

THE STATE ELECTRICITY OMBUDSMAN

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APPEAL PETITION NO. P/085/2015

(Present: V.V. Sathyarajan)

Dated: 08th July 2015

Appellant : Sri Nazim Zackaria
M/s Abad Fisheries (P) Ltd.,
Nambiapuram Road,
Palluruthy
Kochi - 682 006

Respondent : The Assistant Executive Engineer,
KSEBoard Ltd.,
Electrical Sub Division,
Palluruthy,
Kochi

ORDER**Background of the case:**

M/s. Abad Fisheries (P) Ltd, Palluruthy is a consumer having consumer number 19425 in the name of Sri. Nazim Zackaria under Electrical Section, Palluruthy. This connection was effected on 21/03/2005 with a connected load of 110 KW. The appellant is conducting sea food processing unit and the connection is classified under LT IV industrial tariff by the respondent. While being so, the Hon. Kerala State Electricity Regulatory Commission (KSERC), has reclassified the tariff by its order dated 29/08/2008, that sea food processing unit shall be billed under LT IV industrial category and consumers engaged in the freezing and cold storage activity shall be billed under LT VII A commercial category.

Consequent on the inspection conducted by the section squad on 29/10/2009 in the premises of the appellant, the respondent changed the tariff to LT VII A with effect 1/12/2007, as it is found that the consumer 19425 was being used entirely for freezing and cold storage activity. Subsequently a short assessment bill dated 7/11/2009 for Rs. 11,83,784/- was issued to the consumer demanding the difference between LT IV to LT VII A tariff for the period from 12/2007 to 10/2009. The appellant challenged the above short assessment bill by filing a petition before the CGRF (Central Region) in complaint No. 129 of 2009. The CGRF dismissed the petition stating that the issue of short assessment bill by the respondent is in order. Aggrieved against the order of the CGRF, the appellant approached this Authority in appeal No. P-141 of 2010 which was also dismissed.

Aggrieved by the said orders of CGRF and Ombudsman, the appellant approached the Hon'ble High Court of Kerala in WP(C) 79/2011. The Hon'ble High Court confirmed the shifting of tariff from LT IV to LT VII A and also held that the Board could not have retrospectively levied the charge under LT VII A and the impugned short assessment bill was quashed. Aggrieved by the said judgment, the respondent filed an appeal before the Hon'ble High Court of Kerala in Writ Appeal No. 1406 of 2013. The Hon'ble Division Bench in its judgment dated 10/03/2014, directed the appellant to produce the materials available with them before the CGRF. The relevant portion of the judgment reads thus:

"Accordingly, we direct that within four weeks from today the party respondents herein will produce the materials proving that they were carrying on the processing activity in the unit in question for the period subsequent to 01/12/2007 also and that the user of energy for storage/ freezing purpose was a development which occurred only at a later point of time. Such materials shall be produced before the Consumer Grievance Redressal Forum of the KSEB, which is a party to these cases. On production of such materials and after hearing the appellants and the party respondents the Consumer Grievance Redressal Forum will assess the amount, if any, that is due from the party respondents and on that basis it will be open to the appellants to raise fresh demands on the party respondents/consumers.

The judgment of the learned Single Judge will stand modified to the above effect".

In compliance with the judgment, the appellant has filed a petition dated 7/4/2014 before the CGRF which was disposed vide order dated 15/12/2014, as follows:

1. Consumer is liable to pay the electricity charge under LT VII A tariff from 1/12/2007 onwards.
2. The short assessment bill dated 7/11/2009 for Rs. 11,83,784/- is in order.
3. The respondents are directed to demarcate the premises immediately as per rules.

Aggrieved by the decision of the CGRF, the appellant filed this appeal petition before this Authority on 16/01/2015.

Arguments of the appellant:

The appellant has adduced the following contentions in his appeal petition.

