

STATE ELECTRICITY OMBUDSMAN

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Appeal Petition No: P/180/2011

(Present T P Vivekanandan)

Appellant : Sri.V.P.Musthafa
Diadora Shoes Pvt.Ltd
ChelambraP.O. MALAPPURAM-676 513.

Respondent : The Assistant Executive Engineer
Electrical Sub Division, KSEBoard, Feroke,
KOZHIKODE.

ORDER.

Background of the case: -

The appellant is running an industry, Diadora Shoes Private Ltd. at Chelambra in Malappuram District having Consumer No. HTB 32/4301 under Electrical Section, Ramanattukara, Kozhikode. The Tariff assigned to the consumer is HT-I Industrial (power intensive). The appellant had executed an agreement with Dy. CE, Electrical Circle, Kozhikode on 1/10/2005 for availing the electric service. As per the agreement with KSEB, the contract demand of the industrial unit is fixed as 200 KVA and the connected load as 255.42 KW plus 3 KVA. The appellant contended that he had signed the disputed agreement under coercion. His argument is that the power intensive industry is well defined in the order of General conditions for HT and EHT tariff. He argues that the industry, manufacturing any of the products mentioned in the tariff order or using 'Induction Arc Furnace' can only be classified as power intensive industry and in that sense he is not coming in any of those category and also not using 'induction arc furnace'. Hence according to the consumer, he cannot be classified as " Power Intensive Industry". This is his main contention. The appellant had submitted petition before CGRF, Kozhikode challenging the impugned agreement with a request to set aside the agreement or to be declared it as null and void and also demanded to refund the excess amount collected under the above tariff of HT 1 (power intensive). The CGRF dismissed the petition vide Order No.3080064/CGRF-KKD/2010-11/333 on 1/12/2010. Aggrieved by this, the appellant filed this appeal before this Forum.

Argument of the Appellant: -

The appellant has raised the following arguments in his petition.

Complying with section 43 (Power to recover charges) and section 62 (Determination of Tariff) of Electricity Act 2003, KSEB can collect only the charges complying with the directions and tariff fixed by the Hon: Commission. The Commission has notified the new tariff revision with effect from 01.12.

2007 and it is well clear and transparent. The power intensive industry is defined in the tariff order Para (4) of " General conditions for HT and EHT tariff " which states that, " The industries which manufacture any one of the following products or using Induction arc furnaces or industries engaged in any one or more of the following process are classified as power intensive industries. They are Calcium Carbide, Caustic Soda, Charge Chrome, Ferro Chrome, Ferro Manganese, Ferro Silicon, Ferro Alloys, Potassium Chlorate, Silicon Carbide, Sodium Chlorate, Sodium Metal, Chlorates/Per Chlorates, Melting of metals and Alloys, Industries engaged in electro-chemical/electro-thermal processes, Industries using induction arc furnace etc and in other cases, where the cost of power is more than 25% of the cost of the product manufactured. Further it is noted as; "If the industries are having heating load, and if the connected load of the heating load does not exceed 20% of their total connected load, such Industries shall be classified as Non-Power intensive industries". The appellant argues that it is clear that the industries listed out in the order will only be categorized as power intensive. In order to confirm this, the appellant have cited a letter from KSERC addressed to one A.R. Sasikumar, as document. In the letter also it is clearly clarified that the industries in the list will only be coming under the preview of power intensive.

The tariff order applicable during the time of execution of HT agreement also, the number of industries listed were only 16. The industry manufacturing any of those products or using 'Induction Arc Furnace' can only be classified as 'Power Intensive Industry'. Here the consumer is not coming under any of that category and also not using 'Induction Arc Furnace', hence the consumer cannot be classified as 'Power Intensive Industry'.

