

**BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY
COMMISSION SHIMLA**

Review Petition No: 112 of 2024

Date of Institution: **03.07.2024**

Heard on: **09.09.2024**

Decided on: 05.11.2024

CORAM

**DEVENDRA KUMAR SHARMA
CHAIRMAN**

**YASHWANT SINGH CHO GAL
MEMBER (Law)**

**SHASHI KANT JOSHI
MEMBER**

The Himachal Pradesh Power Corporation Limited, through its
General Manager (Generation),
Himfed Building, BCS,
New Shimla, Shimla, H.P. 171009. **.....Petitioner**
Versus

The HP State Electricity Board Limited, through its
Chief Engineer (Commercial)
Vidyut Bhawan,
Shimla, HP-171004. **....Respondent**

**Petition for Review under Section 94 (1) (f) of the Electricity Act,
2003 read with Regulation 63 of the Himachal Pradesh Electricity
Regulatory Commission (Conduct of Business) Regulations, 2005
against the Order dated 05.06.2024 passed in Petition No. 24 of
2024.**

Present:-

For the Petitioner: Sh. Rohit Sharda, General Manager
(Generation) in person.

For the Respondent: Sh. Kamlesh Saklani, Authorised
Representative.

ORDER

This Review Petition has been filed by the Himachal
Pradesh Power Corporation Limited (the HPPCL/ Petitioner for short)

under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 63 of Himachal Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, as amended from time to time, seeking review of order dated 05.06.2024 in Petition No. 24 of 2024 regarding approval of Capital Cost and Determination of Tariff in respect of Integrated Kashang Hydro Electric Project (IKHEP) Stage-I (1 x 65 MW) from Date of Commercial Operation (COD) to Financial Year 2023-24.

2. According to the Petitioner, after filing the Petition, several deficiencies were pointed out by the Commission which were made good and detailed clarifications were supplied to the Commission. However, the Commission disallowing certain claims has reduced the capital cost. The Petitioner has claimed that the order under review suffers from errors apparent on the face of the record as the Commission in impugned Order dated 05.06.2024 at para 3.5.24 (3rd bullet point) has observed as under:-

“With regard to the price escalation of Rs. 63.49 Cr., the Commission observes that the contract awarded to M/s HCC provided for the escalation on account of labour and material during the period of execution. Therefore, the Commission observes that the contract awarded to M/s HCC provided for the escalation on account of labour and material during the period of execution. Therefore, the Commission has approved the

amount of price escalation during the original contract period and the balance amount has been pro-rated based on the delay condoned as against the total delay in execution of the project.”

3. Further at para 3.5.44 (ii), it has been observed by the Commission as under:-

“With regard to the price escalation of Rs. 26.50 Cr., the Commission observes that the contract awarded to M/s Andritz provided for escalation on account of labour and material during the period of execution. Therefore, the Commission has approved the amount of price escalation during the original contract period and balance amount has been pro-rated based on the delay condoned as against the total delay in execution of the project.”

4. According to the Petitioner, while allowing the project cost against the price escalation head, the formula applied is simply *total price escalation x total delay condoned/ total delay*. By following this methodology, the price escalation which has occurred during the contract completion period has not been considered. As price escalation during the original contract period was also to be allowed as per the commission's analysis, the price escalation which occurred during the contract completion period may be allowed and the approved project cost corresponding to the price escalation may be revised accordingly.

5. Also averred that the Commission has restricted the loan/equity amount (debt/normative debt component) by way of considering the

corresponding debt/equity component as 'Grant Component' in Kashang HEP. Since, as on date, the books of accounts of the Petitioner reflect the said restricted amount as loan/equity (as the case may be) and also the books of accounts are in exact line in terms of the provisions of the on-lending Loan Agreement signed between the Government of Himachal Pradesh (GoHP for short) and the Petitioner and the Petitioner is bound by the terms and conditions of the on-lending agreement, the Petitioner must be allowed the tariff rate on the entire capitalization amount of loan and equity. Accordingly, it is prayed that the Commission should reconsider its decision of restricting the loan/equity amount and considering the same as Grant.

6. Further, the Commission has approved the capital cost and determined the final tariff for the Integrated Kashang Hydro Electric Project (HEP) Stage-I (1 x 65 MW) of the Petitioner but the Commission has not fully allowed the claims by reducing the capital cost and other norms as claimed by the Petitioner, which too are required to be reconsidered.

7. As per the Petition, in the E&M Contract, Price Escalation is calculated considering the base price level at the date 28 days prior to the bid opening date and in the Civil Contract, the Price Escalation up to the date at which the price escalation is paid, therefore, the price

escalation would have been paid even if the project had been completed within the time period stipulated in the contract. As such, the amount of price escalation corresponding to the completion period stipulated in the E&M and Civil Contracts may be considered as part of the Approved Project Cost.