On 29.10.2009 the officers of KSEB has conducted Site Inspection and even at that time it was seen that the freezing plant and cold storage were working there as a part of sea food processing in an integrated manner and the appellant have pre-processing/processing and all other connected activity in the very same premises. The pre-processing activity like washing, icing, beheading, peeling, divining, grading, filth washing, stuffing etc are done as and when the raw material is brought. It is also relevant to note that pre-processing activity

like raw material procurement; washing, icing, beheading, peeling, divining, grading, filth washing, stuffing etc are done depending on the availability of the raw material and is a seasonal activity. In the Site Inspection Report itself it is stated that the connection is provided for a seafood processing unit and the various freezers, motors, compressors, condenser pumps, diesel pumps etc. are noted and processing /pre-processing is included in the connection as it is revealed in the site mahazar itself, which shows that unit is having of the activity of that of a sea food processing including a freezing plant and cold storage, integrated. But whereas, in spite of having noted all these facts it is wrongly concluded that the unit is only a cold storage, for the sole reason that at that point of the time/hour there was no pre-processing activity and the same is highly malafide and against true facts.

In compliance of the judgment, the appellant produced various documents to show that the appellant was doing activity of seafood processing as well in the premises along with the freezing plant and cold storage and the freezing plant and cold storage activity was conducted as a part of the seafood processing activity in an integrated manner in the very same unit where the electricity connection having No 19425 is obtained. The appellant was also ready to produce any other documents to substantiate, clarify or support the above materials. Therefore the documents produced will clearly show that the appellant was conducting the activity of seafood processing during the relevant period from 12/2007 to 10/2009 and was not just a freezing plant or a cold storage.

The activity of seafood processing is a seasonal activity depending on availability of raw material. The pre-processing and processing activity will be on days when raw materials are available and whereas on other days, the activity will limited to freezing or cold storage of the processed raw material. Therefore the document produce above will show that the pre-processing and processing activity was conducted in the unit continuously.

Since the appellant has taken the connection of seafood processing and was conducting seafood processing, the burden is on the Kerala State Electricity Board under regulation 24(5) to establish that the consumer was not conducting seafood processing and whereas it was only freezing or cold storage to attract LT VII A and raise a demand for LT VII A. But the Board has not placed any material so far to prove the same. The Sub Engineer of the KSEB every month conducts an inspection and raises the monthly bill. But it was never noted that the appellant has changed the activity from seafood processing to freezing and cold storage alone before at any point of time after December 2007 or at any time after the order of the KSERC. The KSEB did not adduce any evidence or proof to show that from 1-1-2007 the appellant is using the electricity for freezing and cold storage alone or that the petitioner stopped seafood processing activity from 1/11/2007 or any time before that.

Therefore what was directed by the Division Bench of Hon'ble High Court was limited to the scope of making a fresh assessment based on the finding of the date of alleged change of user from seafood processing to freezing cold storage, as per the observations of the Learned Single Judge as well as Division Bench in this regard in the judgment. But the CGRF on a wrong appreciation of the facts and evidence and on a wrong interpretation of the High Court Order travelled beyond its scope and went ahead, even

over riding the judgment of Hon'ble High Court in W.P. No. 79 of 2011 and W.A.1406 of 2013 of the Division Bench and held that the short assessment bill dated 16.11.2009 is in order and that consumer is liable to pay electricity charges under LT VII A tariff from 01-12-2007 and with further directions which is already quashed by the Learned Single Judge. Bill dated 16.11.2009 and the order with directions of the Ombudsman was already quashed by the Single Judge in W.P. No. 79 of 2011. The CGRF has now restored the bill which is already quashed by the High Court, which is prima facie Contempt of Court.

The High court in its judgment in Writ Appeal has only permitted or directed the CGRF to ascertain from which date the consumer started using energy attracting tariff under LA VII A and will assess the amount if any. It was specifically held that ***the Board has demanded higher Tariff with effect from 01/12/2007, only because the change of Tariff was effected from that date and such approach cannot be approved.*** There is no finding by the CGRF that from 1/1/2007 the appellant is using the electricity for freezing and cold storage alone or that the appellant stopped seafood processing activity from 1/1/2007 or any time before that. The CGRF has not made attempt to find that also, where as wrongly concluded that it has not been proved by the appellant that he is doing seafood processing for the period from 1.12.2007 to 30.10.2009, ignoring all the directions and observations of the Hon'ble High Court. In effect, the order of the CGRF is a wilful disobedience of the judgments and directions of the Hon'ble High Court and prejudices and interfere with the judgment and judicial proceedings and findings of the High Court. The findings and reasoning of the CGRF is highly perverse and absurd and serious Contempt of Court, which the petitioner hereby reserves his right to prosecute. All the documents produced by the appellant were simply brushed aside by the CGRF in a very mechanical way by assigning flimsy and perverse reasons. The documents clearly prove that the appellant was conducting seafood processing. The mahazar itself shows that the appellant's unit is a seafood processing unit. There is total non application of mind to the documents as well as judgments of the Hon'ble High Court.