Further he argues that the Member (Distribution) of KSEB, have also given direction to the Chief Engineer (Central), that the list of industries coming under Para (4) HT/EHT tariff in the schedule of Terms and conditions for retail supply by KSEBoard effective from-01.12.2007, refers to the industries mentioned under item 'a to p' of general conditions for HT and EHT tariff, and the same will only be coming under power intensive. Hence in this case the consumer will not come under power intensive category. The consumer has signed the agreement under duress. He has disputed the agreement vide letter No. DSPL/545/207-08 dated 06.11.2007, which clearly shows that the consumer has signed the agreement as power intensive industry for getting the supply and running the unit. He has no other option other than to sign the agreement for getting the supply. He has disputed the agreement highlighting B.O.3028/96 and relevant clauses. The portion of the cost of power will never reach 25% of the total cost. Similarly, he has also stated that industries coming under the list 1 to 16 having heating load more than 20% only will come under the preview of power intensive. The date of agreement is 01.10.2005 and the letter dated 13.06.2005 shows that the consumer informed KSEBoard about 3 months in advance that the industry is not power intensive.

On 29.08.2005 i.e. two months before executing agreement, the consumer have sent a letter to KSEBoard informing that the component of the power is only around 5% and hence the definition of Power Intensive Industry, will not attract. As per Section 10 of the Indian Contract Act, 1872 i.e. "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void". Here

since three letters were already sent, it is clear that the impugned agreement will never become a contract because it is not signed with a free will. Since in the place of tariff, in schedule to agreement, it is unlawfully written as "HT-1 Industrial Power Intensive", this agreement executed on 01.10.2005 is not valid and cannot be considered as a contract, at least up to that extent.

Another point of argument is that the KSEB is always at a dominant position as a single supplier. The consumer has signed the agreement because he does not have other means for getting supply. He signed the agreement only after objecting it with 3 letters. Hence there is a violation of section 16 of Indian Contract Act, which states that "A contract is said to be induced by 'undue influence' where the relation existing between the parties are such that, one of the parties is in a position to dominate the will of the other or uses that position to obtain an unfair advantage over the other". Complying with S 19 of the Indian Contract Act states that "When consent to an agreement is caused by coercion fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused". Since there was undue influence, this contract may be set aside or declared as void up to that extent and the Clause "HT-1 Industrial Power Intensive" may be deleted from the date of execution of the agreement itself.

As per section 24 of the Indian Contract Act which states that "If any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void". The contract is void and null for the consideration of the unit as 'HT-1 Industrial Power Intensive'. Hence the same classification may be removed from the agreement and a fresh one may be executed with retrospective effect from the date of original agreement.

The clarification given by KSERC also proves that the industry is not HT-1 Industrial Power Intensive because it is not coming under the list or is not using induction arc furnace or the cost of a Electricity is more than 25%.

The industry is using electric heating as the temperature required is much less than that generated by combustion process. The electricity is used for accurate temperature control only. Once the steady temperature is reached and the plastic is melted, the heating coil will be disconnected automatically and consumption of electricity will come down. Taking heating consumption alone, it is less than 10% of total electricity consumed. Similarly the cost component of electricity used in fixing the final price of product manufactured, is only 6%, argues the consumer.

The Electricity Act 2003, section 62(6) which states that "If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee". The appellant claims that KSEB will have to repay Rs.23, 99,041/- along with interest @18% (Rs.4, 31,827/-), thus totaling to Rs. 28, 30,868/-.

The following reliefs are sought:-

1) To declare the agreement dated 01.10.2005 as null and void and order to execute fresh agreement complying with Act and Rule i.e. deleting the word 'HT-1 Industry Power Intensive' with retrospective from 01.10.2005.

- 2). To pass an order to direct KSEB to rework out the entire electricity bills from 01.10.2005 onwards under non power intensive tariff.
- 3). To direct KSEB to repay Rs.23, 99,041/- along with interest @18%, so that the total amount will be Rs.28, 30,838/-.
- 4). To direct KSEB to pay Rs. 50,000/- towards the expense incurred for filing this petition and further proceedings.
- 5). To direct KSEB to collect the tariff applicable to non Power Intensive Industry only from Diadora Shoes Private Limited.
- 6). To quash the CGRF order No.3080064/CGRF-KKD/2010-11/333 dated 01.12.2010).

Argument of the Respondent: -

The Respondent, the AEE, Electrical Sub Division, Feroke, has filed the counter statement of the Petition stating that all the averments in the petition except which are admitted, are false and hence denied.

