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APPEAL PETITION NO. P / 308 / 2012.

(Present T.P. Vivekanandan)

Appellant : M/S. Cherian Varkey Construction (P) Ltd.
5th Floor, Alpha Plaza, K.P.Vallon Road,
Kadavanthra, Kochi-20.

Respondent : The Assistant Executive Engineer.
Electrical Sub Division, KSEBoard,
Central, Ernakulum.

ORDER.

Background of the Case: -

The Appellant is a Construction Company and is engaged in building construction and other allied activities. Being so, they have obtained a temporary electric connection under LT-VII A (construction purpose) tariff on 12.5.2008 with consumer No.19737 for one of the work sites and comes under the jurisdiction of Respondent. The said electric connection was terminated on expiry of the maximum period (12 months) that can be extended by the respondent for a temporary connection, as per the prevalent rule of that time. As the work was not over and construction was still continuing, a new temporary connection under the same tariff, with consumer no. 21022 was given on 01.01.2010 to the same consumer (in the same premises), after dismantling the former connection. This service connection was also subsequently terminated on completion of the term of one year. Thus the connections bearing Cons.Nos.19737 and 21022 were dismantled and are not in existence now. The present temporary connection is the 3rd one in the series, bearing Con. No. 21560, in the same premises of the appellant, given for the continuation of the construction work.

While so, an inspection was conducted in the premises of the consumer by the APTS on 12.04.2012 and prepared a mahazar (Exhibit -1) alleging that the multiplication factor of the Meter taken for the reading was wrongly noted as 20, when the actual multiplication factor to be applied was 40. Based on the mahazar the respondent was issued a notice dated 18.4.2012 to the petitioner along with invoice demanding a sum of Rs.5, 93, 168/- in

respect of Cons. No.19737, and Rs. 6, 14, 642/- in respect of Cons. No. 21022 and Rs. 11, 35, 109/- in respect of Cons. No.21560.

Being aggrieved by the bills, the appellant submitted objections dated 14.05.2012 to the Assistant Engineer, Electrical Section, Central, which was rejected. Then the appellant had requested for installment facility for paying the said amount, and accordingly the petitioner was permitted to remit the bill amounts in 10 monthly installments, which is being complied with by the appellant. Still aggrieved, he filed petition before the CGRF, Ernakulum and the Forum dismissed the petition vide order No. CGRF-CR / Comp.42 / 12-13 dated 22.8.2012 and still not satisfied by its decision, the appellant has filed this Appeal Petition.

Arguments of the Appellant:

The arguments of the Appellant are based on the brief facts and circumstances which are narrated above. Further the Appellant has adduced the following arguments.

(1). Apart from the allegation that a wrong multiplication factor (MF) of Meter has been applied, no convincing materials are available to come to the conclusion that there was actually a wrong application of MF. Unless the allegation is proved by positive evidence, no short assessment can be made. It is pertinent to note that, as per Regulation 24 (5) of Supply Code read with Regulation 37(5) of the Terms and Conditions of Supply, unless the Board establishes that consumer was undercharged, no reassessment can be made. The expression “establishes” imposes a clear burden on the part of the respondent to prove the under assessment with positive evidence. Therefore, since there are no materials available in this case to prove the said allegation, all the demands are liable to be set aside.

(2). It is submitted that as far as the consumer nos. 19737-3 and 21022 are concerned, the Board is not empowered to invoke either Reg. 37(5) of the T & C of Supply, 2005 or Reg. 24(5) of the Supply Code, 2005. This is because, the connections referred to above, are not in existence and the petitioner is no longer a consumer as far as these Cons. Nos. are concerned. It is evident from the Exhibit P-2 order, that consumer no.19737-3 was dismantled on 08.12.2010. As per Reg. 37(5), short assessment demand can be made if Licensee establishes that it has undercharged the consumer. The expression “consumer” is defined under Regulation 1 (m) of the T & C of Supply, which reads as follows:

‘Consumer means any person or person authorized by him in writing who is supplied with electricity for his own use by the Board engaged in the business of supplying electricity to the public under the Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of the Board.’

