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APPEAL PETITION NO. P/183/2015

(Present: V.V. Sathyarajan)

Dated: 05th April 2016

Appellant	:	Sri K.P. Siyad Kunnathan Chip Boards Pvt. Ltd. East Vazhapilly P.O. Muvattupuzha
Respondent	:	The Asst. Executive Engineer, Electrical Sub Division, KSE Board Limited Velloorkunnam, Muvattupuzha.

ORDER

Background of the case:

The appellant is running a Company in the name of Kunnathan Chip Boards Pvt. Ltd., bearing Consumer Code LC No. 5/6909 under Electrical Section, Velloorkunnam. The appellant had submitted application for high tension power to their unit with contract demand of 950 kVA to the respondent and remitted an amount of Rs 28,74,000.00 in connection with the expenditure incurred by the licensee towards the distribution side works. Further, the licensee has demanded a sum of Rs 19,60,800 computed @ Rs. 2,064.00/kVA as pro-rata transmission side development charges on per kVA basis from the appellant, vide letter No. TDKM – 89/12-13 dated 1/12/2012 of Executive Engineer, Electrical Division, Kothamangalam.

Against this demand, the appellant approached the Hon'ble High Court by filing W.P. (C) 21311 of 2015. The Hon'ble High Court, vide impugned judgment dated 15-7-2015, ordered the appellant to approach the CGRF and also held that not to disconnect the supply pending final orders of the CGRF. Accordingly the appellant filed a petition before the CGRF which was disposed vide Order No. 61/2015 dated 21-11-2015, with a finding that the demand raised by the respondent is correct and the appellant is bound to pay the same. Challenging the decision of the CGRF, the appellant approached this Authority by filing this appeal petition.

Arguments of the appellant:

The appellant is an HT consumer registered under the Companies Act and has filed a complaint before CGRF as per the direction of Hon'ble High Court of Kerala in WP(C) No. 21311 of 2015(L) against the demand of development/transmission charges issued by the respondent for obtaining High Tension Connection, on pro-rata basis, which is not supported by any provisions of law and is against the orders passed by the KSERC. The facts of the case in detail are as follows.

The appellant is conducting an industrial unit. Since they required a High Tension power connection to their unit with contract demand of 950 kVA, they placed a request with the respondent for the same. Thereafter, it appears that, some improvements in the Substation was required in the Transmission side, and the KSERC has calculated Rs.19,60,800/- as the amount to be paid by the petitioner as Development Charges. Since, the KSERC was pleased to pass an interim order in O.P 22/2011, restraining the respondents from recovering any development charges, the appellant was asked to submit a bond agreeing to pay the said amount, if in case it was found that the said amount was held to be legally recoverable. On the basis of the same, the appellant was provided with an HT connection with a contract demand of 950 kVA.

Thereafter the appellant received a communication from the respondent, bearing No. GB/Development charges/2014-15/3356 dated 05-11-2014. The KSEBL demanded Rs.19,60,800/- as development charges by stating that, in the judgment dated 30.06.2014 in W.A 1040/2013 and connected cases. On the enquiry, the appellant came to know that a Division Bench of Hon'ble High Court was pleased to pass a judgment in batch of cases. It is respectfully submitted that the appellant was not a party to the said Writ Appeal. It is respectfully submitted that the demand made by the respondent is not legally sustainable and any misinterpreting the principles lay down by Hon'ble High Court.

The charges which can be recovered by the Licensee are contemplated in the Electricity Act, 2003. Section 45 of the Act deals with the price of the energy supplied by the Licensee and Section 46 deals with the power of the Licensee to recover the expenditure which reads as follows: "The State Commission may, by regulation, authorize a distribution licensee to charge from a person requiring a supply of electricity in pursuance of Section 43 any expenses reasonable incurred in providing electric line or electrical plant used for the purpose of giving that supply". In exercise of the said powers, the Regulatory Commission formulated Kerala Electricity Supply Code, 2005. In Regulation 7(1) of the Supply Code reads as follows: "Subject to conditions under clause 8, the Commission authorizes the Licensee under Section 6 of the Act, to recover from the owner or occupier of any premises requiring supply the expenses reasonably incurred by the Licensee for providing any electrical line or electrical plant required specifically for the purpose of giving such supply"

