



CASE No. 3 of 2009 (C.W.P.No.1672/ 2016)

In the matter of:

H.P. State Electricity Board Ltd. & others

.....

Applicant/Petitioner

Versus

M/s Virendra Hotels and Allied Hotels Pvt. Ltd. , Dalziel Estate, The Mall, Shimla and others.

..... **Respondents**

Counsel/Representative of Applicant/Petitioner:

1. Sh. Bhagwan Chand, Advocate
2. Sh. Sunil Bhatia, Asstt. Engineer, City ESD, HPSEBL, Idgah, Shimla-171001

Counsel/Representative for Respondent

1. Sh. Rahul Mahajan, Advocate

ORDER

(Last Heard on 09.08.2017)

The Hon'ble High Court of Himachal Pradesh through Order dated 05.12.2016 passed in CWP No.1672 /2010 titled as Himachal Pradesh State Electricity Board & Anr. Versus M/s Virendra Hotels and Allied Hotels Pvt. Ltd. & Anr., have remanded the Case No.3 of 2009 to this office to decide it afresh. The order of the Hon'ble High Court is reproduced below.

"The learned Ombudsman/respondent No.2 has decided the case against the petitioner i.e. HPSEB simply on the ground that the learned Addl.Chief Judicial Magistrate, Court No.1, Shimla, has held that the petitioner has failed to prove the theft, hence the demand notice, raised by the petitioner was set aside and petitioner was directed to refund the amount. The Court finds that the learned Ombudsman/respondent No.2 has erred taking the findings of acquittal in favour of respondent No.1, a sole ground to set aside the demand notice. So, the findings of the learned Ombudsman/respondent No.2, vide its impugned order dated 15.3.2010 is quashed and set aside and respondent No.2 is directed to decide the Case No.3 of 2009, afresh, within a period of two months from the date of first hearing. Parties are directed to appear before the Ombudsman/respondent No.2 on 22nd December,2016. Needless to say that the party against whom learned Ombudsman/respondent No.2 gives the findings shall be at liberty to approach the competent Court, as per law.

The writ petition is disposed of accordingly alongwith all pending application (s), if any.

05.12.2016”

Brief History of the Case:

The respondents M/s Virendra Hotels and Allied Hotels Pvt. Ltd., Dalziel Estate, The Mall, Shimla-171001 (HP) is consumer of the Applicant/Petitioner i.e. H.P. State Electricity Board having connected load of 58.240 kW and 22.320 kW of two connections bearing A/C No.CGC-36-C & 43-C in the name of Sh. Khushi Lal Sood and M/s Virendra Hotels and Allied Hotels Pvt. Ltd., Dalziel Estate, Shimla-171001 in its premises. On 04.02.1998 during surprise inspection of the premises of the Virendra Hotel, Shimla the Asstt. Executive Engineer, ESD, HPSEB, Idgah, Shimla and Executive Engineer, Flying Squad, HPSEB, found the tampering of the meters against Account No.CGC 43-C and CGC 36-C and the electricity was being used directly from the mains by-passing the recording of consumption in the meters installed. Pursuant to the above detection of theft of energy found during inspection, the A.E.E., ESD, HPSEB, Idgah, Shimla-1, disconnected the supply of electricity to both the connections on the same day as per provisions of Clause 7(d) & 18 (d) of Abridged Conditions of Supply of HPSEB. Further, as per the Instruction No.206 of HPSEB Sales Manual provisional assessment was made on 04.02.1998 and thereafter final assessment on 24.02.1998 and raised demand charges amounting to Rs,9,91,776/-.

Instead of paying the demand raised by the respondents Board, the petitioner Virendra Hotels and Allied Hotels Pvt. Ltd., preferred a suit in the Hon'ble Court of the Sub-Judge-III, Shimla and later on in the Court of the Hon'ble District & Session Judge, Shimla. As per judgement of the District & Session Judge, Shimla on 08.05.1998, the electricity supply to the petitioner premises was restored after depositing 50% of the assessed demand by the Petitioner Virendra Hotels. The supply of electricity remained disconnected w.e.f.04.02.1998 to 08.05.1998. The AEE, ESD, HPSEB, Idgah, Shimla also lodged a report with the Police, which after investigation & collecting of evidence challaned the accused under Section 39 of Electricity Act,1910. This case was instituted on 06.05.1998 and decided on 01.07.2002 by the Addl. Chief Judicial Magistrate, Court No.1, Shimla and the accused was acquitted since prosecution could not prove the charge of theft of energy by the accused. Extract of the order of the Addl.Chief Judicial Magistrate, Shimla, is reproduced below:

Final Order:

“ As a result of my findings and reasons, therefore, the prosecution has failed to prove the guilt of accused beyond shadow of reasonable doubt under Section 39 of Indian Electricity

Act, as such, accused is acquitted. Bail bonds of accused stands cancelled and surety discharged. File after completion be consigned to record room.

