IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

WEDNESDAY, THE 1ST DAY OF JULY 2015/10TH ASHADHA, 1937

WP(C).No. 20310 of 2010 (K)

PETITIONER:

VELLAMUNDA STONE CRUSHER,
MANGALASSERI ESTATE, VELLAMUNDA P.O.,
MANANTHAVADI (VIA), WAYANAD-670 731, REPRESENTED
BY ITS MANAGING PARTNER V.MUHAMMED NISSAR.

BY ADVS. SRI. K.M. FIROZ
SMT. M. SHAJNA

RESPONDENT(S):
----

1. **THE KERALA STATE ELECTRICITY BOARD,**
   REPRESENTED BY ITS SECRETARY, BOARD SECRETARIAT,
   VYDYUTHI BHAVANAM, PATTOM-695 014, THIRUVANANTHAPURAM.

2. **THE ASSISTANT ENGINEER,**
   THE KERALA STATE ELECTRICITY BOARD,
   THE OFFICE OF THE ASSISTANT ENGINEER, ELECTRICAL SECTION,
   VELLAMUNDA, WAYANAD DISTRICT - 670 731.

3. **THE SENIOR SUPERINTENDENT,**
   THE KERALA STATE ELECTRICITY BOARD,
   THE OFFICE OF THE ASSISTANT ENGINEER, ELECTRICAL SECTION,
   VELLAMUNDA, WAYANAD DISTRICT - 670 731.

4. **THE DEPUTY TAHSILDAR (RR),**
   TALUK OFFICE, MANANTHAVADY, WAYANAD DISTRICT - 670 645.

5. **THE VILLAGE OFFICER,**
   VELLAMUNDA, MANANTHAVADI (VIA)
   WAYANAD DISTRICT - 670 731.

R1 TO R3 BY ADV. SRI. P. SANTHALINGAM (SR.), SC FOR KSEB
R4 TO R5 BY GOVERNMENT PLEADER SRI. P.V. ELIAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 20310 of 2010 (K)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT. P-1: **A TRUE COPY OF THE AGREEMENT DATED 05.01.2005 EXECUTED BETWEEN THE PETITIONER AND KSEB.**

EXT. P-2: **A TRUE COPY OF THE NOTICE DATED 06.01.2007 ISSUED BY THE D.F.O. TO THE PETITIONER UNDER THE KERALA FOREST (VESTING AND MANAGEMENT OF ECOLOGICALLY FRAGILE LAND) ACT.**

EXT. P-3: **A TRUE COPY OF THE INSPECTION REPORT DATED 09.07.2008 SUBMITTED BY THE STATUTORY COMMITTEE CONSTITUTED UNDER SECTION 18 OF THE KERALA FOREST (VESTING AND MANAGEMENT OF ECOLOGICALLY FRAGILE LAND) ACT.**

EXT. P-4: **A TRUE COPY OF THE REVENUE RECOVERY NOTICE IN FORM NO. 1 BEARING NO. D3-2356/010 ISSUED BY THE FOURTH RESPONDENT TO THE PETITIONER.**

EXT. P-5: **A TRUE COPY OF THE REVENUE RECOVERY NOTICE IN FORM NO. 10 BEARING NO. D3-2356/010 ISSUED BY THE FOURTH RESPONDENT TO THE PETITIONER.**

EXT. P-6: **A TRUE COPY OF THE COMMUNICATION DATED 23.03.2010 ISSUED BY THE SENIOR SUPERINTENDENT OF THE VELLAMUNDA OFFICE OF THE KSEB TO THE PETITIONER.**

RESPONDENT(S)' EXHIBITS - NIL

//TRUE COPY//

P.A. TO JUDGE

ww

ANIL K. NARENDRAN, J.

W.P.(C) No.20310 of 2010
--
Dated this the 1st day of July, 2015

JUDGMENT

The petitioner is a partnership firm represented by its Managing Partner. It was a consumer of electrical energy under the 2nd respondent with consumer No.17736. The petitioner secured electric connection to his metal crusher unit on the strength of Ext.P1 minimum guarantee agreement executed with the Kerala State Electricity Board (hereinafter referred to as 'the Board').