From the reading of the above provisions, it is clear that, the right of the licensee is to demand charges towards expenditure for providing supply, is confined to the expenditure incurred by the licensee specifically for the purpose of giving such supply. This would mean that, the recovery of expenditure towards the improvement of the Sub Station of the licensee, which was not done for the purpose of the appellant alone and instead, done as part of the overall infrastructural development of the Board, cannot be recovered from the appellant. The said amount ought to have been included by the Board in its Annual Revenue Requirements (ARR) to be submitted before the KSERC annually.

The above aspect is evident from the proviso to Regulation 7(l) of the Supply Code, 2005, which reads as follows: "Provided that the Licensee shall not be entitled to recover such expenditure if such expenditure is under the scheme approved by the Commission or otherwise charged in Annual Revenue Requirements of the Licensee." In this case, the amount demanded by the respondent as development charges is the proportionate amount allegedly payable by the appellant, in tune with its power requirement, towards the cost incurred by the licensee in installing 12.5 MVA Transformer at 110 kV Sub Station, Muvattupuzha. This was done not for the appellant exclusively but on the other hand it was done as part of the improvement of the infrastructure of the Board.

It is understood that the said amount was calculated on pro-rata basis, in tune with the power requirement of the appellant. It is further submitted that the demand made by the respondent based judgment is based on a misconception. The said judgment does not permit the licensee to recover the development charges on pro-rata basis. It is pertinent to note in this regard that, the KSERC has passed an order in O.P 22/2011 on 22-01-2015 after considering the judgment of the Hon'ble High Court. In the above circumstances, the appellant submitted an objection to the licensee. However, without considering the said objection, the licensee issued order bearing No. GB2/T3/Dev. charges/2014-15/4049 dated 15.12.2014.

Thereafter, the appellant received another communication bearing No. GB2/Transmission charges/2014-15/5152 dated 28-02-2015 permitting the appellant to deposit the entire amount in four monthly instalments. Based on the same, the licensee again issued a notice bearing No. GB2/Transmission charges/2015-16/1087 dated 22-06-2015 by directing the appellant to deposit the 50% of the total demand as 1st instalment within a period of seven days from the date of the said notice and disconnection of supply is also threatened.

The licensee has no right to demand development charges or transmission charges. It is pertinent to note that a joint reading of Section 46 of the Act 'The State Commission may, by regulations, authorize a distribution licensee to charge from a person requiring a supply of electricity in pursuance of Section 43, any expenses reasonably incurred in providing any electricity line or electrical plant used for the purpose of giving that supply' and Regulation 7(l) of the

Supply Code, 2005 would clearly reveal that, the right of the licensee to recover the charges towards the expenditure is confined to the recovery of those expenditure incurred by the licensee for specifically providing the supply to the appellant. In this case, the expenditure incurred by the licensee for specifically providing the supply is demanded. The said amount was paid by the appellant as well. Therefore the obligation of the appellant under the aforementioned provisions stands discharged.

At any rate, they are not entitled to demand any charges on pro-rata basis. The statutory stipulation provides for collection of specific charges to meet the expenses incurred by the licensee in providing the supply to appellant. In this case the development charges are demanded for installing 12.5 MVA Transformer at 110 kV Substation Muvattupuzha. This was done not for the appellant exclusively but on the other hand it was as part of improvement of the infrastructure of the licensee. It is understood that the said amount was calculated on pro-rata basis, in tune with the power requirement of the appellant. It is further submitted that the demand made by the licensee based on a misconception.

The demand of charges by the licensee is specifically prohibited by the KSERC. The KSEB Limited being licensee under the KSERC, the same is binding upon them and hence issuance of demand deviating from the same is illegal and arbitrary. Now on account of the illegal demand made by the KSEB Limited, despite the fact that the appellant had remitted an amount of Rs. 28,74,000.00 towards cost of expenditure incurred by the licensee in providing supply to them, the appellant is put to great hardships. The industrial unit was set up by the appellant by investing huge amounts and imposing any further burden upon the appellant without the authority of law, would not be in the best interest of any of the parties.

