IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

WEDNESDAY, THE 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

WP(C).No. 15679 of 2014 (H)

PETITIONER:

THAHIR KALLAT
S/O.MOOSA KALLAT, NVP HOUSE, MUTTIL P.O.
WAYANAD - 673 122.

BY ADVS.SRI.K.A.MOHAMED HARIS
SRI.RAKESH.V.R.

RESPONDENTS/RESPONDENTS:

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1. KERALA STATE ELECTRICITY BOARD LIMITED
   VYDHYUTHI BHAVAN, PATTOM
   THIRUVANANTHAPURAM - 695 004.

2. THE ASSISTANT ENGINEER,
   KERALA STATE ELECTRICITY BOARD, ELECTRICAL SECTION
   KALPETTA, WAYANAD DISTRICT - 673 121.

3. THE SUB ENGINEER,
   KERALA STATE ELECTRICITY BOARD, ELECTRICAL SECTION
   KALPETTA, WAYANAD DISTRICT - 673 121.

4. THE DEPUTY CHIEF ENGINEER,
   ELECTRICAL CIRCLE, KERALA STATE ELECTRICITY BOARD
   KALPETTA, WAYANAD DISTRICT - 673 121.

R1 -R 5 BY ADV. SRI.JAICE JACOB,SC,KERALA STATE ELECTRICITY BOARD

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 15-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 15679 of 2014 (H)

APPENDIX

PETITIONER'S EXHIBITS

EXHIBIT P1. TRUE COPY OF THE SITE MAHAZAR PREPARED BY THE APTS TEAM AND SUB ENGINEER KALPETTA ELECTRICAL SECTION 28.03.2012.
EXHIBIT P2. TRUE COPY OF THE INTIMATION LETTER SIGNED BY ASSISTANT ENGINEER ELECTRICAL SECTION KALPETTA DATED 29.03.2012.
EXHIBIT P2(A). TRUE COPY OF THE PROVISIONAL INVOICE ISSUED BY SENIOR SUPERINTENDENT OF ELECTRICAL SECCTION KALPETTA DATED 29.03.2012.
EXHIBIT P3. TRUE COPY OF THE FINAL ASSESSMENT ISSUED BY ASSISTANT ENGINEER ELECTRICAL SECTION KALPETTA DATED 03.05.2012.
EXHIBIT P3(A). TRUE COPY OF THE FINAL ASSESSMENT INVOICE FOR RS.7,91,893/- ISSUED BY ASSISTANT ENGINEER ELECTRICAL SECTION KALPETTA DATED 03.05.2012.
EXHIBIT P4. TRUE COPY OF THE SERVICE CONNECTION APPLICATION SUBMITTED FOR NEW CONNECTION TO THE RESTAURANT BEFORE THE ASSISTANT ENGINEER, KALPETTA.
EXHIBIT P4(A). TRUE COPIES OF THE RECEPTS OF THE PAYMENTS MADE FOR NEW CONNECTION DATED 25.04.2012.
EXHIBIT P4(B). TRUE COPY OF THE SUMMARY OF THE BILLS IN THE NEW CONNECTION WITH CONSUMER NO.33415 FROM 26.04.2012 CERTIFIED BY THE ASSISTANT ENGINEER.
EXHIBIT P4(C). TRUE COPIES OF THE BILLS ISSUED TO THE PETITIONER VIDE CONSUMER NO.33415 UNDER LT VIIA TARIFF DATED 26.02.2013 & 20.04.2013.
EXHIBIT P5. TRUE COPY OF THE RECEIPT DATED 25.05.2012 VICE RECEIPT NO.421598.
EXHIBIT P6. TRUE COPY OF THE ORDER OF THE DEPUTY CHIEF ENGINEER, KALPETTA DATED 28.06.2013.
EXHIBIT P7. TRUE COPY OF THE COVERING LETTER WITH REVISED BILL DATED 19.10.2013.
EXHIBIT P7(A). TRUE COPY OF THE REVISED BILL DATED 19.10.2013.
EXHIBIT P8. TRUE COPY OF THE RECEIPTS DATED 21.11.2013, 21.12.2013 AND 23.01.2014 VIDE RECEIPT NO.596775, 605894 & 614393 ISSUED TO THE PETITIONER.
EXHIBIT P9. TRUE COPYT OF THE SHORT ASSESSMENT DEMAND LETTER NO.BS/ES/KPTA/2014 DATED 14.02.2014.
EXHIBIT P9(A). TRUE COPY OF THE SHORT ASSESSMENT BILL DATED 14.02.2014.
EXHIBIT P10. TRUE COPY OF THE DETAILED OBJECTION FILED BEFORE 2ND RESPONDENT.
EXHIBIT P11. TRUE COPY OF THE SHORT ASSESSMENT DEMAND LETTER NO.BS/ES/KPTA/2014-15/32/DATED 28.05.2014.
EXHIBIT P11(A). TRUE COPY OF THE SHOT ASSESSMENT BILL.
EXHIBIT P12. TRUE COPIES OF THE BILLS ISSUED TO THE PETITIONER VIDE CONSUMER NO.31103 UNDER LT IA TARIFF DATED 23.08.2012, 27.10.2012.

