

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT: Shri. C. Balakrishnan, Chairman
 Shri. C. Abdulla, Member
 Shri. M.P.Aiyappan, Member

March 11, 2008

IN THE MATTER OF:

Review Petition on TP 20 and TP 22 of 2006 on Truing up for 2003-04
and 2004-05

Kerala State Electricity Board

---- Petitioner

ORDER

1. KSEB filed a review petition dated 3-1-2008 before the Commission on the Order dated 24-11-2007 in the matter of Truing up of ARR & ERC for the years 2003-04 and 2004-05. The Commission placed the petition in its website and also issued a notice for inviting the objections from the public on 25-1-2007. The preliminary hearing on the matter for the admission was held on 15-2-2008.

2. In the public hearing, Petitioner KSEB was represented by a team headed by Member (Finance). He presented the grounds for the petition. During the hearing the Commission specifically sought the opinion of KSEB on the maintainability of the Review Petition under 94(1)(f) of the Electricity Act 2003 and The Code of Civil Procedure, 1908. The petitioner KSEB has argued the maintainability of the petition on the ground that there is apparent error on the face of the record in the matter of treating the subsidy receivable from the Government by the Commission.

3. KSEB has argued that the adjustment of revenue gap of Rs.218.48crore relating to 2004-05 against the electricity duty payable by KSEB to the Government has made without the concurrence of the Government. As the Government is not willing to adjust the same, it amounts to error apparent on the face of the record which needs revision.

4. KSEB has pointed out that regarding Section 3(1) duty, which is a statutory payment by KSEB to the Government is part of the annual accounts and the same needs to be allowed as expense. The Order of the Commission to penalize the Board on account of underachievement of T&D loss for 2003-04 and 2004-05 is also without considering the efforts made by the Board in this direction. Regarding R&M expenses, the Board has argued that, the CERC norms provides for 4% inflation, which was not allowed to the Board. Further, considering the increase in service connections, sales, assets and implementation of quality standards, the Commission to allow the actual expenses under A&G, DA etc. The Commission in the True Up order has allowed only Rs.360.06crore against the actual revenue gap of Rs. 793.77Crore, hence KSEB has to bear huge financial loss of Rs.433.68Crore. The Board mentioned during the hearing that, if the employee expenses are not allowed at actual, the Board will have no other option but to curtail the benefits to the employees, which may result in employee unrest.

5. The Commission has considered the petition and oral arguments made by the Board. Initially, it is to be ascertained whether the petition qualifies within the purview of the powers conferred upon the Commission under Section 94(1)(f). The application and the scope of the review of an Order are circumscribed under Order 47, Rule 1, of Code of Civil Procedure. The scope of review, at the very outset, is much restricted. The Court of review has only a limited jurisdiction under Order 47, Rule 1. The review power, under the aforesaid provision are re-produced as below: -

“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”.

6. The above mentioned provisions of CPC mandates that a Court of review may allow a review only on specific grounds such as (a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or such matter or evidence could not be produced by him at the time when the order was made; or (b) Mistake or error apparent on the face of the record; or (c) For any other sufficient reason which is analogous to the above two grounds. Hon. Supreme Court in PARSION DEVI & ORS V. SUMITRI DEVI & ORS [1997] RD-SC 768 (14 October 1997) has noted that :

“Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the 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 the record justifying the court to exercise its power 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 limited purpose and cannot be allowed to be "an appeal in disguise."

7. The Hon Supreme Court in Smt. Meera Bhanja Vs. Nirmala Kumari Choudhury (Order dated (16-11-1994) reported in AIR 1995 SC 455, has held that the scope and jurisdiction of mistake apparent as :

“It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, CPC.”

.....

“it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions”

8. Hence, the review proceedings under Order 47, Rule 1, to be used for the for the rectification of an error, which is self evident, apparent and glaring on the face which would warrant reconsideration of the judgment/order so pronounced. The Review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The law has made clear distinction between what is an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the latter can be corrected by exercise of review jurisdiction. A Review Petition has a limited purpose that cannot be allowed to be an appeal in disguise.