The reliefs sought for

1. The Hon. Ombudsman may cancel the impugned bill.
2. The Hon. Ombudsman may provide us with an interim direction not to disconnect the supply till hearing and disposal of the complaint/petition.

Arguments of the respondent:

The appellant is running a company registered under Companies Act and bearing Con No LC No 5/6909 under Electrical Section Velloorkunnam. The appellant had submitted application for high tension power to their unit with contract demand of 950 kVA. The respondent demanded an amount of Rs 25,91,000 as the distribution side cost for providing supply to the appellant. KSEB Terms and Conditions of Supply, 2005 enables the licensee to recover its expenditure for providing supply to the appellant. Thereafter, the licensee issued another notice to the appellant in which it was stated that the estimate cost of Rs 25,91,000.00 was revised due to the variation of labour charges and hence the consumer was directed to make payment of an additional amount of Rs.

2,83,000.00 and appellant had remitted the above referred amount (thus a total of Rs 28,74,000.00) which is towards the expenditure incurred by the Licensee in distribution side works.

KSEBL has also demanded the appellant to remit Rs 19,60,800.00 towards transmission side development charges. Then the appellant approached the Hon'ble KSERC against this demand. As per the order in OP 22/2011 of KSERC the consumer was directed to execute an agreement to pay the amount of Rs 19,60,800.00 if in case the amount was held to be legally recoverable. In WA No. 1042 of 2013 of the Hon'ble High Court of Kerala held that Licensee is entitled to realise transmission side development charges. So the appellant is directed to remit the transmission side development charges of Rs.19,60,800.00 as per BO(BF) No.2444/2014/LA 111/8347/2011 dated TVM 17-09-2014.

The Hon'ble High court in its judgement in WA 1042/13 dated 30-06-2014 held that Licensee is entitled to realise the development charges. The KSEBL has the right to demand and collect the transmission side development charges. In complaint No 5/15 before Hon'ble CGRF and in similar cases the Hon'ble CGRF also upheld the decision of High court in WA No 1042 of 2013. KSERC vide its interim order in OP 22/2011, directed the appellant to execute an agreement to pay the amount of RS 19,60,800.00 if in case it was found that the amount was held to be legally recoverable. Appellant had remitted Rs 28,74,000.00 towards the cost of distribution side work, but he is legally bound to remit Rs 19,60,800.00 more which is the transmission side development charges.

The Hon'ble CGRF in its order 61/15-16/dated 21-11-2015 disposed the complaint with the opinion that the demand raised by the respondent is correct and the petitioner is bound to pay the same. The Hon'ble High Court vide its interim order in WP(C)No 15993/15 stayed the order of Kerala State Electricity Regulatory Commissions order in OP 22/2011 dated 22-1-2015.

Analysis and findings

A hearing of the case was conducted in my chamber at Edappally, Ernakulam, on 11-03-2016. Sri Shaji Sebastine, the representative of the appellant was present for the appellant's side and Sri. Dileep Kumar K.N., Assistant Engineer-in-charge, Electrical Sub Division, Velloorkunnam and Sri Tito V. William, Nodal Officer (L) Perumbavoor represented the respondent's side. Both sides have presented their arguments on the lines as stated above. On examining the petition of the appellant, the statement of facts filed by the respondent, the arguments in the 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 instant appeal has been filed against the demand issued for a sum of Rs. 19,60,800.00 as development charges on the transmission works. The appellant is aggrieved to the extent that the respondent has no right to collect the pro-rata development charge or any other similar charge in any other name.

Hence the point to be decided in this case is as to whether collection of transmission side development charge on per kVA basis is in accordance with the above orders of the Regulatory Commission.

On a perusal of the above orders it can be seen that in the Petition No. TP-87/2011 filed by KSEB before the Regulatory Commission in the matter of approval of cost data for transmission works. In the order dated 30-11-2010 issued by the Commission, it is held that the Licensee is entitled to recover the cost of works on the distribution side as well as transmission side based on the estimated cost of works. The Commission has approved the following methodology for estimating the cost of providing HT/EHT connections and for executing transmission works in favour of other beneficiaries.