M/S Diadora Shoes Pvt Ltd, Chelambra, is an HT consumer with consumer code No. 32/4301, under Electrical Section, Ramanattukara, within the jurisdiction of Electrical Circle, Kozhikode. The consumer has executed an agreement with Deputy Chief Engineer, Electrical Circle, Kozhikode on 01.10. 2005. As per the agreement, the contract demand of the consumer is stipulated as 200 KVA and connected load as 255.42 KW plus 3 KVA. It is submitted that this load includes a heating load of 95.68KW, which comes to about 37% of the total load. The schedule of tariff and Terms and Conditions for supply by KSEB, which came into force with effect from 01.12.2007, notified by the Hon: KSERC has clearly said that "the tariff mentioned in this schedule shall apply to Consumers to whom KSEB has undertaken or undertake to supply electricity notwithstanding anything to the contrary contained in any agreement entered into with any consumer earlier, by Board/Government or any of the tariff regulations or rules and/or orders previously issued. The KSERC has the power to differentiate consumer based on their load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or geographical position of any area, the nature of supply and the purpose for which supply is required etc. In the instant case, the consumer is classified as HT-1 Industrial Power Intensive.

When an industry is having heating load and the same is exceeding 20% of the total connected load, such industry shall come under Power Intensive Industry. As 37% of the total connected load was being used for heating purpose of Electro-thermal process, the consumer was categorized under HT-1 power intensive tariff and billed accordingly.

As per KSEB tariff notification dated 24.10.2002, published in Gazette dated 01.11.2002, industry which produce or engage in Electro-thermal process is one among the industries classified as power intensive industries. Tariff revision order Nos.TP 23 of 2006 and TP 30 of 2007 dated 26.11.2007 of KSERC, published in Gazette dated 27.11.2007, also justify Board action in including the petitioner under HT-1 power intensive tariff. Having found that 37% of the total connected load was to be used for heating purposes, the billing is being done accordingly, which is in order.

KSEB is a body engaged in the business of Generation, Transmission and Distribution of electricity to the consumers in the state of Kerala. The electrical energy is supplied to the consumers as per the Terms and Conditions laid down and as per the agreement entered into between the KSEB and the consumer. The agreement thus executed is binding on both the contracting parties. The KSEB Board is in no way coerced the consumer to sign the agreement against his freewill. As a statutory body the Board has to comply with the rules, regulations and others, framed from time to time by itself as well as by various controlling agencies or by the Regulatory body. When there is an agreement, executed between the contracting parties and both the parties had acted up on the same, one party cannot unilaterally state that the contract is null and void. As a statutory body the Board is duty bound to comply the Regulations in force and the other contracting party is well aware of all the Terms and Conditions laid down in the agreement at the time of its execution. There is no question of undue influences or coercion as alleged by the petitioner in obtaining consent for executing an agreement.

The respondent has submitted that one of the criteria taken for classifying whether an industry is power intensive or not, is based on the heating load used for the industry. Here in this case of the petitioner, the heating load is estimated to be 37%, which is well above 20% of the total connected load and hence the consumer comes under power intensive category. The connected load details of the consumer while taking the electric connection initially is produced as document. The consumer uses Resistor type heating coils of 95.68 KW load (capacity) with thermostat for heating purpose.

Analysis and Findings: -

The Hearing of the case was conducted on 20.12.2011, in my chamber at Edappally, and Mr. Shaji Sebastian represented the appellant's side and Sri P T Joseph, Assistant Executive Engineer, Electrical Sub Division, Feroke and Sri.K.S.Shaji, Senior Assistant, SO(R), Vydyuthi Bhavanam, Tvpm, represented the Respondent's side. A second hearing was done on 15.3.2012 and the following persons appeared, Sri Shaji Sebastian and Sri V P Mustafa for the appellant's side and Smt. Sreedevi B, Dy. CE (TRAC) and Sri. Edward P Boniface, AE (TRAC) and Sri. Shaji N B, O/o the SO (R), KSEB for the respondent's side respectively. On perusing the Petition, the counter of the Respondent, the documents submitted and considering the facts and circumstances of the case, this Authority comes to the following findings and conclusions leading to the decisions there of.

After considering the Appellant's arguments and the Respondent's contentions, this Forum framed the following issues to be answered.