From the above, it is evident that in order to invoke the above provision, the connection based on which the said proceedings are initiated, must be in existence. That is, the person against whom the proceedings are initiated must be a consumer to the said power connection as on the date of invoking the proceedings. A person, who was a consumer at some point of time, is not included in the said provision. Both the connections have been dismantled and thereof no relationship is in existence between the petitioner and the Board

as a consumer and supplier. Hence the above provision is not available for the Board for short assessment.

(3). Though the above contention was specifically raised before the respondent, it was rejected by relying up on Regulation numbers, 7, 31 and 36 (12) of the T & C of Supply, 2005. It is to be noted that Reg. 7 deals with the dues of the previous consumer and the said rule nowhere authorize the licensee to demand any charges either for the previous connection or recoveries from the previous owner. Similarly, Reg. 31 is applicable only to a Consumer as the said provision start with wording; 'The Board is entitled to recover from a consumer...'. In this provision the expression 'Consumer' is a person defined under Reg.1 (m) of the Terms and Conditions which does not takes in the charges which have become due after connection is dismantled. The same reasoning is applicable to Reg. 36 (12) also as Reg. 36 also starts with; "The bill amount shall be paid by the consumer.....". Thus it is evident that the grounds based on which the respondent rejected the contentions of the petitioner are unsustainable and hence the impugned demands are liable to be set aside.

(4). Even if it is assumed that the Board is justified in invoking powers under Reg. 37 (5), the said provision is subject to the period of limitation stipulated under section 56 (2) of the Electricity Act, 2003. As per the said provision, no amount can be recovered after a period of two years from the date on which the amount have become first due. In this case, the amount became due when the monthly bills were issued for the respective months and hence no re-assessment of the said bills can be made after expiry of the period mentioned under section 56 (2). The decision referred by the respondent is not applicable in this case.

(5). At any rate there is no justification in demanding the said amount from the petitioner. There is no allegation that the petitioner had committed any malpractice in this regard. The meter reading and preparation of the invoices were being made by the officers of KSEB. The connection was given and the meter was installed by the said officers. Therefore, for the latches on the part of any of the officers, no liability for the same be fastened up on the petitioner as he had already remitted all the charges demanded as per the bills issued.

(6). The CGRF rejected the said contention merely on the reason that, all the said electric connections were being used by the same person in the same premises. However this finding is unsustainable since, from a reading of the impugned order, it can be seen that, separate security deposit was collected by the respondent for each connections. Therefore it is evident that respondent has treated all the said connections as separate and distinct. Therefore, for the purpose of invoking power under Reg. 24 (5) alone, the said connections can not be treated as a single one.

Arguments of the Respondent: -

The Respondent has filed the counter statement against the complaints contained in the Appeal Petition, stating that all the averments in the petition except which are admitted, are false and hence denied by him.

(1). The appellant is misleading the Forum by stating that they have obtained temporary electric connections at various times. All the said three electric connections were taken by the same party, for the same purpose, due to the constraints of prevailing rules in taking and maintaining a single temporary electric connection. As per the existing rules of that time, temporary connection have to be renewed monthly and can be extended up to 12 months only and if the work is not over, a new connection can be given again for the same purpose after dismantling the existing connection, as per KSE Board circular No: Plg.Com. / 3806/99/1130 dated 20.11.2001. The next connection (consumer no: 21022) is in fact the continuation of the old consumer no:19737 which was dismantled due to existing rules and the connection was again retained through a new consumer number. It may be noted that, there is no change in consumer or the metering equipment or the purpose. It may be noted that the appellant is engaged in construction work of M/s. Peevees Shopping Mall. All the connections were for the above purpose. In fact the construction is still going on.