No.	Description	Amount (Provisional)
1	Cost of materials	A
2	Erection & Commissioning	B = 7.5% of A
3	Transportation, Insurance & contingencies	C = 6% of A
4	Civil Works and special works like SCADA etc if any	As per estimation = D
5	Tree cutting compensation if any	As per estimation = E
6	Sub-Total	F = A+B+C+D+E
7	Overhead/Supervision charges	G = 10% of F
8	Total	F+G
9	Taxes & Duties if any extra	

In the order it was also specified that the licensee shall prepare the estimate of costs of works based on the principles laid down above. A copy of the estimate thus prepared should be handed over to the beneficiary under acknowledgement and on completion of works, the licensee shall prepare an evaluation statement of the work, based on actual quantities, within 3 months of completion/energisation of the works and hand over the same to the beneficiary.

The beneficiaries shall be bound to remit the excess cost if any, within one month, failing which the licensee shall be entitled to recover the same, as if it was arrears of current charges under appropriate regulations. Excess remittances if any shall be refunded by the licensees by adjustment in the monthly current charges/ direct refund within a period of 3 months. The Commission has also ordered that any dispute on the matter, including the rates, quantum of works executed etc shall be subject to review by CGRF and Ombudsman. Therefore, any individual dispute of the consumer related to the

development charges can be brought before such Forum by the respective consumers.

In petition No. OP 22/2011 the Commission had issued an interim order on 07-10-2011. In the said interim order the following directions were given.

(i) The Kerala State Electricity Board is directed not to proceed with the pro-rata system devised arbitrarily till a decision is taken on the OP 22/2011 filed by KSSIA (Ernakulam)

(ii) KSEB is further directed to give connection to the consumers listed in Exhibit-1 of the petition OP 22/2011 by executing indemnity bond as commitment for making payments of additional charges if allowed in final orders of the Commission on the above petition.

(iii) KSEB may proceed with collection of transmission charges as per the order of the Commission dated 23-05-2011 on TP 87/2011.

In view of the above direction issued by the Commission on 07-10-2011, various consumers filed Writ Petitions before the Hon'ble High Court of Kerala challenging the levy of transmission side development charges on per kVA basis by KSEB.

The Single Bench of Hon'ble High Court in its common judgment dated 22-11-2012 in WP (C) No. 18726/2011 and connected cases, held that the levy of transmission side development charges and the demand for non-refundable advance impugned in the Writ Petitions was illegal and on that basis the Learned Single Judge had ordered that the amounts realized from the Writ Petitioners should be refunded to them with simple interest @ 6% per annum.

KSE Board filed Writ Appeal no. 900/2013 and connected cases challenging the common judgment rendered by Single Judge in WP (C) 18726/2011 and connected cases. The Division Bench of the Hon'ble High Court in its judgment dated 30-06-2014 in the above Writ Appeals allowed the collection of transmission side development charges by setting aside the judgment of Learned Single Judge in WP (C) 18726/2011 and connected cases.

Meanwhile the Hon'ble KSERC had issued a final order in petition OP No. 22/2011 dated 22-01-2015. The order reads as follows:

(1) KSEB Limited has the right to recover the reasonable expenditure, specifically incurred by its distribution profit centre for providing electric line and electrical plant required for giving supply of electricity to any consumer irrespective of whether such electric line and electrical plant are in the distribution system or the transmission system owned by the distribution profit centre, subject to the following conditions:-

- (i) the expenditure has been incurred by the distribution profit centre;
- (ii) the expenditure is reasonable;
- (iii) the expenditure has been estimated fairly and transparently in accordance with the cost data approved by the Commission;
- (iv) the expenditure is incurred for providing electric line or electrical plant used for the purpose of giving that supply; and
- (v) the expenditure is not included in the ARR & ERC or in any other investment plan approved by the Commission,

(2) The individual cases for recovery of expenditure from the consumers under Section 46 of the Electricity Act, 2003, as mentioned in the petition may be settled in accordance with the principles pronounced by the Hon'ble High Court in its Judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases.