8. It is averred that no other Petition has been filed.

REPLY OF THE RESPONDENT

9. The review Petition has been resisted and contested by the Respondent/ HPSEBL by filing reply that the escalation on account of labour and material during the period of execution has been approved by the Commission at para No. 3.5.24 (3rd Bullet Point) and at para 3.5.44(ii) of the order dated 05.06.2024 after prudence check, however, any calculation error may be decided, as the Commission considers appropriate.

10. Further, for the debt-equity ratio, the Commission has considered Debt-Equity ratio in accordance with the Regulation 16 of the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Hydro Generation Supply Tariff) Regulations, 2011. Further, the Commission at para 3.8.19 of the order under review has held that the Commission shall take

appropriate decision with regard to the treatment of such ADB loans during the truing-up.

11. The Commission vide Order dated 01.08.2024 observed that hearing of the Consumer Representative is necessary in the Petition and accordingly, issued notice to the Consumer Representative with a direction to file reply within two weeks. The Consumer Representative has submitted that the order of the Commission dated 05.06.2024 is well reasoned and detailed which has been passed after taking into consideration all the factors like multilateral funding received from the Government of India (Gol for short) in the ratio of 90% grant and 10% debt, the E&M Contracts, price escalations etc. It is averred that the order warrants no interference or review on the basis of untenable grounds in the absence of supporting material and plausible facts. Also that the Gol has provided multilateral funding to the State in the ratio of 90% grant and 10% debt for the Hydro Electric Projects (HEPs) to ensure promotion of clean energy at cheaper and affordable rates to the consumers of the State. Thus, lending of the funds as loan to the Petitioner by the State Govt. at 10% interest rate is wrong and its burden cannot be allowed to be passed on to the consumers.

12. Further, averred that in the interest of the consumers of the State, the tariff rate on the entire capitalization amount of loan and

equity cannot be allowed, as prayed for. Also that GoHP should refrain from assuming the role of a financial institution and instead should have passed on the grant received under this arrangement to the Petitioner as grant only for the benefit of the consumers of the State in order to promote clean energy. It is averred that the issue should be resolved at the State Govt. level to settle it for good. Further, the Commission has rightly approved the amount of price escalation on pro-rated basis. Thus, there are no justiceable reasons to review the order and allow the amount of price escalation corresponding to the completion period stipulated in the E&M and Civil contracts to be considered as part of the Approved Project Cost. Also that any cost overrun etc., should not be allowed to be compensated by the consumers of the State while determining the additional tariff for the HEPs which would amount to penalizing the consumers for inefficiencies and negligence of the Petitioner.

13. In rejoinder, the contents of the reply have been denied and those of the Petition have been re-affirmed that the Order under review suffers from patent errors apparent on the face of the record and required to be reviewed.

14. We have heard, Sh. Rohit Sharda, General Manager (Generation) for the Petitioner and Sh. Kamlesh Saklani, Authorised Representative for the Respondent.

15. Sh. Rohit Sharda, General Manager (Generation) for the Petitioner has submitted that the impugned order suffers from errors apparent on the face of the record, *inter-alia*, that the Commission while allowing the project cost against the price escalation has applied formula for the *total price escalation x total delay condoned/ total delay* and by applying the said methodology, the price escalation that occurred during the construction period has not been considered and that the price escalation during the original contract period was also to be allowed. Further that the Commission has restricted the debt/ equity component by considering 'Grant Component' in Kashang HEP and since the books of accounts of the Petitioner reflect the said restricted amount as loan and the books of accounts are in line with the terms of the provision of on-lending agreement signed between the GoHP and the Petitioner, which is binding on the Petitioner, the Commission may reconsider its decision of restricting the loan/ equity amount and consider the same as grant.

16. Sh. Kamlesh Saklani, Authorised Representative for the Respondent on the other hand has submitted that the Commission has

considered each and every aspect of the matter as well as the events highlighted by the Petitioner in the Impugned Order and there are no errors apparent on the face of record and the Petition is liable to be dismissed.

17. We have carefully gone through the submissions and perused the entire record carefully. The following points arise for determinations in the Petition:-

Point No. 1: Whether there are sufficient reasons for reviewing the Order dated 05.06.2024 in Petition No. 24 of 2024?

Point No. 2: **Final Order**

18. For the reasons to be recorded hereinafter in writing, our point wise findings are as under.

Point No. 1: No.

Point No. 2: The Petition dismissed per operative part of the Order.