(2). The electric connection provided to the complainant is through a CT meter. The CTs were purchased and made available for service by the consumer himself after testing the Meter at the Testing and standards Laboratory, Ernakulum (under Electrical Inspectorate). Copy of the test certificate is produced and marked as Exhibit-D2. The ratio of CTs used is 200/5A. But by oversight the ratio was recorded as 100/5A on the reading register. Hence the MF applied for the meter readings were 20. The consumer was wrongly billed for only half of what he had actually consumed. The CTs were purchased and made available for the 1st connection by the appellant consumer. The same sets of CTs are still in service.

(3). Exhibit-P1 is the copy of the site mahazar prepared on 12.04.2012 by Sri.V P. Latheef, Sub Engineer, Electrical Section, Central, after the inspection done by the APTS. All the tests conducted on the CTs at the premises are recorded in Mahazar. It is established beyond doubt that the CTs are of ratios 200/5A and that the multiplication factor to be applied is 40, to find out the actual consumption of the complainant consumer.

(4). The Cons. Nos. 19737, 21022 and 21560 are actually one and the same consumer; viz; M/s.Cherian Varkey Construction Company (P) Ltd. The appellant has availed the said connections for the purpose of construction of 'Peevees Shopping Mall' and if there was no stipulation for dismantling temporary connections after one year, the consumer number of the connections still would have been the 1st Cons.No.19737 and it was much later that the KSEBoard issued orders to provide connection of permanent nature for such cases. Thus the Cons. No. 21560 is still in service and is used on the basis of the current order, vide B.O. (FM) No.671/2011 (KSEB/TRAC/S Code/Amndts/R2/09) dated 01.03.2011).

(5). It was just a technical reason that the Cons. No. 19737 had to be 'dismantled', and 're-effected' as Cons. No. 21022. In effect, there was no physical dismantling or re-effecting. The date of dismantling is 8.12.2009 with FR (final reading) as 3282. The new connection, Cons. No. 21022 was given with the same metering equipments, with IR (Initial reading) as 3282 on 01.01.2010. The above process of dismantling was done certainly not because the complainant (consumer) no more wanted the electric connection, but only to comply with the provision of temporary service connection, as mentioned in Exhibit-D1.

(6). In terms of item (4) of Exhibit-D1 (Board order dated 20.11.2001), it had stipulated that; "The maximum period of temporary connections shall be twelve months including all extension granted. Any request for temporary connection for a period exceeding twelve months, shall be treated as a new temporary connection....". As such there is no change to the consumer who enjoyed the electricity. The only change here is the Cons. Nos., which was due to the limitations of period to temporary service connections.

(7). As per notification, 641/CT/12/KSERC dated TVM 30th May 2012, of the Hon KSERC, clause 12 of the Electricity Supply Code has been amended as;

"Notwithstanding anything contained in sub clause (1), the purchaser referred to there in shall deposit an amount equivalent to such arrears excluding interest with the licensee, which shall be reimbursed as and when realized from the previous owner/occupier."

Hence, even if it is admitted that all the three Cons. Nos. are different consumers, the above mentioned clause specifically states that all dues of the previous consumer shall be deposited by the present consumer, till it is recovered. Copy of it is marked as Exhibit-D4.

(8). The WP (C) 90 of 2009 (1) [reported in 2009 (1) KHC 945], filed before the Hon High Court of Kerala is a very similar case and the Court has upheld the power of KSEBoard to issue short assessment for the entire period. In the order dated 19.02.2009, the Hon Court has mentioned as;

"...The case at hand represents the exceptional case, namely the meter reader who was taking the reading had not taken note of the fact that the correct multiplication factor is 40 and the bills were being issued on the basis that it is 20. Regulation 37(5) clearly enables issuance of a bill either on the basis of review or otherwise. Here there was an inspection and the mistake was discovered and the bill was issued.....It also need bear in mind the petitioner himself sought for payment in installments..... The meaning that the amount becomes due and first due in my view must be linked with the issuance of the bill ... The scheme of section 56 (2) is that the amount becomes due when the bill is issued. I do not see any reason to grant any relief as sought by the petitioner."

Hence, the argument of the appellant that the claim is time barred by Section 56 (2) of Electricity Act 2003, is not sustainable. Copy of the Judgment is marked as Exhibit-D5.