(3) The individual cases which arose on or before 31-03-2014, for recovery of expenditure from the consumers under Section 46 of the Electricity Act, 2003, which are not mentioned in the petition, may also be settled in accordance with the principles pronounced by the Hon'ble High Court in its Judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases.

(4) The recovery of expenditure under Section 46 of the Electricity Act, 2003 in the cases which arose on or after 01-04-2014 shall be regulated in accordance with the provisions in the Kerala Electricity Supply Code, 2014, since the Judgment of the Hon'ble High Court dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases was issued in view of the provisions in the Supply Code, 2005.

But it may be noted that various consumers filed writ petitions before the High Court challenging the levy of transmission side development charges on per kVA basis by KSEB. Writ Appeal No. 900/2013 and other connected appeals were filed by KSEB challenging the common judgment by the single judge. The appellant is not a party in the Writ Appeal No. 900/2013 or other connected cases and SLPs filed before the Hon'ble Supreme Court. The Commission has not admitted an argument that the judgment dated 30-06-2014 of the High Court in Writ Appeal No. 900/2013 and connected cases is only applicable to the petitioners mentioned therein and it has no general application. The Commission cannot take a view that the said judgment of the High Court in a Writ Appeal has no application in other individual cases on the same matter.

Generally the principle pronounced by the Hon'ble High Court in its judgment has to be followed by KSEB in similar cases. If the petitioner wants such clarification it is for him to move the Hon'ble High Court and obtain such clarification. In the SLPs filed by the connected parties against the judgment in Writ Appeal No. 900/2013, the Hon'ble Supreme Court have not stayed or annulled the judgment in the Writ Appeal.

On a perusal of the estimate for enhancing the station capacity by installing a 12.5 MVA Transformer for an amount of Rs. 258 lakhs prepared by the respondent, it is found that the estimate prepared is not in consonance with Circular No. KSEB/TRAC/S Code/SCC/R2/09/502 dated 13-07-2011 which was issued pursuant to Order dated 23-05-2011 in Petition No TP 87/2011. The following variation is noted against the methodology for fixing the cost as stipulated by the KSERC in its orders.

1. Added 3% extra for spares in the estimate of materials (Part-1 Materials) which is not allowable as per KSEB circular dated 13-07-2011. Due to this an excess amount of Rs. 5,41,660.03 is charged.
2. Erection & Commissioning (Part-2) was calculated as 10% of part-1 in the estimate instead of 7.5%.
3. Insurance, transportation & contingencies was calculated as 13.75% (10% + 3.75%) of Part I instead of 6%.

In addition to the above discrepancies in the preparation of estimate, the respondent has not seen handed over a copy of the estimate prepared without observing the cost of works based on the latest material cost data. Further, the respondent has not prepared an evaluation statement of the works based on actual quantities within 3 months of completion / energisation of the work as stipulated in the Order dated 23-05-2011 in Petition No TP 87/2011 of Commission.

It is the bounden responsibility on the part of respondent to prepare the estimate fairly and transparently in accordance with the cost data approved by the Commission and on completion of works the licensee has to prepare and hand over an evaluation statement of the work, based on actual quantities, within 3 months of completion/energisation of the works. On the basis of this the excess/arrears shall be recovered / adjusted by the respondent. This was not seen followed in this case which amounts to lapses on the part of respondent.

According to statutory provisions and facts it is clear that distribution licensee can recover the expenditure specifically incurred for giving connectivity to a consumer provided

1. The expenditure has been incurred by the distribution licensee.
2. The expenditure is reasonable.
3. The expenditure has been estimated fairly and transparently in accordance with the cost data approved by the Commission.
4. The expenditure is incurred for providing electric line or electrical plant used for the purpose of giving that supply and
5. The expenditure is not included in the ARR and ERC or in any other investment plan approved by the Commission. Such expenditure can be recovered irrespective of whether it is for distribution line or transmission line or substation.