9. In the present petition, KSEB has argued that, on the ground of error apparent on the face of record regarding the treatment of revenue gap through adjustment of subsidy. The Commission in page 21 of the impugned Order has deliberated on this issue and noted that:

“Subsidy from Government of Kerala:

In response to the Orders of the Commission regarding release of subsidy by the Government to KSEB, Principal Secretary to the Government (Finance) in his letter dated 2-11-2005 had stated that it is possible to “set off” the subsidy due from the Government against the Duty to be payable by KSEB, provided the Commission has firmed up the amount due. The Government has also pointed out that ‘KSEB in any case has not been paying its dues voluntarily to the Government of Kerala (since according to them there are other accounts to be settled)’. The Commission considers the observation of the Government, and is of the view that, as the duty payable by the licensee has not been transferred to the Government, there is no requirement of providing financing cost for the portion of subsidy adjustable/set off against the duty.”

10. In page 22 of the impugned Order it is stated that:

“The licensee in its Petition mentioned that the revenue gap is Rs.342.77 Crore as per audited accounts for 2004-05. The licensee further submitted that, the Commission may recommend to the Government to bear the total revenue gap of Rs.342.77 Crore by way of waiver of duty to the tune of Rs.200 Crore as recommended by the Commission in the Order for 2004-05, and release the balance Rs.142.77 Crore as cash subsidy (ie., Rs.96 Crore + additional Rs.46.31 Crore). In case the Government declines to allow the additional claim of Rs.46.31 Crore, the same as to be treated as either regulatory asset or tariff increase. The licensee has also requested to allow interest on the subsidy of Rs.96 Crore as recommended by the Commission.

As mentioned in the previous para, Commission recognizes the gap after true up as Rs.218.48 Crore for 2004-05. However, based on the audited accounts submitted by the Licensee, the actual Section 3(1) duty was Rs.54.98 Crore and Section 4 duty was Rs.167.08 Crore.

Thus the actual duty available for adjustment would be Rs.222.06 Crore for 2004-05. The Commission has already recommended to the Government for adjustment of duty for the year 2004-05”.

11. The above portion of the impugned order clearly shows that the Commission has deliberated on the issue and allowed the adjustment of duty for 2004-05 on merits. Further, the KSEB in its ARR & ERC for 2008-09 (Page 119) has stated that “Government of Kerala have issued orders vide GO(MS) No.25/02/PDdt.09.10.2002 to net off the dues between KSE Board and the Government as on 31.3.2002. The full board of KSE Board vide order no B.O.1421/2007(Annual Accounts/Nettingoff/2006-07) dt.18.6.2007 had approved the suggestions made on the meeting on netting off dues between KSE Board & the Government of Kerala held on 25.11.2006.” As per this, the Board has written off the loan payable to the Government in its provisional accounts for 2006-07. Hence, adjustment of subsidy has taken place and formal order from the Government is expected on this. So, it is become amply clear that there is no error on the face of record.

12. The Commission would also like to point out that in the extreme case, if the Government has declined to allow the subsidy, the KSEB has the right to recover the same as a pass through on consumer account. In such situation, the Commission would take appropriate decision by passing on to the consumer tariff, by adjusting a substantial portion to the highly subsidized consumer groups as per the provisions of the Electricity Act, 2003 and Tariff Policy.

13. Regarding other issues raised by KSEB, none of them fall in the realm of Review. Regarding employee costs, the Commission has a considered view which are expressed in so much words in the impugned order (Page 18) is as follows.

“The Commission is of the view that cutting down employee costs based on such short term and adhoc measures is not sustainable and may give wrong signals to the employees. The licensee has to take

genuine efforts to substantially enhance the productivity of employees through proper incentive-disincentive mechanism. It is a fact that, the employee cost of the licensee is no way comparable to neighbouring states or any productivity indices available at present. The Commission would like to point out the fact that, already alarming signals are visible as the terminal liabilities have overstepped (now it is more than the employee costs). Hence it is needles to emphasize that it is high time, the Licensee should take genuine long term steps to arrest the increase in employee costs. Also, the increase in DA due to inflation has to be allowed to KSEB employees as and when it becomes due and shall not be permitted to accrue”.

14. With the above observations, it is ruled that the present petition is not maintainable under Section 94(1)(f) of the Electricity Act and hence dismissed.

Sd/-
M.P. Aiyappan
Member

Sd/-
C. Abdulla
Member

Sd/-
C. Balakrishnan
Chairman