CGRF has not even understood what is the industrial activity or manufacturing activity in a seafood processing unit. The CGRF has misunderstood even the definition of "premises". In this regard the CGRF has misinterpreted the term "premises" from what is stated by the KSERC. The contention of the KSEB was also contradictory before the CGRF and KSERC. The findings and directions in this regard are all against the orders of the KSERC and the Hon'ble High Court.

Arguments of the respondent:

According to the respondent the argument of the appellant that the unit with consumer number 19425 is having preprocessing/processing halls is not correct. There is a seafood processing and freezing unit in the same compound having electric connection with consumer no. 12181 which was effected on 11/01/1995 in the name of Sri Anwar Hashim with a connected load of 115 KW. This unit is having a processing hall. The appellant has not produced any documents to prove that both units are having pre processing/processing halls.

Another contention of the respondent is that the appellants unit with consumer no. 19425 was not carrying out any sea food processing activity and the supply was used only for running freezers. The Hon'ble KSERC in clarification petition 1/08 in DP 39/08 has ordered that seafood processing units with freezing/cold storage are to be classified under LT IV tariff and power connection for cold storage/freezing unit without processing activity are to be classified under LT VII A. If a separate connection is taken for freezing/ cold storage, it shall be deemed to be billed under LT VII A.

The document produced by the appellant does not prove that the unit with consumer no. 19425 is having license for seafood processing. The documents are related to the other unit with consumer no. 12181 in the name of Anwar Hashim. The appellant has produced the certificate of registration from MPEDA which is issued in the name of M/s Abad Fisheries, Door No. 19/2055 A, Nambiapuram road and the registration was done on 20/10/1994. This registration relates to connection no. 12181 and it shows that there is processing plant and storage unit attached to the unit. The registration of the peeling shed is in the Door No. 19/2055A and the date of registration is 22/04/1997. The electrical drawing furnished as document no. 1 is connected with installation of diesel generator set in the unit during 2004. The electric connection to consumer no. 19425 was effected only on 21/03/2005 with a connected load 110 KW in the Door No. 19/2055, Abad Fisheries. Hence it is evident that the documents produced by the appellant are not connected with consumer no. 19425. The appellant could not produce any documents to show that any processing hall is attached to Door No. 19/2055.

Analysis and findings

A hearing of the Case was conducted in my chamber at Edappally, Ernakulam, on 14-05-2015 and 1-06-2015. The counsel of the appellant, Sri Blaze K George, was present for the appellant's side and Sri Sunil K.W., Asst. Executive Engineer, Electrical Sub Division, Palluruthy 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 only issue that is raised before this Authority is regarding the finding of CGRF that the levy of differential tariff under LT IV to LT VII A with effect from 01-12-2007 is in order or not?

The appellant is running a seafood processing unit under LT IV tariff. While so by Tariff Order dated: 26-11-2007 the freezing and cold storage units were shifted from LT IV to LT VII A tariff. Accordingly, Hon'ble KSERC has ordered that the seafood processing unit shall be billed under LT IV tariff and consumers engaged in the freezing and cold storage activity shall be billed under LT VII A tariff. The appellant's premises was inspected by the respondent on 29-10-2009 and found that supply was used for freezing and cold storage activities. Based on the above findings the appellant was issued a short assessment bill for Rs. 11,83,784.00 which is differential amount under LT IV to LT VII A for the period from

12/2007 to 10/2009. In this background the appellant earlier approached CGRF and this Authority vide Appeal Petition No. P-141/2010 and the same was disposed.

Against the above order the appellant approached the Hon'ble High Court in WP (C) 79/2011 and the High Court held that what has been stated in the mahazar is that no processing activity has been done at the relevant time of inspection and therefore the Board is justified in converting the same to LT VII A. It was also held that, but the Board could not have retrospectively levied the charge on LT VII A, particularly when there no material before it and therefore the petitioner could be classified as LT VII A prospectively only from the date of mahazar and set aside the orders of CGRF and this Authority.