As per Regulation 8 (3a) of Supply Code, 2005 deals with supply where new Substation is to be commissioned – *if the licensee finds that supply of electricity to premises applied for requires commissioning of a new Substation which is not covered as part of the investment plan approved by the Commission, the licensee shall inspect the premises of the applicant and prepare the cost estimate for the work and intimate the applicant within one month of receipt of application.*

According to the Commission the judgment of Hon'ble High Court dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases has to be understood and implemented in view of the Section 46 of Electricity Act, 2003. The licensee may require the applicant to pay the cost estimate worked out under the sub clause (3 a) within a period of one month or such extended period as the licensee may allow at the request of the applicant. Here in this petition the respondent has not produced any documents to prove these facts.

However, the respondent stated that for investments involving huge expenditure only one applicant had to bear the entire cost for the establishment of capital works even though his power requirement may only be a fraction of the total installed capacity. On the other hand, the other applicants whose demand is catered from the investment already made need not bear any cost towards providing supply to his establishment. In order to administer the processing of applications properly and to avoid inequitable distribution of expenses, KSEB started to levy cost of giving supply as per kVA rate of total expenditure incurred for the development of the infrastructure facilities from all prospective consumers who are the beneficiaries of the electric plant so created.

The cost as per the estimate for the construction of the entire capital work is not levied from such applicants and instead, the total cost is divided among all the beneficiaries/applicants considering their power requirement. The methodology was implemented in good faith in order to have an equitable distribution of expenses rather than burdening any one applicant from bearing the entire cost of providing infrastructure, and relieving the others from bearing any cost.

Hence the demand of charges on transmission part is legal and not in violation of existing provisions of the rules. The amount demanded is arrived based on the estimate cost of work for the capacity enhancement necessitated for giving supply to the appellant and the prospective consumers.

Decision

The Division Bench of Hon'ble High Court laid down the law in its judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and in view of the direction issued by the Hon'ble Commission to treat the pending cases in accordance with law laid down by the Hon'ble High Court till 01-04-2014, the date on which new Supply Code came into existence. The individual cases which arose on or before 31-03-2014 for recovery of expenditure from the consumers

under Section 46 of Electricity Act, 2003 which are not mentioned in the petition may also be settled in accordance with the principles pronounced by the Hon'ble High Court in its judgment dated 30-06-2014 in Writ Appeal No. 900/2013 and connected cases.

According to the judgment in Writ Appeal No. 900 of 2013 of Hon'ble High Court and in OP No. 22/2011 of Hon'ble Commission the licensee can recover the transmission charges from the appellant and this Authority is of the view that there is no violation in issuing the demand for transmission charges. But it is found that the cost estimated is not in accordance with the order dated 23-05-2011 in petition No TP 87/2011. Hence the respondent is directed to issue revised demand in accordance with the order dated 23-05-2011 in petition No TP 87/2011 to the appellant for 950 kVA on proper acknowledgement within a period of 30 days from the date of receipt of this order.

Since the work is already completed and energised, the respondent shall prepare an evaluation statement of the work based on actual quantities. The appellant shall remit the excess cost if any, within one month, failing which the Licensee shall be entitled to recover the same, as if it was arrears of current charges under appropriate regulations. Excess remittances if any shall be refunded by the respondent by adjustment in the monthly current charges/ direct refund within a period of 3 months.

Having concluded and decided as above it is ordered accordingly. The appeal filed by the appellant is admitted to the extent as ordered above. The order of CGRF in petition No CGRF-CR/Comp.61/2015-16 dated 21-11-2015 is modified accordingly. No order as to costs.

ELECTRICITY OMBUDSMAN

P/183/2015/ _____ /Dated: _____

Delivered to:

1. Sri K.P. Siyad, Kunnathan Chip Boards Pvt. Ltd., East Vazhapilly P.O., Muvattupuzha
2. The Asst. Executive Engineer, Electrical Sub Division, KSE Board Limited, Velloorkunnam, Muvattupuzha.

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, Thiruvananthapuram-4.
3. The Chairperson, CGRF-CR, 220 kV, KSE Board Limited, Substation Compound, HMT Colony P.O., Kalamassery, PIN: 683 503.