimum information to be maintained by the licensee or the generating company in their books, the manner in which such information shall be maintained, the checks and other verifications to be adopted by licensee or the generating company in that connection and all other matters incidental thereto as are, in its opinion, necessary to enable the Investigating Authority to discharge satisfactorily its functions under section.

Explanation. - For the purposes of this section, the expression "licensee or the generating company" shall include in the case of a licensee incorporated in India-

(a) all its subsidiaries formed for the purpose of carrying on the business of generation or transmission or distribution or trading of electricity exclusively outside India; and

(b) all its branches whether situated in India or outside India.

*(9) All expenses of, and incidental to, any investigation made under this section shall be defrayed by the licensee or the generating company, as the case may be, and shall have priority over the debts due from the licensee or the generating company and shall be recoverable as an arrear of land revenue." **(Emphasis Added)***

Hence, the Commission hereby appoints and directs Shri R.D. Pal Retired Electricity Ombudsman, Shri Arun Kumar Srivastava, Secretary, Uttar Pradesh Electricity Regulatory Commission & Shri Amit Bhargava, Director (Tariff), Uttar Pradesh Electricity Regulatory Commission to act as an 'Investigating Authority' to investigate the above matter as per the provisions of Section 128 of EA, 2003. The investigating authority shall be headed by Shri R.D. Pal retired Ombudsman. The 'Investigating Authority' shall endeavour to submit its Report to the Commission within 3 (Three) months from the date of its appointment hereunder.

The Commission hereby directs the respondent licensee to cooperate with the 'Investigating Authority' in its investigation and make available all the required data as desired.

The 'Investigating Authority' shall act as per Section 128 of the EA, 2003, as directed by the Commission and authorized by the Commission to do so under this Section including whenever necessary employ any auditor or any other person for the purpose of assisting it in the investigation.

(I. B. Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Dated: 06-01-2015