

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram :**

- 1. Shri. Ashok Basu, Chairperson**
- 2. Shri Bhanu Bhushan, Member**

**Review Petition No. 31/2006  
in  
Petition No.153/2005**

**In the matter of**

Review of the order dated 16.3.2006 in Petition No. 153/2005 – Grant of inter-State trading licence in electricity.

**And in the matter of**

21<sup>st</sup> Century Infrastructure (India) Pvt. Limited

**.....Applicant**

**The following were present for the applicant**

1. Shri Atul Pandey, Advocate
2. Shri Dipen Agrawal
3. Shri Sanjay Agrawal
4. Shri Manish Pandey, (C.S.)
5. Shri Kirthi Kumar Thakkar, (C.A)

**ORDER  
(DATE OF HEARING: 13.2.2007)**

The application has been made for review of order dated 16.3.2006 in Petition No.153/2005.

2. An application, taken on the file of the Commission as Petition No. 153/2005 was made by the applicant for grant of licence for inter-State trading in electricity for trading of 100 Million Units in a year. It was noticed that the applicant had collected an amount of Rs.297 lakh as premium for allotment of shares, but no cash balance was available in the Cash Book/Bank Account representing the amount of share premium collected, implying thereby that the amount had already been utilized. The

applicant, on affidavit, clarified that the amount was being utilized in its regular business in its net fixed assets and net current assets. The applicant had also clarified that the amount of share premium had not been applied for any of the purposes specified in sub-section (2) of Section 78 of the Companies Act as the need for such an application had not arisen. The Commission held that the share premium collected by a company cannot be utilized for any purpose other than those specified in sub-section (2) of Section 78 and if the amount was used for any other purpose or purposes it was tantamount to reduction in share capital. It was also noticed that even if the amount of Rs.297 lakh was not utilized, the amount was not available to the applicant for the purpose of its business, including business of trading in electricity because, otherwise it would be violating the provisions of sub-section (2) of Section 78 of the Companies Act. Therefore, the Commission decided that the share premium collected by the applicant could not be considered for determining its net worth. Accordingly, the application made was dismissed by order dated 16.3.2006, review of which has presently been sought, holding that the applicant did not fulfil the condition of net worth of Rs.1.50 crore, specified by the Commission.

3. The applicant has submitted that it had net worth of Rs.312.99 lakh for the year 2004-05, computed in accordance with the procedure prescribed under the Companies Act. The applicant has now stated that the share premium amount of Rs.297 lakh was not utilized on the date of the application. It has been further submitted by the applicant that the Commission has wrongly concluded that the amount collected on account of share premium cannot be utilized for any purposes other than those specified in sub-section (2) of Section 78 of the Companies Act, since, according to the applicant, mandate/spirit of law is not to make any restriction

on the use of the amount/fund collected by way of share premium on issue of equity shares. It is also the contention of the applicant that the amount received on account of share premium can be utilized for creation of fixed assets and for working capital needs or for any other purpose of the company so as to meet and generate the funds required for internal accrual and such utilization of the funds cannot be termed as reduction in share premium account. The applicant has submitted that it strictly complied with Section 78 of the Companies Act by crediting the amount received as share premium to the share premium account. The petitioner has submitted that the separate share premium account required under Section 78 of the Companies Act should be construed as separate ledger account, which is being maintained by it.

4. At the hearing held on 4.7.2006, it was further contended on behalf of the applicant that sub-section (2) of Section 78 of the Companies Act lays down only the purposes on which the share premium “account” may be applied but there is no restriction on utilizing the “amount” collected as share premium for furthering its business as the money collected cannot be kept idle. Thus, the applicant sought to make a distinction between “account” and “amount” for the purpose of utilization under sub-section (2) of Section 78 of the Companies Act. It was suggested that the applicant could apply the “amount” standing in the share premium account without debiting the share premium account.

5. In view of the contentions made by the applicant, a reference was made to Ministry of Company Affairs for a clarification on interpretation of sub-section (2) of Section 78 of the Companies Act. The Ministry has clarified that the objective of provisions of Section 78 of the Companies Act is to ensure that the amount collected

as share premium is utilized by the company towards capital expenditure and not revenue expenditure and the provisions of sub-section (2) of Section 78 indicate the manner in which share premium account may be applied and utilized by a company. It has been further added that in case the account is utilized for purposes other than those prescribed under sub-section (2) of Section 78 of the Companies Act, this will amount to reduction of share capital. The Ministry has further clarified that there are no specific provisions in the Companies Act which specify the manner in which the amount collected as share premium may be used by a company. In the opinion of the Ministry, in case the shares have been issued for cash consideration, it should correspondingly be reflected in the cash or bank balance of the company.

6. The matter was again heard after an opportunity of hearing to the applicant on the advice received from Ministry of Company Affairs. Also, by order dated 9.1.2007 the applicant was directed to furnish the following details:

- (i) Bank Statements showing deposit of share premium amount in the Bank and its utilization by withdrawal;
- (ii) Details of assets, if any, acquired by applying the share premium amount; and
- (iii) Manner of utilization of share premium amount, if not applied on acquisition of assets, along with appropriate documentary evidence.

7. The applicant has furnished the copies of the Bank Statements. The applicant in its affidavit filed on 31.1.2007 has clarified that it has utilized the share premium account towards advancement of its business interest, thereby creating current assets in the books of account and that it has not utilized the share premium amount for revenue expenditure.