REASONS FOR FINDINGS

Point No. 1:

19. It is well settled law that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The

power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced at the time when the order was made. It may also be exercised where some mistake or error apparent on the face of the record is found but may not be exercised on the ground that the decision was erroneous on merits which is the domain of a court of appeal. While exercising the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. In this regard, reliance may be placed in *Parsion Devi v. Sumitri Devi*, (1997) 8 SCC 715 wherein it is held as under:-

“9. 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 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 cannot be allowed to be “an appeal in disguise”.”

20. Similarly in *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170 it has been held by the Hon’ble Supreme Court that the review proceedings are not by way of appeal and have to be strictly

confined to the scope and ambit of Order 47, Rule 1, CPC. Para 8 of the aforesaid law is reproduced as under:-

“8. 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. In connection with the limitation of the powers of the court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleswar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389 : AIR 1979 SC 1047] , speaking through Chinnappa Reddy, J., has made the following pertinent observations: (SCC p. 390, para 3)

“It is true as observed by this Court in Shivdeo Singh v. State of Punjab [AIR 1963 SC 1909] , there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court.”

21. A similar view has been taken by the Hon'ble Supreme Court in Ram Sahu v. Vinod Kumar Rawat, (2021) 13 SCC 1.

22. The Petitioner has claimed that the Commission has disallowed the price escalation during the contract completion period and that the

price escalation which occurred during the contract completion period has not been considered which need to be reconsidered.

23. While allowing the price escalation which occurred during the contract completion period and revision of the approved project cost of Rs. 63.49 Cr., the Commission in para 3.5.24 (3rd bullet point), in Order dated 05.06.2024 has observed that the contract awarded to M/s HCC provided for the escalation on account of labour and material during the period of execution. In the circumstances, the Commission has approved the amount of price escalation during the original contract period and the balance amount has been pro-rated based on the delay condoned as against the total delay in execution of the project.

24. Similarly with regard to the cost escalation of Rs. 26.50 Crore, the Commission at para 3.5.44 (ii), has observed that the contract awarded to M/s Andritz provided for escalation on account of labour and material during the period of execution. In the circumstances, the Commission has approved the amount of price escalation during the original contract period and balance amount has been pro-rated based on the delay condoned as against the total delay in execution of the project.

25. It is, therefore, evident from both Para 3.5.24 (3rd bullet point) and Para 3.5.44(ii) that the Commission has approved the amount of

price escalation during the original contract period and only the balance amount has been pro-rated based on the delay condoned, as against the total delay in execution of the project by applying the methodology of *total price escalation x total delay condoned*

total delay.

26. Since no satisfactory proof was produced by the Petitioner in this regard and the documentary proof as produced in the main Petition was inadequate, the Commission has allowed the escalation as per formula given above in Para 25. However, the Petitioner may submit sufficient evidence at the time of truing up for the control period and the Commission may consider the price escalation based on proof of actual cost incurred on this account upto the date of delay condoned by the Commission.

27. Coming to the issue of Debt: Equity: Grant ratio, the Commission has considered the issue in detail in Order dated 05.06.2024. It has been mentioned by the Consumer Representative that the ADB loan as received by the Gol was 90% grant and 10 % debt for the HEPs to ensure promotion of clean energy at cheaper and affordable rates in order to benefit the consumers of the State. The capital allocation to the Petitioner has to be on the same terms and conditions under which the Gol has allocated the same to the GoHP in the interest of the

consumers of the State. As such, the Commission has also considered capital allocation from the GoHP to the Petitioner on 90% grant and 10% debt. Further, in case of funding through similar loan facility from ADB, the Commission has considered the availability of 90% of ADB loan as grant in line with the submissions of the Petitioner considering the special category status to the State of Himachal Pradesh.

28. In the entire Petition, the Petitioner has not been able to show that the order under review suffers from any error apparent on the face of record or that the review is necessitated on the discovery of new and important matter of evidence, which after exercise of due diligence was not within the knowledge of the Petitioner or could not be produced when the order was made. In fact, the Commission has considered each and every aspect of the matter in the order under review and has passed the detailed order and nothing has been brought on record warranting review.

29. Thus, the Petitioner has failed to establish on record that there are sufficient reasons for reviewing the Order dated 05.06.2024 in Petition No. 24 of 2024. Point No. 1 is accordingly decided against the Petitioner.

Final Order

30. In view of the above discussions and findings, the Petition fails and is accordingly dismissed.

31. The pending applications, if any, are also dismissed.

The file after needful be consigned to records.

Announced
05.11.2024

-Sd-
(Shashi Kant Joshi)
Member

-Sd-
(Yashwant Singh Chogal)
Member (Law)

-Sd-
(Devendra Kumar Sharma)
Chairman

HPERC