(9). There is no allegation that the consumer had indulged in any sort of malpractice. It is evident that the consumer is one and the same for all 3 Consumer Nos and the CTs used were also the same. The multiplication factor (MF) was wrongly applied as 20 instead of 40 from the date of connection. There are no disputes regarding the Exhibits-P1 and D2 and therefore it is clear that the MF to be applied was 40 to find out the actual consumption of the consumer. The complainant has made undue profit by not paying the correct electricity charges. Due to oversight by the meter reader, the consumer was billed only for half of what he had actually consumed. As per section 37 (5) of T & C of Supply, 2005, KSEBoard is empowered to demand any undercharged amount. The demand is as per rules and the complainant is liable to pay the amount.

(10). In clause 23 of T & C of Supply, 2005, matters related to temporary connections are detailed. Clause 23 (1) reads; *'Service Connections will be given for period not exceeding six months, except in the case of seasonal loads such as, Punja Pumping, Sugar cane crushing etc. At the discretion of the concerned Executive Engineer, this period may be extended by one month at a time, provided that, for each month the minimum amount prescribed by the Board is paid. For temporary service also the consumer has to comply with all the formalities required for permanents service, such as application for supply, completion test report of installation and service connection agreement...'*

The Clause 23 of KSEB T & C of supply, 2005, which came into effect from 01.02.2006, has stipulated that the 'temporary connections' will be given for a period not exceeding 6 months. The period can be extended on a monthly basis with the approval of the Executive Engineer. The date of connection of the first service was on 12.5.2008. The consumer has requested to renew his temporary connection and Board has done it as per Exhibit-D1.

(12). The finding of the Hon CGRF, that all the said connections were being used by the same person in the same premises is true, which fact the appellant has not denied. These 3 connections (Cons. Nos.) are given in succession and used by the same consumer for the same purpose, which is construction of a shopping mall in MG Road. The assessment bills raised and demanded by KSEBoard is as per the prevailing rules.

Analysis and Findings: -

The Hearing of the case was conducted in my chamber at Edappally, Kochi on 3.4.2013. The learned Advocate, Sri. Ziyad Rehman, has appeared for appellant and the opposite side was represented by Sri. Kenny Philip, the Asst. Exe. Engineer, Electrical Sub Division, Central, and they have argued the case mainly on the lines stated above. On perusing the Appeal Petition, the counter statement of the Respondent, the documents attached, the contentions during Hearing and considering all the facts and circumstances of the case, this Authority comes to the following findings and conclusions leading to the decisions.

The main contentions of the appellant in this appeal petition are: -

(1). The short assessment bill was issued for the dismantled service connections and the appellant will not come under the purview of 'consumer' once the connection dismantled and as such respondent cannot demand the undercharged amount from the consumer.

(2). Section 56 (2) of Electricity Act 2003, prevents recovery of an undercharged amount which is more than 2 years old.

The question to be decided is whether the present consumer is liable to remit the dues of a dismantled connection (of the same consumer), if it is established that Licensee has undercharged the old consumer, by mistake and has incurred revenue loss?

Point-(i). The consumer has questioned that, the Multiplication factor (MF) of the Meter of the consumer, found as 40 on inspection, is not established conclusively by KSEB:-

1.1 The APTS inspection was conducted on 12.4.2012 and they have verified and confirmed that the CT used for the energy meter is of the ratio 200/5, i.e. has a MF of 40 and this fact has been recorded in the site Mahazar prepared during the inspection. It is seen that the mahazar is witnessed by the representative (Admn. Asst.) of the appellant's Firm. The appellant has not raised any dispute on the site Mahazar prepared so far.

Secondly, the respondent has stated that the consumer has purchased the CTs (Current Transformers) for the Meter and the same were installed after getting it tested, at the time of giving connection initially. The Test Report of the CTs issued by the Dept. of Electrical Inspectorate, Ernakulum, dated 26.4.2008 establishes that the CTs were of the ratio 200/5 Amps. In the report it is clearly mentioned that the client of the CTs is; Sri. Reji M Cheriyan Cheriyan Varkey Construction Co. and is meant for the site at Peevees shopping Mall, at the MG Road. This corroborates the finding that CTs used for the Meter at the consumer site were having a MF of 40.