8. Although the present application is for review of the order dated 16.3.2006, we have proceeded to examine the issue in the light of submissions made by the applicant on merits of its claim and the opinion of Ministry of Company Affairs without insisting on technicalities or limiting our consideration to the procedure laid down under the Code of Civil Procedure for review of orders.

9. As clarified by Ministry of Company Affairs, the objective of provision of Section 78 of the Companies Act is to ensure that the amount collected as share premium is to be utilized by a company towards capital expenditure. The applicant has not furnished the details of any capital assets created out of the amount collected as share premium. At the same time, the Cash Book and Bank Account do not show the cash balance corresponding to the share premium collected. Obviously, the amount collected has not been utilized for creation of capital assets. Neither has the amount been used for some purposes authorized under sub-section (2) of Section 78. Therefore, the amount cannot be considered for computation of net worth of the applicant.

10. In A. Ramaiah's commentary on the Companies Act, the learned authors have noted as under:

**“Retention of share premium in a separate account [Sub-section (2)]**

Any share premium collected by a company on issue of shares is required to be retained in a separate account. This amount cannot be utilized for any purpose, other than the ones specified in sub-section (2). If the amount lying in the securities premium account is used for any other purpose(s), it would tantamount to reduction in share capital, attracting the provisions of sections 100 to 105.” (Emphasis added)

11. The above view of the learned author gets support from the observations of the Hon'ble Supreme Court in Commissioner of Income Tax, West Bengal Vs Allahabad Bank Limited [1969 (39) Company Cases 760] which are to the effect that "After the coming into force of the Companies Act, 1956 (1 of 1956), a share premium account had to be maintained and the share premium could not be used otherwise than for the specific purposes mentioned in Section 78 (2)." (Emphasis added)

12. It follows that share premium could not be used for any purpose other than the purposes identified under sub-section (2) of Section 78 of the Companies Act. The applicant has placed strong reliance on the definition of the term 'net worth' given in Section 2 (29A) of the Companies Act, according to which 'Share Premium Account' forms part of the net worth. However, for the view we have taken, the amount on account of share premium collected by the applicant cannot be accounted towards its net worth for the purpose of grant of trading licence. The distinction sought to be made by the applicant between 'account' and 'amount' is preposterous. In our opinion, for the purpose of Section 78 of the Companies Act, they are synonymous. In fact, the definition of 'net worth' given in Section 2(29A) of the Companies Act, uses the word 'Account', though it is the 'amount' that is counted towards net worth.

13. The applicant has filed bank statements in respect of its 4 accounts with two banks, viz. Lakshmi Vilas Bank Ltd and Central Bank of India. As per the bank statements of Lakshmi Vilas Bank, an amount of Rs. one crore and ninety five lakh was deposited on 19.3.2001 through fifteen entries and the entire amount was withdrawn the same day through nine entries. It is seen that all the withdrawals are in the name of Ramdeo. On 20.3.2001, an amount of Rs. sixty lakh was deposited

through six entries and the entire amount was withdrawn in the name of Ramdeo through three entries of the same date. In respect of the account in Central Bank of India, Rs. fifty lakh was deposited on 13.3.2001 and the entire amount was withdrawn by Shri Ramdeobaba on the same date. Another amount of Rs. forty lakh was deposited on 14.3.2001 through three entries and the entire amount was withdrawn again in the name of Shri Ramdeobaba on the same date. The balance amounts in both the accounts were Rs. 2912/= and Rs. 2027/= only respectively after these transactions.

14. As per the balance sheet of the applicant for the year 2004-05, its current assets were worth about Rs. 9.79 crore, out of which amount of Rs. 2.90 crore was in the form of sundry debtors and Rs. 6.25 crore is in form of loans and advances. It is significant to note that against the loans and advances of Rs. 6.25 crore, the balance sheet also shows current liability of Rs. 6.66 crore.

15. Further, the Auditor's report for the year 2004-05 contains, *inter alia*, the following observations:

“III.

The company has granted loan to nine parties covered u/s 301 aggregating to Rs. 596.07 lakh on which no interest is being charged. This prima facie appears to be prejudicial to the interest of the company.

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The transactions that need to be entered in the register to be maintained u/s 301 have not been entered.

We are unable to comment on whether the transactions with parties covered u/s 301 have been made at reasonable prices with regard to the market prices since the transactions are not entered in the said register.”

16. Similar observations exist in the Auditor's report for the year 2003-04.

17. The observations have also been made by the Auditors relating to grant of advances without charging of interest in the reports for the years 2000-01 (Rs.373.81 lakh), 2001-02 (Rs. 614.58 lakh) and 2002-03 (Rs.607.01 lakh), 2003-04 (Rs.593.07 lakh).

18. We also find that the applicant has been taking contradictory stand in the proceeding before the Commission. In the original proceedings in Petition No.153/2005, the applicant stated that the amount of share premium collected was being utilized for the purpose of its business. However, in the present application for review, the applicant has submitted that the amount remained unutilized till the date of making of application.

19. The facts narrated at para 13 *et sic* raise doubts about the credibility and creditworthiness of the applicant.

20. Considering the totality of the circumstances, we do not consider case for reconsideration of the decision contained in the order dated 16.3.2006 in Petition No.153/2005 has been made out. Accordingly, the present application for review is dismissed.

**Sd/-**  
**(BHANU BHUSHAN)**  
**MEMBER**

**Sd/-**  
**(ASHOK BASU)**  
**CHAIRPERSON**

New Delhi dated the 15<sup>th</sup> March 2007