IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

WA.No. 2390 of 2015 ()

AGAINST THE JUDGMENT IN WP(C) 11416/2012 DATED 01-01-2014

APPELLANT(S):
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1. THE ASSISTANT ENGINEER,
   KERALA STATE ELECTRICITY BOARD LTD,
   CENTRAL ELECTRICAL SECTION, KOZHIKODE - 673

2. THE DEPUTY CHIEF ENGINEER
   KERALA STATE ELECTRICITY BOARD LTD
   ELECTRICAL CIRCLE , KOZHIKODE. 673 001

BY ADV. SRI.T.R.RAJAN,SC,K.S.E.B.

RESPONDENT(S):

NIDHISH P.V.
K.T.C.MOTORS, Y.M.C.A, KANNUR ROAD
KOZHIKODE, PIN-673 001.

R1 BY ADV. SRI.T.G.RAJENDRAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 02-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

kp/-

P.N.RAVINDRAN & ALEXANDER THOMAS, JJ.

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W.A. No. 2390 of 2015

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Dated this the 2nd day of December, 2015

JUDGMENT

P.N.Ravindran, J.

The sole respondent herein is a consumer of electrical energy. He was provided with electricity connection under LT-IV industrial tariff with consumer No.11170. The Anti Power Theft Squad ('APTS' for short) of the Kerala State Electricity Board inspected the business premises of the consumer on 6.2.2012. On such inspection it was found that there was misuse of energy and also unauthorised additional connected load. Consequently, a provisional assessment was made and Ext.P1 invoice issued on 1.2.2012 demanding payment of the sum of ₹6,25,872/-. It was served on the respondent along with Ext.P2 communication whereby he was informed that he can object to the provisional assessment and appear before the assessing officer at 3 pm on 16.2.2012. The respondent appeared and submitted Ext.P3 representation dated 16.2.2012. The assessing officer, viz; the Assistant Engineer, Central Electrical Section, Kozhikode considered the representation submitted by the respondent and issued Ext.P4 final bill for ₹6,16,272/-. Aggrieved thereby the respondent filed Ext.P5 appeal before the Deputy Chief Engineer, Electrical Circle, Kozhikode, after depositing 50% of the amount demanded in Ext.P4. The appellate authority heard and dismissed the appeal by Ext.P7 order dated 19.4.2012. Consequently, the assessing authority issued Ext.P8 invoice demanding payment of the balance sum of ₹3,08,072/-. The respondent thereupon filed W.P.(C). No.11416 of 2012 in this court challenging Ext.P7 appellate order and Ext.P8 invoice.

2. Before the learned single Judge, the respondent contended that levy of penalty at twice the tariff applicable to LT-VIIA category is not permissible in the light of the law laid down by this court. It was contended that penalty can be assessed only at two times the tariff applicable to LT-IV category. The learned single Judge accepted the said contention relying on the decision in **J.D.T. Islam Orphanage Committee v. Assistant Engineer, K.S.E.B** (2007 (3) KLT 388 and **Jomy Thomas Manjooran v. K.S.E.B** (2013 (1) KLT 595). The learned single Judge accordingly held that penalty shall be levied on the fixed charges for a period of one year at two times the rate applicable to LT-IV category prevailing as on the date of inspection and current charges will be levied only on the proportionate consumption of energy at LT-IV tariff applicable as on the date of inspection. The assessing officer was directed to issue a revised bill within 15 days from the date of receipt of a copy of the judgment. The learned single

Judge also directed that if after giving credit to the amount already remitted by the consumer, any amount is liable to be refunded, it shall be refunded to him. There was also a direction that if any further amount is payable, the consumer shall pay the same within 15 days from the date of service of the revised bill. The learned single Judge also exonerated the consumer of the liability to pay interest on the amount payable under the revised bill to be issued by the assessing officer. The said judgment is under challenge in this appeal.

3. We heard Sri. T.R. Rajan, learned counsel appearing for the appellants and Sri. T.G. Rajendran, learned counsel appearing for the sole respondent. Sri. T.R. Rajan, learned counsel appearing for the appellants submitted, relying on the decision of a Division Bench of this court in **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (2014 (3) KLT 57) that for unauthorised use of electricity, assessment shall be made at a rate equal to two times the tariff applicable for the relevant category of service attracting higher tariff for which the electricity supplied was unauthorisedly used and not the relevant category of service to which the consumer belongs. Learned counsel contended that in the light of the binding decision of this court, the impugned judgment is liable to be set aside and Ext.P7 appellate order and Ext.P8 invoice upheld.

4. Per contra, Sri. T.G. Rajendran, learned counsel appearing for

the respondent submitted that after the impugned judgment was delivered, a revised assessment was made and a revised bill issued and the amount covered by the said revised bill was paid in full and therefore, the appellants cannot, in an appeal, which was belatedly filed contend that in the light of the decision of the Division Bench in **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (supra) which was rendered on 27.6.2014 contend that the impugned judgment which was delivered on 1.1.2014 should be set aside and the assessment originally made should be upheld.