Announced in the open Court today on this 1st July of 2002 in the presence of Ld. A.P.P. for State and Ld. Counsel for accused.”

The petitioner approached the Hon'ble High Court of H.P. in C.R. 173/98. Hon'ble High Court in its Order dated 27.09.2001 issued direction that the petitioner may file petition before the Zonal Level Dispute Settlement Committee of the Board within a period of one month and HPSEB will not disconnect the electricity connection during the pendency of petition before the Committee subject to their depositing an amount of Rs,4,96,896/- in four equal instalments. The petitioner filed his petition to the Zonal Level Dispute Settlement Committee (ZLDSC) and ZLDSC decided the case on 04.01.2003, taking into consideration the arguments of both the parties over the issue and examination of record, decided that the petition filed by the petitioner is not maintainable and ordered that the demand raised by the respondents Board of Rs.9,91,776/- is payable by the petitioner. On the judgement of the ZLDSC the, petitioner appealed before the Board Level Dispute Settlement Committee on 19.04.2003. Thereafter, the petitioner filed petition before the High Court of H.P. for directing the HPSEB to decide the appeal before the Board Level Dispute Settlement Committee in a time bound manner and refund the amount of Rs.9,91,776/- deposited by them alongwith interest. Thereafter the petitioner approached the FRGC and then FRGC announced its Order on 20.05.2009 and did not entertain the said petition on jurisdictional grounds. Aggrieved by the order of the FRGC, the petitioner again approached the High Court on 25.08.2009 and on their appeal the High Court of H.P. through Order dated 25.08.009 passed the Order to the Electricity Ombudsman to decide the case.

Order of the Ombudsman dated 15.03.2010:

“After examining the record Ombudsman fails to understand as to why the ZLDC did not take cognizance of this judgement of the Addl. Chief Judicial Magistrate Court No.1, Shimla, which was given to ZLDC on 08.09.2002 through affidavit much before the judgement was announced by the ZLDC on 04.01.2003. Ombudsman having reached the conclusion that the case being not of theft, sets aside the orders of FRGC as well as that of ZLDC and now take up the case, as case of billing dispute being within the jurisdiction of this office. Moreover, as per sub-section (6) of Section 42 of the Electricity Act,2003 and regulation (7) of H.P. Regulatory Commission (Electricity Ombudsman) Regulations,2004, Electricity Ombudsman is empowered to entertain

the representation of any consumer aggrieved by the order of FRGC and as such the dispute is within jurisdiction of this office. It is strange to observe that while the Counsel of Board has got the case transferred from the Hon'ble High Court to the Forum (FRGC) and in the Forum the respondent is taking plea of being out of jurisdiction of FRGC.

As per record of the licensee, the petitioner has paid all the bills for supply of power to the licensee (including for the period when the meter in dispute remained disconnected from 04.02.1998 to 08.05.1998), and this amount of Rs.9,91,776/- as raised by the licensee is a penal amount on account of theft as worked out on the basis of instruction No.203 to 206 of the Sales Manual. As per demand notice dated 04.02.1998 & 24.02.1998 this amount has been raised by the licensee as additional penal amount on account of alleged theft which has not been proved as per decision of the Hon'ble Addl. Chief Judicial Magistrate , Court No.1, Shimla as referred above.

Keeping in view the foregoing deliberations, the amount of Rs.9,91,776/- raised by the respondent Board through demand notice dated 04.02.1998/24.02.1998 is set aside and quashed and HPSEB is directed to refund this amount to the petitioner alongwith annual interest @ 9% as per orders of the Hon'ble High Court immediately but not later than one month of this order. The compliance of the order may be reported to this office by both the parties i.e. petitioner and respondent Board after one month of the issuance of this order.”

Now analysis of the Case and opinion of the Ombudsman:

In view of the transfer of the above Case No. 3 of 2009 by the Hon'ble High Court of Himachal Pradesh through Order dated 05.12.2016 passed in CWP No.1672 /2010 titled as Himachal Pradesh State Electricity Board & Anr. Versus M/s Virendra Hotels and Allied Hotels Pvt. Ltd. & Anr., to this office, to decide it afresh, the aforesaid matter was listed for first hearing on 08th February,2017 and subsequently on 29.05.2017, 30.06.2017, 12.07.2017 and lastly on 09.08.2017 and opportunity to both the parties was afforded to represent their case during the hearings alongwith necessary documents/record in support of their claims in the matter. On the basis of the Claims/counter claims put forth by both the parties and listening the arguments expressed during hearings and perusing the written arguments/submissions made by both the parties as per directions given to the Counsels during the course of last hearing held on 09.08.2017, I observe as under:-

01. On 04.02.1998 during inspection of the premises of the Virendra Hotel, Dalziel Estate, The Mall, Shimla-1, the Asstt. Executive Engineer, ESD, HPSEB, Idgah, Shimla and Executive

Engineer, Flying Squad, HPSEB, found the tampering of the meters against Account No.CGC 43-C and CGC 36-C.