RESPONDENT(S)' EXHIBITS: NIL

ANU SIVARAMAN,J.

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W.P.(C).No.15679 of 2014

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Dated this the 15th day of July, 2015

JUDGMENT

Petitioner is a consumer of electricity with consumer No.31103 under the LT 1A tariff. He had availed the connection as the promoter of his multi-storeyed apartment building for operating common facilities of the residential apartments. On 28.03.2012, the Anti Power Theft Squad of the 1st respondent Board conducted a surprise inspection on the petitioner's premises and found that he had taken unauthorised connection to a kitchen and restaurant being operated in the name and style “Hotel Kalpetta” in the building. Ext.P1 is the site mahazar prepared by the Sub Engineer attached to the Squad. It was stated that the petitioner's approved connected load under the domestic tariff is 20KW and that an additional load of 24 KW was detected in the inspection. It is alleged that the electrical equipments used in the restaurant and kitchen come under commercial tariff (LT VIIA) and that the petitioner is liable to pay penalty. A provisional assessment bill was issued to him showing an amount of Rs.7,91,893/- as due from him.

2. The petitioner submitted his objections before the Assistant Engineer, who confirmed the provisional assessment and issued final assessment by Ext.P3 order dated 03.05.2012. The petitioner thereupon preferred an appeal before the Deputy Chief Engineer and deposited a sum of Rs.3,75,934/- being half of the assessed amount. By Ext.P6 order, the appeal was allowed in part reducing the period of assessment from 31.03.2011 to February 2012 and also holding that the total connected load at the time of inspection was only 33837 Watts. Based on the directions in Ext.P6, a revised bill of Rs.4,36,825/- was issued to the petitioner along with a covering letter on 09.10.2013. The petitioner paid the amount demanded as per this bill by remitting the balance amount of Rs.40,878/- in installments, last of which was paid on 23.01.2014. In the meanwhile, it is stated in the writ petition that on 26.04.2012 pursuant to Ext.P4 application made by the petitioner, a new connection was sanctioned and effected in respect of the restaurant and kitchen functioning in the premises as consumer No.33415 with commercial tariff (LT VIIA). The grievance of the petitioner is with regard to Exts.P9 and P9(a) as well as Exts.P11 and P11(a) short assessment bills issued to him. Ext.P9 is issued in respect of consumer No.31103 under tariff LT 1A. It is stated in

Ext.P9 dated 14.02.2014 that the tariff and additional load with respect to the misuse that was detected on 20.03.2012 has not been regularised till date, therefore short assessment bill of Rs.2,37,203/- is being issued for non-regularisation of tariff and additional load for the period from 06.2012 to 12.2013. The short assessment bills appended to Ext.P9 and marked as Ext.P9(e) also shows that the amount covered is from June 2012 to December 2013 for non-regularisation of tariff misused and additional load.

3. The petitioner submitted Ext.P10 reply. He had pointed out that by Ext.P1 mahazar, a total connected load of 43397 Watts was estimated but by Ext.P6 order in appeal it was reduced by about 10 KW. It is further submitted that a new connection under LT VIIA tariff having been effected as early on 26.04.2012 with a connected load of about 8 kws for the restaurant and kitchen, there is, as a matter of fact, no additional connected load in the domestic connection with consumer No.31103. A list showing the details of discrepancies in respect of amounts collected for the domestic connection have also been appended in the explanation. However by Ext.P11 dated 28.05.2014 the demand is again made showing a short assessment bill for non-regularisation of tariff and additional load. It is stated that

tariff and connected load has been regularised by the consumer on 22.11.2013 and short assessment bill has been reassessed as Rs.289413/- adding the short fall which was omitted in the previous assessment. A demand for the same has also been issued by Ext.P11 (a). The short assessment bills are challenged by the petitioner mainly on the ground that they are not preceded by by any notice or inspection and are issued only on the basis of audit enquiry and audit report of the Regional Audit Officer and therefore they are completely in competent.

