

STATE ELECTRICITY OMBUDSMAN

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REPRESENTATION No: 20/2008

Appellant : Sri Mohammed Risa
Pallivila Puthen Veedu,
Arunoottimangalam,
MANGADU(Po) Kollam Dt

Respondent: Kerala State Electricity Board
Represented by
The Assistant Executive Engineer
Electrical Subdivision
PERINAD ,Kollam Dt

ORDER

Sri Mohammed Risa, Pallivila Puthen Veedu, Arunoottimangalam, MANGADU(Po) Kollam Dt submitted a Representation on 4th August 2008 seeking the following relief:

To set aside the direction in the Order dated 7.6.2008 of CGRF Kottarakkara to issue fresh short assessment bill after reconsidering the concession of power tariff already allowed to the Petitioner and to pass such other orders that are deemed fit and proper in the nature and circumstances of the case.

The counterstatement from the Respondent was obtained which was forwarded to the Appellant and hearing was conducted on 14.10.2008 . The Appellant submitted argument note on 29.10.2008.

The issue is related to the Consumer No 12890 Majeeda Flour Mill of Kilikollur Section which is reported to be under the possession of the Appellant at present. They had commenced operation on 01.02.1991 with 20HP load and had added 5 HP load on 11.12.1996. The Respondent KSEB had applied Pre-92 tariff to the unit for the 25 HP load from 12/98 onwards but stopped the concession in 3/2001 on the grounds that no manufacturing activity was going on in the plant. The Respondent also issued arrear bill for the above period applying normal tariff. This was challenged by the Appellant in the CGRF Kottarakkara .The CGRF issued orders on the matter on 13.11.2007 which was quashed by the Hon: High Court .The CGRF again heard the matter and issued orders on 7.6.2008 allowing partial relief to the Appellant. The Appellant has approached the undersigned to set aside the direction in the Order dated 7.6.2008 of CGRF Kottarakkara to issue fresh short assessment bill after reconsidering the concession of power tariff already allowed to the Petitioner .

I. The contentions/arguments/points raised by the Appellant in the representation, argument note and other documents and during the hearing are summarized below:

1. The Complainant is entitled for the benefit of Pre 92 tariff for the entire period during which the Government order is applicable. This cannot be withdrawn on the basis of an audit report. There are no grounds for withdrawing the concessional tariff prior to 16.3.2001, that is, the date of site inspection by the officials of the Respondent where it was found that no manufacturing activity was going on in the premises.
2. The CGRF has exceeded the jurisdiction vested upon it by directing the Respondent to issue short assessment bill. The Respondent is competent to issue the short assessment bill subject to the laws relating to limitation and other legal restrictions. No judicial forum can overcome the law of limitation in order to enable a party to sustain an otherwise stale claim.
3. The issue of short assessment bill at present has to be treated as fresh assessment which can be done only in accordance with the Electricity Act 2003. The embargo imposed by Section 56(2) of the Electricity Act 2003 is applicable here. The right of the Respondent to claim arrears would fall due on 3/01 when the benefit was withdrawn. Hence the amount had become first due in 3/01 under Section 56(2). But the demand was raised by the Respondent only in 2007 and hence it is hopelessly barred by limitation.
4. The CGRF has no justification to hold that the Indian Electricity Act 1910 and the Conditions Of Supply Of Electrical Energy 1990 are applicable to this case.

II. The contentions/arguments/points raised by the Respondent in the counterstatement and during the hearing are summarized below:

1. As per the GO (MS) No 4/92/PD dated 06.02.92 and the BO dated 27.3.2002 pre-92 tariff concession was eligible to units which started commercial production between 01.01.1992 and 31.12.1996. Hence the Appellant unit was not eligible for the concession. But the Appellant had expanded his unit with 5HP additional load on 11.12.1996 and became eligible for the concessional tariff for the expanded portion for 5 years with effect from 12/96. The calculation of the proportionate consumption is to be done as per directions in the BO dated 27.3.2002.
2. The Appellant submitted necessary documents and applied for concessional tariff. Due to a mistake in the office of the Respondent concessional tariff was applied for the entire consumption of the Appellant from 12/98 onwards. The concessions were stopped with effect from 3/01 consequent to an inspection by the Assistant Engineer when it was revealed that no manufacturing activity was going on in the premises. An invoice for the period from 12/98 to 2/2001 was issued to the consumer applying normal tariff for the entire consumption. This invoice was revised in the light of the CGRF order directing to allow concessional tariff to the expanded portion of the plant.
3. The Hon : Supreme Court has held that in view of the Indian Electricity Act 1910 and the Conditions Of Supply of Electrical Energy 1990 which is applicable for the period there is no limitation in reference to arrears due from a consumer. (AIR 1994 SCC 2544). The Hon High Court Of Kerala has unambiguously held that if