Hence, since it is proved that the actual MF is 40, the respondent is eligible for billing the consumer on the true quantity of energy consumed by him.

Point-(ii). Question of raising a bill for undercharged amount of a dismantled connection:-

2.1 The consumer has taken a temporary electric connection initially for his Multi storied Building construction purpose. As the name implies, the temporary electric connections are provided for temporary purposes only and as per the existing rule of that time, it can have a maximum life of six months. But as the activity (construction work) is not complete and extended to more than 3 years, the consumer wanted his electric supply to be continued. For that, he was given a new electric connection, after terminating the old service, as the Board was compelled to do so. No physical changes are taking place, except the allotment of a new consumer No. and supply is continued uninterrupted.

2.2 In the instant case under dispute, the consumer, the Licensee, the premises, Meter etc. remain one and the same. The change to a fresh temporary connection is mandatory as per electricity Reg. 23 referred above, once the temporary service completes the time

limit. Hence, in every sense, the fresh temporary connection availed by the appellant is a continuation of his previous temporary connection, without change of consumer's name.

2.3 Moreover, clause 12 (2) of the Electricity Supply Code, 2005, states that, *“Notwithstanding anything contained in sub clause (1), the purchaser referred to there in shall deposit an amount equivalent to such arrears excluding interest with the licensee, which shall be reimbursed as and when realized from the previous owner/occupier.”* In this case, all the three Consumer Nos. are different but used for the same premises and by the same consumer and in such a case, the above clause specifically states that all dues of the previous consumer shall be deposited by the present consumer and since the old and new consumer being one and the same, he has to pay the dues.

2.4 The Hon Supreme Court also held in *Paschimanchal Vidut Vithan Nigam Ltd. V DVS Steels and Alloys Pvt.Ltd.*, Civil Appeal No. 6565 of 2008 [SLP(C) No. 14003 of 2007] reported in 2009 (1) KLT 253 (SC) as follows:

‘.....A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment may sell away the property and move on to another property, thereby making difficult, if not impossible for the distributor to recover all dues’.

In short, this order upheld the right of the licensee to recover any undercharged amount due from the consumer, even if, the service connection was dismantled.

2.5 Here the defaulter of old dues and the new consumer are the same person. In short, the Temporary connection was terminated on reaching its term and dismantled only to adhere to the existing provisions regarding the release of temporary connections. Hence, I am of the view that the dues is payable by the appellant, pending on its previous service.

Point –(iii) The applicability of Sec. 56(2) in this Case:-

3.1. Another main contention of the Appellant is based on the Limitation or Time Bar under Section 56(2) of Indian Electricity Act, 2003, which reads “The licensee shall not recover any arrears after a period of two years from the date when such sum become first due unless such sum has been shown continuously in the bill as recoverable as arrears of the charges of electricity supplied”. The question to be decided is on the point ‘when the electricity charges become due for payment’ i.e. the date from which the electricity charges are ‘liable to pay’ by the consumer, which is also termed as the ‘due date’.

3.2. This ‘due date’ is an important date as far as both consumer and KSEB (Licensee) is concerned. This is because after a period of 2 years from the ‘due date’ the bills are time barred and hence the consumer is not liable to pay the amount even if it is a legitimate

claim otherwise. The consumer does not have a claim that the short assessment bill raised by the respondent is a bogus claim. His claim is that it is time barred and hence invalid. Since this issue has been dealt with, analyzed and given a firm opinion by Upper Court of Law and as such, in the Judgment delivered by the Hon: High Court, Bombay, vide case No: 3784/ 2007, which has dealt the 'due date' issue and pronounced its considered opinion which is as follows;

'In construing the expression "due" the interpretation that is to be placed must be harmonized so as to be applicable both in the context of Sub section (1)& (2) of Section 56. A sum cannot be said to be due from the consumer unless a bill for the electricity charges is served upon the consumer. Any other construction would give rise to a rather anomalous or absurd result that a disconnection of supply would be contemplated even without the service of bill. Though the liability of consumer arises or is occasioned by the consumption of electricity, the payment falls due only upon the service of a bill. Thus for the purpose of sub section (1) & (2) of section 56, a sum can be regarded as due from the consumer only after a bill on account of the electricity charges is served upon him'.