- 1). Whether any compulsion or coercion has been exercised by the respondent on the appellant to sign an Electric connection agreement?
- 2). Whether the appellant's industry comes under HT 1 Industrial (power Intensive) tariff and the tariff applied in this case is correct as per rules?
- 3). What is an electro thermal process, as alleged by the respondent, under which the appellant was running the industry? If it is an electro- thermal process, whether the total consumption of the heating load of the industry is above 20% or below it?
- 4). Whether the request of the appellant to declare the existing agreement as null and void and need to delete the word ' HT 1 Industrial Power Intensive' from the new agreement is justifiable?

5). Whether the consumer is eligible for any refund, by way of wrong tariff fixation, by treating it as a power intensive industry?

Point No 1: - The appellant's contention is that, he executed the agreement with KSEB under duress, having no other alternatives to obtain electric connection to his industrial unit. It is true that KSEB is the only licensed agency for supplying electric power in the appellant's area but I find it difficult to understand the accusation of coercion, since KSEB is a Public Sector unit, which strives hard to meet the increase in energy demand from the consumers and therefore the possibility of duress from KSEB side, on a consumer to take connection, is remote and moreover there is no evidence to substantiate neither this allegation nor anything produced by the appellant to prove it. I feel the consumer has signed the agreement on his free will and hence the allegation of duress from KSEB side is ruled out.

Point 2 & 3: - In view of the rival contentions it has to be decided whether the industry comes under power intensive category or not? In the tariff order dated 24.10.2002, the power intensive industries is defined as; "the industries which manufacture any one of the following products or using induction arc furnaces or industries engaged in any one or more of the following processes are classified as power intensive industries". The list includes among other items, 'melting of metals and alloys and industries engaged in electrochemical/ electro-thermal processes and in other cases, where the cost of power is more than 25% of the cost of the product manufactured' are classified as power intensive industries. Further it is stated in the 'note' to this definition that 'if the industries are having heating load and if the connected load of the heating load does not exceed 20% of their total connected load, such industries shall be classified as non-power intensive industries". In short, the above listed industries having heating load below 20% of their total connected load, will not come under the purview of category power intensive industries.

Here the argument of the respondent is that the appellant's industry is using direct high frequency heaters for producing heat through electro thermal process and the heating load of the industry is 95.68 KW out of the total connected load of 256 KW which accounts for 37% of the total load, there by this industry comes under the purview of power intensive tariff. The appellant does not dispute the 'capacity of Load' used for heating which is stated as 95.68 KW out of total connected load of 256 KW. But instead during the hearing, the appellant has argued that the energy consumption of the heating load is less than 10% of the total electrical energy consumption. The appellant cites that the intention behind the classification of power intensive industry is to restrict the usage of electricity as a raw material. Further he argues that the electricity is used only for indirect heating and the energy consumption is getting reduced, because of disconnection of elements in the heating process, once the required temperature is attained.

There is no separate Meter in a consumer's premises to measure the energy used for heating purpose alone. The whole energy consumption used by the consumer including the heating load and for other purposes are measured by the single Energy meter. Hence the argument of the appellant, that he uses below 10% energy for heating, will not hold good as it is not separately metered. The heating load can only be assessed, as per the load details shown in the Completion Report of the Electrical Installation of the Industry, submitted to KSEB while availing the electric service connection.

It is found to be more than 20% of the total connected load. Further, in the consumer's letter dated 29.8.2005 addressed to the Member (Distribution) it is stated that; "though the heating load is higher our total requirement/ usage for heating purpose is very minimal. On regular running the total requirement/usage comes to only 15-20% of the total heating load connected". This shows that, the consumer is aware that his heating load is more, even at the time of availing the electric connection.

The appellant says that the 'manufacture of foot wears' is not included in the list of Power intensive industries mentioned in the Tariff order. But the respondent states that they have included the Unit under 'power intensive' category, on the basis that the industry falls under 'electro thermal process' classification, that is enlisted as item No 14 of the "Power Intensive Industries (11KV)" in the KSEB tariff revision order 2001.

The next point to decide is what is an 'electro thermal process' as alleged by the respondent, for levy of Power Intensive status to the appellant's industry. As per Oxford Dictionary it is defined as 'relating to heat derived from electricity'. In the websites, its definition is; 'Any process which uses an electric current to generate heat, utilizing resistance, arcs or by induction used to achieve temperature higher than that can be achieved by combustion methods'. It is also noted there that 'Electro Thermal Process are among the most energy intensive industrial processes'.