there is under billing it is always open to the respondent to rectify their mistakes and to demand proper charges due from the consumer in K.A. Balakrishnan Vs KSEB (OP 5935/85P). The Hon Supreme Court in Kusumam Hotels Vs KSEB held that the liability to pay electric charges is a statutory liability. The Apex court has also held that Section 56(2) of the Electricity Act 2003 shall apply after the said act come into force and shall not be applicable. If the bills are issued in respect of the dues arising in terms of the law as was applicable prior to the coming into force of 2003 Act. (CA 101/2007 etc.)

III. Discussion and Findings:

The operative part of the Order dated 7.6.2008 of CGRF is reproduced below:

' In view of the above findings the Forum orders to quash the impugned bill dated 29.9.2007 for Rs 77178/-. At the same time the opposite party is free to reconsider the concession of power tariff already allowed to the petitioner restricting to the extent of extension / addition made to the existing load as provided in the GO dated 6.2.1992 and BO dated 27.3.92. The under charging if any on account of the wrong application of concessional tariff can be realized by issuing fresh short assessment bill. It shall be in accordance with provisions under clause 24(3) and 24(5) of supply code 2005'

The issues to be decided are the following:

1. Whether the methodology for applying Pre-92 tariff decided by CGRF is correct?
2. Whether the CGRF has exceeded its jurisdiction as contended by the Appellant?
3. Whether the issue of short assessment bill in 2007 attracts the limitation as per clause 56(2) of Electricity Act 2003? Whether the Indian Electricity Act 1910 and the Conditions Of Supply Of Electrical Energy 1990 are applicable for the demand relating to the short assessment?

The above issues are discussed below:

1. The Pre-92 tariff was made applicable by the GO (MS) No 4/92/PD/ dated 6.2.1992 to the '*manufacturing units*' which '*start production between 1.1.92 and 31.12.96*'. The Appellant has no case that he started production during this time frame. Hence he was not eligible for the concession. The concession was also made available for substantial expansion/modernization/diversification. The concession '*will be available only for the consumption of the new machinery and equipment which add to the capital asset by not less than 25% of the existing fixed capital investment*'. The methodology of computing the proportionate consumption for the expanded portion was detailed in the subsequent KSEB Order dated 27.3.92. The Appellant was eligible for concession for the '*consumption of the new machinery and equipment only*'. The Appellant had been given the above concession for the power consumed for the whole plant contrary to the Government Orders and Board Orders is an undisputed fact. The amount of public money related to the concessions for which he is not eligible has to be repaid by him. The Respondent is duty bound to recover it.
2. The contention of the Appellant that the CGRF order tantamount to a direction to issue short assessment bill is wrong on the face of it. The CGRF has only stated that '*the opposite party is free to reconsider the concession*'. This observation, made after quashing the original bill dated 29.9.2007 for Rs 77178/- and allowing partial relief to the Appellant, can not be interpreted to be a direction. No

question of stepping beyond jurisdiction in the matter. Even if the CGRF issues direction to the Respondent to issue short assessment bill in accordance with the Government Orders and Board Orders for recovery of public money, one can not call it exceeding of jurisdiction.

3. On the question of the legal position regarding limitation, the Appellant has put forward contradicting contentions. On the one hand it is argued that the right of the Respondent to claim arrears if any would fall due on 3/01, when the law of the land on Electricity was the Indian Electricity Act 1910 and the Conditions Of Supply of Electrical Energy 1990. On the other hand it is argued that the Limitations imposed by Section 56(2) of Electricity Act 2003 should be made applicable from 3/2001 since the demand is raised in 2007 only. However both the contentions shall be examined in detail below.
4. The following facts are found to be relevant here:
 - Ø As pointed out by the Respondent, the Hon: Supreme Court of India has observed on May 16, 2008 that the where the bills are issued in respect of the dues arising in terms of the laws as was applicable prior to coming into force of 2003 Act, the Section 56(2) of Electricity Act 2003 shall not be applicable. (CA101/2007 Kusumam Hotels Vs KSEB etc).
 - Ø Even then the argument of the Appellant that the claim by the Respondent is barred by limitation in view of the Section 56(2) of the Act is also worth examination. Section 56 of the Electricity Act 2003 deals with non-payment of amounts due to the Licensees and consequent disconnection.