02. The electricity was being used directly from the mains by-passing the recording of consumption in the meters installed and the photographs in support of it were also clicked.
03. Pursuant to the above detection of theft of energy found during inspection, the A.E.E., ESD, HPSEB, Idgah, Shimla-1, disconnected the supply of electricity to both the connections on the same day as per provisions of Clause 7(d) & 18 (d) of Abridged Conditions of Supply of HPSEB. Further, as per the Instruction No.203 to 206 of HPSEB Sales Manual provisional assessment was made on 04.02.1998 and thereafter final assessment on 24.02.1998 and raised demand charges amounting to Rs,9,91,776/-. The respondents has alleged that the said raid/inspection by the Flying Squad of the HPSEB was based on anonymous tip received by them.
04. The assessed amount of Rs,9,91,776/- stands deposited by the Respondents i.e. Virendra Hotels and the respondents has prayed that the demand charges of Rs,9,91,776/- be quashed and be refunded to them alongwith interest at rate of 09 percent.
05. On transfer of the Case as per Hon'ble High Court of H.P. Order dated 25.08.2009 to the Electricity Ombudsman to decide the case, the matter was taken up for deliberations by the Electricity Ombudsman and he passed the Order on 15.03.2010 in favour of the petitioner i.e. Virendra Hotels and Allied Hotel Industries Pvt. Ltd., Shimla, in view of acquittal of the accused by the Addl. Chief Magistrate, Court No.1, Shimla.

ORDER OF THE OMBUDSMAN

Mere acquittal of accused as per Order dated 01.07.2002 by the Addl. Chief Judicial Magistrate, Court No.1, Shimla cannot be a definite ground to prove that no pilferage/theft of electricity was committed in the premises of M/s Virendra Hotel, Shimla. Hence, the matter is now being taken up for consideration on merits of the facts.

Keeping in view the arguments expressed by both the parties during the course of various hearings, claims and counter-claims, evidences/proofs in support of the claims and written arguments/submissions as well, furnished by the Counsels of the Petitioner i.e. HPSEB and Respondents M/s Virendra Hotels and Allied Hotels Industries Pvt. Ltd., Dalziel Estate, The Mall, Shimla, it can be established that the pilferage/theft of electricity has been committed in the premises of M/s Virendra Hotels, Shimla.

1. Photographs exhibited as R-3 to R-7, showing that electricity was being used directly from the mains by-passing the recording of consumption in the meters installed and the modus operandi used by M/s Virendra Hotels for stealing electricity.
2. Statements of Asstt.Executive Engineer, ESD Idgah, Shimla and Executive Engineer, Flying Squad, Unit-1, O/o C.E.(Comm), HPSEB, Shimla and Lineman of HPSEB.
3. Meter Disconnection order No.162 dated 04.02.1998 of HPSEB on account of theft of electricity.
4. Confessional statement of the Receptionist Sh. Kuldeep of M/s Virendra Hotel, Shimla and witnesses Sh.G.M.Vani, Chhaya Travel, Shimla and Sh. Sukh Dev Nag, made at the time of raid/inspection by the Flying Squad of the HPSEB in presence of Asstt. Executive Engineer, City Electrical Sub Divn. HPSEB, Idgah, Shimla.
5. The occupancy record for the rooms as submitted by the respondents i.e M/s Virendra Hotels on the respective meters shows that during the months of November, December 1997 and January, 1998, the occupancy load on Meter No.CGC 36-C was 12 %, 14 % and 8 % and on Meter No. CGC 43-C 01%, 03% and 01 % respectively, whereas the meter reading during this period was Nil. From this, it is transpired that despite above (though low percentage) of occupancy of rooms, there cannot be Nil consumption of electricity. Nil consumption can only be there, if some bye-pass arrangement exists for using electricity or there is Nil occupancy.

Therefore, the demand of Amt.Rs.9,91,776/- assessed provisionally on 04.02.1998 and thereafter final assessment made on 24.02.1998 by the HPSEB as per the Instruction No.203 to 206 of HPSEB Sales Manual, raised by the HPSEBL as penal amount on account of theft of the electricity by M/s Virendra Hotels is correct and has been assessed as per their Sales Manual instructions in vogue at that time and payable by the respondents i.e. Virendra Hotels and not to be refunded by the HPSEB.

The compliance of the Order may be reported to this office by both the parties.

Dated:22.08.2017

H.P. Electricity Ombudsman