4. A counter affidavit has been filed by respondents 1 to 4 contending that though a commercial connection was effected to the restaurant and kitchen run by the petitioner with consumer No.33415 with connected authorised load of 7803 watts, it was contended that, the new electricity connection was effected only on 21.04.2014. It was admitted that the amounts due under Ext.P6 appellate order had been remitted by the petitioner in full on 04.06.2013. It was further stated that though the monthly invoices showing unauthorised additional load was issued to the consumer on 25.06.2010, the same was objected to by the petitioner since the appeal was pending and the bill was kept pending. After the appeal was disposed of on

28.06.2013, it is submitted that the short assessment bill Ext.P9(a) was issued for continuously using the unauthorised load without getting it regularised by producing revised test report. It is further stated that the internal audit wing of the Kerala State Electricity Board and the Accountant General of Kerala had directed realisation of amount on account of continuous usage of unauthorised load. It was admitted that the petitioner had raised an objection stating that a new service connection with consumer No.33415 had been taken in the premises and therefore the short assessment bill is unsustainable. It is stated that R1(d) letter was issued to the petitioner inviting him for a hearing before the Assistant Executive Engineer, Electrical Sub Division, Kalpetta to get more clarification on the bill. It is stated that the petitioner did not turn up. Ext.R1(e) certificate issued by the Kalpetta Municipality to show that D&O licence has been issued to the restaurant from 30.06.2011 was also produced. It was a specific case in the counter affidavit that the connected load remained unregularised and the tariff violation also continued until December 2013 and therefore the amounts claimed are liable to be paid by the petitioner.

5. The petitioner filed a reply affidavit pointing out that he had availed a commercial connection to his restaurant as early as on

25.04.2012 and the entire load excluding the authorised connected load of 20kws connected to LT1A consumer No.31103 has been shifted to the new commercial connection. Therefore it is contended that from 26.04.2012 there cannot be any further allegation of tariff misuse or unauthorised connection of load in the domestic connection. It is also contended that the earlier inspection and orders passed thereon have since attained finality by Ext.P6 order in appeal and no amounts can be claimed from the petitioner on the basis of that inspection or orders passed thereon.

6. Heard Sri.Mohammed Haris, learned counsel appearing for the petitioner and Sri.Jaice Jacob Learned counsel appearing for respondents 1 and 4. The question to be examined in the writ petition is with regard to the correctness or otherwise of Exts.P9,P9(a), P11 and P11(a) short assessment bills issued to the petitioner. It is the admitted case of the parties that the first connection given to the petitioner for the purpose of common area in an appartment building was under LT1A tariff appliable to domestic consumers. In none of the notices issued to the petitioner including notices impugned herein have the Board or its officials raised any dispute regarding the applicability of the domestic tariff to that connection that is Consumer No.31103 of

the petitioner's building. The dispute involved in this case is with regard to the usage of power for the restaurant and the kitchen attached thereto which, according to the respondents has been functioning in the premises of the petitioner. It is alleged by the respondents that even after the finalisation of the amounts due from the petitioner under Ext.P3 final order, the petitioner has been continuing to use the power for commercial purpose without regularisation of the tariff and the connected loads. The petitioner has produced Ext.P4 application submitted by him for a fresh commercial connection in respect of his restaurant and kitchen. Ext.P4(a) shows that amounts due for granting a connection have been paid by him on 25.4.2012 itself. Ext.P4(b) is a statement showing the bills and payment history in respect of consumer No.33415 under tariff VII A (commercial tariff) issued to the petitioner. The date of connection is shown as 26.04.2012 and bills have been raised from 26.04.2012 onwards. Ext.P4(c) is one such bill dated 26.02.2013 where the prior reading date is shown as 22.12.2012. it is therefore clear that the petitioner had, in fact, taken a commercial connection in respect of his restaurant and kitchen on 26.04.2012 itself. The contention of the petitioner is that with the availing of the commercial connection in April

2012 the tariff violation as well as the excess connected load stood regularised and therefore no further bills could be issued against him in respect of the allegation made in Exts.P9 and P11. It is further contended that Exts.P9 and P11 to the extent they are not preceded by an inspection or notice, provisional order and a hearing are in violation to provisions of the Electricity Act and the Regulations made thereunder and are inoperable and unsustainable.