The Section 56(2) is reproduced here:

56 (2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity .

As per the clause 56(2) the claim shall be barred by limitation after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges. Here the most pertinent question is *when does a sum from the consumer become first due?*

Does the sum become due as soon as the energy is consumed by a Consumer? Or does the sum become due as soon as the right to claim the arrears arises as contended by the Appellant? If yes, how can the Licensee show that sum as '*continuously as recoverable as arrear of charges for electricity supplied*'? It is obvious that the sum could be shown continuously as recoverable as arrear of charges *only if* the amount is computed and demand is raised by the Licensee.

It is also seen that the Section 56(2) speaks about the sum due from any consumer "under this section". Section 56 as a whole deals with the sum which any person *neglects to pay*, with the course of action specified in Section 56(1) and certain limitations on the Licensee specified in 56(2).

The consumer would be able to pay any amount to Licensee only when a demand is raised by the Licensee and the question of negligence comes up only when a demand note or Invoice is issued to the consumer. The only conclusion one can

reach under this situation is that the Section 56(2) is related to the Sum which a licensee has raised as demand and which a consumer neglects to pay.

In other words the Clause 56(2) as well as Clause 56(1) becomes operative only if the Licensee raises a demand and issues an Invoice to the Consumer. And obviously the clock of Limitation commences from the due date of such Invoice or demand note, that too when the licensee fails to *continuously record the sum as recoverable as arrears*.

The Appellate Tribunal for Electricity of India in their order dated 14th November, 2006 on Appeal Nos. 202 & 203 of 2006 have dealt with the question in detail:

The basic question for determination is what is the meaning of the words 'first due' occurring in Section 56(2) of the Electricity Act 2003.... In case the words 'first due' is construed as meaning consumption, it would imply that the electricity charges would become due and payable, the moment electricity is consumed. In that case failure to pay charges will entail consequences leading to disconnection of electricity to consumers even though the consumer will only know the units consumed by him and will not know the exact amount payable by him as per the approved tariff as the actual computation depends upon different parameters such as peaking/non-peaking rates; HT/LT rates etc. The responsibility to determine the amount payable by the consumer is that of the licensee. The consumer cannot be expected to discharge the duties of the distributor or the supplier of electricity. Moreover, it will create an anomalous situation as it would be difficult to determine the last date by which the payment is to be made by the consumer and in case last date is not known, it will be difficult to levy surcharge for delayed payment. Besides there will be problem in issuing notice for disconnection for failure to pay the charges on consumption. It appears to us that it could never be the intention of the legislature to equate the words 'first due' with consumption. The consumption of electricity will certainly create a liability to pay but the amount will become due and payable only after a bill or demand is raised by the licensee for consumption of electricity by the consumer in accordance with the Tariff Order. Such a bill/demand will notify a date by which the dues are to be paid without surcharge... Thus, in our opinion, the liability to pay electricity charges is created on the date electricity is consumed or the date the meter reading is recorded or the date meter is found defective or the date theft of electricity is detected but the charges would become first due for payment only after a bill or demand notice for payment is sent by the licensee to the consumer. (Ref: APTEL order dated 14th November, 2006 on Appeal Nos. 202 & 203 of 2006)

The only conclusion one can arrive is that the limitation of time under Section 56(2) of Electricity Act 2003 commences only after the Licensee raises a demand or issues an invoice to the consumer for any sum liable to be recovered from him.

IV. Orders:

Under the circum stances explained above and after carefully examining all the evidences, arguments and points furnished by the Appellant and Respondent on the matter, the representation is disposed off with the following orders:

1. *The Representation dated 4.8.2008 submitted by the Appellant is dismissed.*
2. *The Respondent KSEB shall be free to recover the amounts related to the Pre-92 Tariff concessions for which the Appellant was not eligible.*
3. *No order on costs.*

Dated this the 27th day of November 2008,

Sd/-
P.PARAMESWARAN
Electricity Ombudsman

No P 20/08 /104 / dated 28.11.2008

Forwarded to:

1. Sri Mohammed Risa
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2. The Assistant Executive Engineer
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