5. We have considered the submissions made at the Bar by the learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. The consumer has no case that there was no unauthorised use of electrical energy. It is also not in dispute that the consumer is an industrial consumer who is liable to pay energy charges at the rate applicable to LT-IV category. There is also no dispute that the energy charges payable at the relevant time for LT-VIIA category was more than twice the energy charges payable for LT-IV industrial category. A Division Bench of this court has in **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (supra) elaborately considered the purpose underlying the imposition of penalty for unauthorised use of energy and held that the assessment shall be made at a rate equal to one and half times (two

times with effect from 15.6.2007) the tariff applicable for the relevant category of service attracting higher tariff for which the electricity supplied was unauthorisedly used and not the relevant category of service to which the consumer belongs. The Division Bench also took note of the fact that if the appellant before it is assessed under section 126 (6) of the Electricity Act, 2003 for unauthorised use of energy taking LT-IV industrial tariff as the basis for calculating the penalty, the assessee will end up paying energy charges only at a lesser rate for unauthorised use of electricity for commercial purpose, for which he has to pay at a higher rate. The Division Bench also held that **J.D.T. Islam Orphanage Committee v. Assistant Engineer, K.S.E.B** (supra) which was followed in **Jomy Thomas Manjooran v. K.S.E.B** (supra) was decided prior to the enactment and coming into force of the Electricity Act, 2003 and that the said decisions cannot be relied on for the purpose of interpreting section 126(6) of the Electricity Act, 2003.

6. After hearing learned counsel appearing on both sides at length, we are in agreement with the view expressed by the Division Bench in **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (supra) that the decision of the learned single Judge in **J.D.T. Islam Orphanage Committee v. Assistant Engineer, K.S.E.B** (supra) can have no application to the case on hand.

Regulation 42(d) of the conditions of supply of electrical energy framed under the Electricity (Supply) Act, 1948, stipulated that

> "misuse of energy will be billed at three times the rate applicable to the respective tariff for the previous six months from the date of detection of misuse unless there are convincing reasons for adopting different periods and supply disconnected without notice."

7. It was interpreting the aforesaid provision that the learned single Judge held in **J.D.T. Islam Orphanage Committee v. Assistant Engineer, K.S.E.B** (supra) that the expression "respective tariff" in Regulation 42(d) denotes only the tariff at which the quantity of supply at the main premises is billed. The stipulation in section 126 (6) of the Electricity Act, 2003 is not pari materia with Regulation 42 (d). The relevant provisions in section 126 of the Electricity Act, 2003 are extracted below:

> "**126. Assessment**:- (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.
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> (5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has

taken place, it shall be presumed that such unauthorised use of electricity was continuing for a period of three months immediately preceding the date of inspection in cases of domestic and agricultural services, and for a period of six months immediately preceding the date of inspection for all other categories of services, unless the onus is rebutted by the person, occupier or possessor of such premises or place.

(6) The assessment under this section shall be made at a rate equal to one and half times the tariff applicable for the relevant category of services specified in sub-section (5)."

8. Interpreting the aforesaid provisions, **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (supra) the Division Bench held in an identical case where a consumer who was given electricity connection under the industrial category misused it for commercial purpose as follows:

"16. The K.S.E.B is supplying electricity for industrial purpose, under LT-IV tariff, at a subsidised rate, whereas, supply of electricity for commercial purpose, under LT-VIIA tariff attracts a higher rate. As evident from the calculations made in Exhibit P5 demand, the commercial tariff under LT-VIIA during the relevant period was ₹8.25 per unit. As pointed out by the learned Standing Counsel for the K.S.E.B., the industrial tariff under LT-IV during the relevant period was only ₹4.25 per unit. Therefore, if the appellant is assessed under S.126(6) for the unauthorised use of electricity, taking LT-IV industrial tariff @ ₹4.25 per unit as the basis for calculating the rate equal to one and half times the tariff applicable for the relevant category of service, than the appellant need pay only ₹ 6.37 per unit for unauthorised use of electricity for commercial purpose, as against the prevailing rate of ₹8.25 per unit applicable for the commercial tariff under LT-VIIA. If such an interpretation is given, it would defeat the very purpose that S.126 has to achieve, i.e., to put an implied restriction on unauthorised consumption of electricity. On the other hand, if the appellant is assessed for the unauthorised use of electricity, taking LT-VIIA industrial tariff @ ₹ 8.25 per unit as the basis for calculating the rate equal to one and half times the tariff applicable for the relevant category of service, the appellant has to pay only ₹12.37 per unit for unauthorised use of electricity for commercial purpose, as against the prevailing rate of ₹8.25 per unit applicable for the commercial tariff under LT-VIIA. Therefore, the only interpretation that can be given to S.126(6) of the Electricity Act, 2003, is that, in an assessment under S.126 for unauthorised use of electricity, assessment shall be made at the rate equal to one and half time (two time with effect from 15.6.2007) the tariff applicable for the relevant category of service attracting higher tariff for which the electricity supplied was unauthorisedly used and not the relevant category of service to which the consumer belongs, and we hold so." (emphasis supplied)

9. We are in agreement with the view expressed by the Division Bench in the aforesaid decision. In the light of the binding decision of this court with which we concur, we are of the opinion that the appellants are entitled to succeed. Though the learned counsel for the

respondent submitted that pursuant to the decision of the learned single Judge, a revised order of assessment was made and the penalty levied was paid in full, we are of the opinion that, that by itself is not a reason to hold that the respondent is not liable to pay enhanced penalty.

We accordingly allow the writ appeal, and reverse the judgment delivered by the learned single Judge on 1.1.2014 in W.P.(C). No.11416 of 2012 and dismiss the writ petition. It will be open to the appellants to demand and realise from the respondent the balance amount payable in terms of Ext.P8 invoice. Having regard to the fact that the decision of the Division Bench in **Classic Colour Lab v. Assistant Engineer, Electrical Section Central** (supra), was rendered six months after the impugned judgment was delivered, we deem it appropriate to direct that the respondent shall not be mulcted with the liability to pay interest (surcharge) for belated payment of Ext.P8 invoice.

sd/
P.N.RAVINDRAN
JUDGE

sd/
ALEXANDER THOMAS
JUDGE

kp/-