Aggrieved by the above judgment the respondent filed a writ appeal No. 1406 of 2013. The Hon'ble Division Bench in its judgment dated 10/03/2014, has directed the appellant to produce the materials available with them before the CGRF to prove that seafood processing activity was being carried out in the premises for the period from 01/12/2007. Accordingly, the appellant produced a number of documents before the CGRF for substantiating their claim. But the Forum has not admitted those facts and held that the short assessment issued is in order.

On going through the counter affidavit the respondent stated that the appellant has another unit in the same compound with consumer No. 12181 and this service connection was effected in the name of Sri Anwar Hashim with a connected load of 115 kW and date of connection was on 11-01-1995. Further, he argued that the unit with consumer No. 19425 is not having preprocessing / processing hall. The Certificate of Registration from MPEDA produced by the appellant is in the name of M/s Abad Fisheries, Door No. 19/2055-A, Nambiapuram Road and the date of registration was on 20-10-1994. Further the certificate of registration of peeling shed is in Door number 19/2055-A and the date of registration is 22-04-1997. The certificate issued by Department of Factories and Boilers shows that the registration was on 01-01-1999. It is pertinent to note that the service connection with consumer No. 19425, Door No. 19/2055, Abad Fisheries was effected only on 21-03-2005 with a connected load of 110 kW. Hence the respondent argued that the documents produced by the appellant are not connected with consumer No. 19425. The certificate of registration issued by MPEDA in the name of M/s Abad Fisheries, Door No. 19/2055-A in which processing plant and storage unit attached. Here, the appellant failed to produce relevant documents to show that seafood processing activities were carried out in the premises of consumer No. 19425.

But the appellant's contention is that the Hon'ble Court directed CGRF to ascertain the period from which the appellant has converted seafood processing activities to freezing and cold storage activities alone and the appellant was directed to produce the documents to show that they are continuing seafood processing. The CGRF was directed to assess amount, if any, due from the appellant on the above basis. But the CGRF has not yet made any effort to find out the said aspect.

On going through the documents the appellant has not placed any material before this Authority instead of their claim that theirs is a seasonal industry and they were also carrying processing activity and that the freezing mentioned in the mahazar were the situation only on the date of inspection or the period immediately preceding thereto. At the same time the respondent argued that the documents produced by the appellant are related to the unit having consumer No. 12181 issued in the name of Abad Fisheries, Door No. 19/2055-A. In that situation Hon'ble Division Bench allowed an opportunity to produce materials available with the appellant before the CGRF. Since the appellant failed to produce sufficient documents before the Forum CGRF, their argument could not be admitted. Further, the appellant also has not produced any documents to show that seafood processing is being carried out in the appellant's premises. In the absence of any relevant materials to show that the only activity carried out in the appellant's premises was seafood processing alone. I could not rely on the argument advanced by the appellant. Neither before the CGRF nor before this Authority, has the appellant not produced any convincing documents as directed by the Hon'ble High Court for revising the short assessment already issued to the appellant.

Decision

In view of the above discussion, I find no reason to interfere with the order of CGRF (Central Region), Ernakulam. Having concluded and decided as above the order of CGRF No. CGRF-CR/Comp.47/2014-15 dated: 15-12-2014 is affirmed. The appeal is dismissed. No order as to costs.

ELECTRICITY OMBUDSMAN

Appeal Petition No. P/085/2015/ _____ /Dated: _____

1. Sri Nazim Zackaria, M/s Abad Fisheries (P) Ltd., Nambiapuram Road, Palluruthy, Kochi - 682 006
2. The Assistant Executive Engineer, KSE Board Ltd, Electrical Sub Division, Palluruthy, Kochi

Copy to:

1. The Secretary, Kerala State Electricity Regulatory Commission, KPFC Bhavanam, Vellayambalam, Thiruvananthapuram-10.
2. The Secretary, KSE Board Limited, Vydhyuthibhavanam, Pattom, KSE Board Ltd. Thiruvananthapuram.
3. The Chairperson, Consumer Grievance Redressal Forum, Power House, Power House Buildings, Cemeterymukku, Ernakulam-682 018