7. Learned counsel for the respondents would submit that Ext.R1 (a) would show that the additional load of 19369 Watts was permitted to the Consumer No.33415 only on 22.11.2013 and therefore the tariff violation and the additional load stood regularised only from that date. It is therefore contended that Exts.P9 and P11 are perfectly in order and cannot be assailed by the petitioner.

8. In the reply affidavit filed by the petitioner, it is stated that the allegation of misuse and violation of tariff detected and covered by Ext.P3 bill has become final in appeal and a further bill in respect of the same allegations is completely unjustified. It is further submitted that he was availing the connected load which could be used by him authorisedly in respect of both of his connections only. In November 2013, he had sought enhancement of the connected load in respect of

the commercial connection since he proposed to make additions in his electrical load as he proposed to start a new gymnasium, club room, swimming pool etc. in the building. It is therefore stated that the said application made in November 2013 cannot be relied on by the respondents to mulct him with penalty. The decisions of this court in **Jomy Thomas Manjooran v. K.S.E.B** (2013(1) KLT 595) and **Luqman Ali Muhammed v.K.S.E.B** (2014(2) KLT 833) are relied on by the counsel for the petitioner in support of his contention that the respondents are not empowered to revise or reopen or rectify assessment of penalty once finalised under section 126 of the Electricity Act, especially on the basis of instructions issued by the audit officers. In **Luqman Ali Muhammed supra** this court has in paragraph 9 held that even for the imposition of penalty on the allegation of continuance of unauthorised usage the procedure contemplated under section 126(2) and (3) are mandatory . It is held as under:-

> "Penalty for any continued unauthorised extension can be imposed only if the Assessing Officer is convinced that the unauthorised extension had actually continued during any period after the date of inspection, that too after complying with all the procedure under s.126(2) &(3)."

9. In the instant case, the respondents have no case that the procedure contemplated under section 126 of the Electricity Act has

been followed in the issuance of Ext.P9 and P11 covering letters or the short assessment bills. It is clear from Exts.P9 and P11 that the inspection referred to therein is the inspection held on 28.03.2012 which has already become final by Ext.P6 order and all amounts due under the bills raised thereunder have already been paid. The references in P9 and P11 would clearly show that the said assessments have been made only on the basis of audit reports and no inspection or notice preceded them

10. Learned counsel for the respondent brought to our notice the judgment of the Division Bench of this court in Writ Appeal No.975 of 2014 which according to him supports this case. The relevant paragraphs of the said judgment are extracted hereunder:-7 & 8.

> "7. In so far as these cases are concerned, it is the case of the appellant that they had applied for regularising the additional connections. But there is nothing on record to show that the same has been done. In such a situation, the subsequent demands which were issued by the Board are authorised by Regulation 51 of the KSEB Terms and Conditions of Supply,2005. This does not need a fresh inspection or assessment as contemplated under section 126 of the Electricity Act. Therefore, the first contention raised by the learned counsel for the appellant cannot be accepted and has to be rejected.
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> 8. In so far as the second contention relying on the judgment of this Court in Jomy Thomas Manjooran's case (supra)

is concerned, that judgment reiterates the well settled principle that under Section 126 of the Electricity Act, the assessing officer is not empowered to revise, reopen does not enable him to undertake any such exercise. Although we don't have any doubt about the correctness of the settled principle of law, the question is whether the said principle of law has any relevance in so far as these cases are concerned. In these cases as already stated by us, further demands issued against the appellant were a consequence of the inspection and assessment under Section 126 of the Electricity Act. As far as Ext.P14 mentioned above is concerned, that was issued following the audit objection. That does not amount to any revision, reopening or rectification as laid down in the judgment relied on. Therefore, both the contentions raised by the learned counsel for the appellant cannot be accepted."

11. I find it difficult to accept the contention raised by the learned counsel for the respondent that the said observations in the judgment amount to a permission to the Board to issue short assessment bills on the basis of audit objections raised by the competent authorities in the Board and the Accountant General his contention and that no further inspection or notice is necessary. A reading of section 126 of the Act would make it abundantly clear that this is not the procedure contemplated for issuance of short assessment bills.

I have therefore no hesitation to hold that impugned order and short assessment bills [Exts.P9, P9(a), P11 and P11(a)] are unsustainable and are liable to be quashed. This will not, however, affect the rights of the respondents to take appropriate action in accordance with law against the petitioner, if they are so advised.

sd/-

Anu Sivaraman, Judge

sj

TRUE COPY

P.A.TO JUDGE