2. Going by Clause I of Ext.P1 minimum guarantee agreement, the Board will have to draw 3.5 km of 12 KV Single Circuit by reinstalling 1 x 160 KVA transformer and 150 meters of LT 3 PH line, for distribution of electricity to the petitioner's metal crusher unit, with an estimate cost of the work, including 10% establishment charges, of Rs.12,46,838/-. As per Clause 2 of the agreement, the Managing Partner of the firm has guaranteed to pay to the Board energy charges subject to the minimum amount specified in terms of the schedule appended to Ext.P1 agreement making up an amount equal to 25% of the estimate capital cost or the actual cost of the work including

10% establishment charges for a minimum period of 7 years or such other period as the Board may fix from time to time, with or without notice to the guarantors. Going by Clause 4 of Ext.P1 minimum guarantee agreement, the guarantor also guarantees to make up any amount that falls or may fall short of 25% return of the capitalized cost of the work mentioned in Clause 1, which is subject to the condition that, the minimum guaranteed amount will be charged only until the line extension has become self remunerative as per norms fixed by the Board from time to time. Clause 7 of Ext.P1 minimum guarantee agreement further provides that all dues that may become payable by the guarantor in terms of the agreement by reason or breach or otherwise are recoverable under the provisions of the Revenue Recovery Act for the time being in force, as if they are arrears of public revenue due on land or in any other manner as the Board may deem fit. The schedule to Ext.P1 minimum guarantee agreement shows the details of electric installation for providing electric connection to the petitioner's premises and it also shows that the amount guaranteed per year comes to Rs.3,11,710/-.

3. According to the petitioner, though it availed the power supply to run a stone crusher unit, the land in question was

notified as an Ecologically Fragile Land and the same was taken possession by issuing Ext.P2 notice under the Kerala Forest (Vesting and Management of Ecologically Fragile Land) Act, 2003. Ext.P3 is the report of the Inspection Committee under Section 18 of the aforesaid Act, which is dated 09.07.2008. The grievance of the petitioner in this writ petition is that though the petitioner had to close down its industrial unit as the land in which it was set up was notified as Ecologically Fragile Land, at the instance the respondent Board, the 4th respondent has issued Exts.P4 and P5 demand notices for a sum of Rs.15,75,715/-, under the provisions of the Revenue Recovery Act.

4. On receipt of Exts.P4 and P5 demand notices, the petitioner submitted an application before the Information Officer in the Electrical Section, Vellamunda and obtained Ext.P6 information, which shows that, from the electric line drawn under Ext.P1 minimum guarantee agreement, the respondent Board has already given connection to 53 consumers and that, the establishment charge already spent for drawing line to the petitioner's industrial unit was not collected from the said consumers. It is aggrieved by the demand made in Exts.P4 and P5, the petitioner is before this Court in this writ petition

seeking a writ of certiorari to quash the aforesaid demand notices and also seeking a declaration that the Board is not entitled to realise any amount on the basis of Ext.P1 agreement as well as Ext.P4 and P5 demand notices, without proper adjudication of the amount, if any, payable by the petitioner, by a competent civil court.

5. The respondents have filed a counter affidavit contending that, based on the request made by the petitioner for establishing a stone crusher unit with a capacity of 85 KW an estimate was prepared for Rs.11,33,489/-. Thereafter, the petitioner executed Ext.P1 minimum guarantee agreement with the Deputy Chief Engineer, Electrical Circle, Kalpetta. Subsequent to the execution of that agreement, the line extension work was carried out and electricity connection was provided to the industrial unit as per Consumer No.17736, on 01.07.2006, under the Electrical Section, Vellamunda. Relying on Ext.P1 minimum guarantee agreement, the respondent Board would contend that the petitioner is bound to remit Rs.25,976/- per month for a period of seven years. But the petitioner failed to remit electricity charges from August 2008 onwards and the service connection was put under disconnection after issuing

statutory notice under Section 56 of the Electricity Act, 2003. Even after repeated notices, the petitioner failed to remit the electricity dues and in such circumstances, the connection was dismantled on 20.04.2009 after serving notice. According to the respondent Board, the arrears of Rs.15,75,715/- demanded in Exts.P4 and P5 are towards the guaranteed minimum charges and the demand made therein is perfectly legal. The respondent Board has also stated in Paragraph 4 of the counter affidavit that, electric supply to the petitioner's premises was discontinued due to the violation of conditions 2 and 4 of the minimum guarantee agreement and that electric system provided as per the aforesaid agreement has not become self remunerative and the petitioner could not prove this aspect.