3.3. The period of two years as mentioned in Sect. 56 (2), would run from the date when such a bill is raised by the Board against consumption of electrical energy and will become due for payment only after that demand has been raised. It has been further clarified by Hon: High Court that; "Amount of charges would become due and payable only with the submission of the bill and not earlier. Word 'due' in this context must mean due and payable after a valid bill has been sent to the consumer", (2007 KHC 3784:2007 (3) KLTSN 11 (Bom)). Since the disputed bill was raised on 18.04.2012 only, I am of the opinion that the claim is not barred by section 56 (2) of Electricity Act 2003.

3.4. The Reg. 24(5) of the Electricity Supply Code, 2005, reads as; *"If the Licensee establishes that it has under charged the consumer either by review or otherwise, the licensee may recover the amount under charged from the consumer by issuing a Bill...."*

DECISION: -

From the analysis done and the findings and conclusions arrived at, which are recorded above, I take the following decision.

It is noted that the Board was not in a position to extend the time period of a temporary electric connection given, beyond a certain time limit as per rule (six months as per Clause 23 of the KSEB T & C of Supply, 2005 and previously the limit was one year) and for that matter, the old electric (temporary) connections given were dismantled on completing the time limit and a fresh temporary connection was given in its place in succession of the old connection. There was neither change of energy meter provided in the premise nor any alteration carried out in the consumer's electrical installation. The Meter reading is seen as the continuation of the old reading. The only difference is that the supply (connection) is continued using a different consumer No., but keeping all other, i.e. the Consumer name,

purpose of the connection and the premises where the electrical energy is used etc. all remaining the same. The old consumer No. is recorded as dismantled and terminated. Hence it is sure that the new Cons. No. is only an extension of the old temporary connection, originally availed by the consumer.

The consumer was being billed only for half of his true energy consumption during the disputed period and this fact has been established. The true quantum of energy consumed by the party is arrived at, by using the correct MF of 40 and the consumer is bound to pay the electricity charges, for the actual energy he has consumed.

Therefore I am convinced that the appellant is liable to pay the undercharged amounts of Cons. No.19737-3, Cons. No. 21022 and of Cons. No.21560, vide the demand notice dated 18.04.2012 issued by the KSEB. No interest is payable by the consumer for the bill amount for the appeal pending period before this Authority. The consumer is eligible for, up to 20 (twenty) installments, if requested for by him and has to pay the whole bill amount or the 1st installment, as the case may be, within 30 days of the date of this order. The subsequent installments will carry interest as per the interest rate applicable in KSEB, from the 30th day of this order to the day of payment.

Having concluded and decided as above it is ordered accordingly. The Appeal petition filed by the appellant is found having no merits and is dismissed. No order on costs. Dated the 9th of October, 2013.

Electricity Ombudsman.

Ref. No. P / 308 / 2012 / 1997/ Dated 09.10.2013.

Forwarded to : (1). M/S. Cherian Varkey Construction (P) Ltd.
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Kadavanthra, Kochi-20.

(2). The Assistant Executive Engineer.
Electrical Sub Division, KSEBoard,
Central, Ernakulum.

Copy to: - 1).The Secretary, Kerala State Electricity Regulatory Commission,
KPFChavanam, Vellayambalam, Thiruvananthapuram-10.
2).The Secretary, KSEB,
Vydyuthibhavanam, Pattom,Thiruvananthapuram-4.
3).The Chairperson, Consumer Grievance Redressal Forum,
KESB, Power House Building, Ernakulam- 682018.