In the present case, the heating load of the consumer is more than 20% of the total connected electrical load of the industrial plant and the appellant does not dispute this fact. His contention is that he uses the full heating load only initially and then progressively reduces it as time goes on, thereby using the heat energy lower than the 20% limit and if it is put for separate metering, this can be confirmed. It is certain that the consumer uses electric heating for his 'Production/manufacturing' purpose. Separate metering for each and every load is not an established custom in the power sector nor supported by any Rules or Regulations framed under Indian Electricity Act, 2003, for that matter. Further the information available suggests that 'electricity used for deriving heat constitute an electro thermal process and it is one of the most energy intensive industrial processes'. Hence I am of the view that the appellant's arguments that the industry does not fall under power intensive group are not maintainable and therefore inclined to accept the respondent's decision, that the consumer belong to "Industries engaged in electro-thermal process" and hence comes under 'Power intensive' group, as reasonable and justifiable.

Point No 4 & 5 :- The electrical energy was supplied to the consumer as per the Terms and Conditions of Supply in force and as laid down in the agreement entered between the KSEB and the consumer in the year 2005. The dispute of the validity of the Electric connection Agreement executed with KSEB arose only in 2010. Though the appellant had claimed that he objected the levy of 'power intensive' tariff in the initial period, no further steps were seen taken by him at least during the last three years before filing the petition before CGRF in 2010. When an agreement is executed between the parties and both the parties had acted upon the same Agreement for the last so many years, I feel one party cannot unilaterally state 'the contract was null and void'. The appellant was having other avenues to question the legality of the Terms of the agreement by approaching the CGRF of KSEB, established in 2005 or any appropriate Court or judicial authority, before or after signing the agreement, at that

time itself. For the above reasons I am not impressed by the argument advanced by the appellant in the above lines. Moreover it is established by the analysis and findings arrived at that the respondent has acted as per rules only in assigning the 'Power intensive' classification on the consumer. Hence I do not find any merit in the demand to declare the existing Agreement as null and void and to give order for executing a fresh agreement under non power intensive group. Also based on the same conclusion, the request for refund of electricity charges paid by the consumer, does not deserve any merit and hence denied.

DECISION:-

From the analysis of the Case done as detailed above and the findings and conclusions arrived at, I take the following decisions.

It is established that the consumer is utilizing the principle of 'Electro thermal processes' (by way of electric heating load) for the 'Production or Manufacturing purpose', in his industrial unit. Further the heating load used by the consumer for the Production/ Manufacturing purpose, exceeds 20% of the total connected load. An industry applying Electro-thermal process and having heating load more than 20 % of total load will surely come under the purview of "power intensive industries" as detailed under, item 14 of the Tariff Order notified in the Govt. Gazette dated 01.11.2002 and in subsequent notifications issued thereafter. All other contentions raised by the appellant are found not maintainable and therefore the reliefs sought by the consumer are declined. The Appeal Petition filed by the appellant, Mr V P Mustaffa, of M/s Diadora Shoes Pvt Ltd, is found having no merits and hence stands dismissed. Having concluded and decided as above it is ordered accordingly. No order on costs.

Dated the 14th of August, 2012.

Electricity Ombudsman.

Ref No P/180/2011/ 1348/ Dated 14.08.2012.

Forwarded to : 1). Sri .V.P. Musthafa,
Diadora Shoes Pvt.Ltd,
ChelambraP.O.- MALAPPURAM- Pin: 676 513.
2).The Assistant Executive Engineer
Electrical Sub Division,
KSEBoard, Feroke, KOZHIKODE.

Copy to:

- (1). The Secretary, Kerala State Electricity Regulatory Commission,
KPFChavanam, Vellayambalam, Thiruvananthapuram-10
- (2). The Secretary, KSEBoard, Vidyuthibhavanam, Pattom, Thiruvananthapuram-4
- (3). The Chairperson, Consumer Grievance Redressal Forum, KSEB,
Vidyuthibhavanam, Gandhi Road, Kozhikode.32.