6. The petitioner has filed a reply affidavit reiterating the contentions raised in the writ petition. The petitioner has also contended that, it could not consume electricity after August 2008 since the land in question was notified as Ecologically Fragile Land, and the petitioner was also dispossessed from the aforesaid land. The petitioner has denied the allegations in the counter affidavit filed by the respondents that, the line has not become self remunerative. The petitioner has also contended

that, it is the burden of the Board to prove that fact, which is within the knowledge of the Board. Therefore the petitioner would contend that the demand made in Exts.P4 and P5 are legally unsustainable.

7. I heard the arguments of the learned counsel for the petitioner and also the learned Standing Counsel for the respondent Board.

8. The issue that arises in this writ petition is as to the liability of the petitioner to pay the minimum guarantee amount in terms of Ext.P1 minimum guarantee agreement. Going by the terms of Ext.P1 minimum guarantee agreement, on an undertaking given by the petitioner, the respondent Board spent a sum of Rs.12,46,838/- for drawing 3.5 km of 12 KV single circuit, installing 1 x 160 KWA transformer and constructing 150 meters of LT 3 PH line for distribution of electricity to its industrial premises. The drawing of line was on a specific condition that, the petitioner has to pay the minimum guaranteed amount until the line extension become self remunerative as per the norms fixed by the Board from time to time. Going by the terms of Ext.P1 agreement, the petitioner is legally bound to pay the minimum guarantee amount for a period

of seven years and the annual amount notified in Ext.P1 Rs.3,11,709/-. It is relying on the information received under Ext.P6, the petitioner is contending that, the line has already become self remunerative and it was ignoring the aforesaid fact, the minimum guarantee amount was demanded vide Exts.P4 and P5 demand notices. But, Ext.P6 would only indicate that about 53 consumers were given electric connection from the line drawn pursuant to Ext.P1 minimum guarantee agreement. Whether 53 consumers are domestic consumers or industrial consumers is disclosed in Ext.P6.

9. In the counter affidavit filed by the respondent Board, the Board has not disputed the fact that on the strength of Ext.P2 notification issued the land in question was notified as Ecologically Fragile Land and the petitioner was dispossessed from the property. Going by the terms of Ext.P1 minimum guarantee agreement, the liability of the petitioner to pay the minimum guarantee amount ceases as and when the line extension become self remunerative. In the counter affidavit filed by the respondent Board, the stand taken by the Board is that, it is for the petitioner to prove that the line has become self remunerative. I am unable to accept the aforesaid contention

raised by the respondents. When Clause 4 of Ext.P1 minimum guarantee agreement specifically provides that, the liability of the petitioner is till the line extension become self remunerative, the respondent Board, cannot demand minimum guarantee amount in case the line extension in question has already become self remunerative. When the petitioner has a specific case that, the line extension work has already become self remunerative, it is for the Board to prove to the contra by producing the relevant materials. When the consumer has raised a specific contention that, the line has already become self remunerative, it is for the respondent Board to furnish necessary particulars to the consumer alongwith a calculation statement so as to enable the consumer to establish that he is not legally bound to pay the amount in terms of the minimum guarantee agreement.

10. The learned counsel for the petitioner, relying on the judgment of this Court in **KSEB v. State of Kerala [2002 (3) KLT 933]** would contend that, a consumer is liable to pay minimum guarantee amount only if the Board is able to supply power. According to the learned counsel, since the land in question was notified as an Ecologically Fragile Land, it was

impossible for the petitioner to run the stone crusher unit and consume electricity. In such circumstances, no demand for minimum guarantee amount can be made once the land in question has already been notified as an Ecologically Fragile Land and the petitioner is dispossessed from that property.

11. From a reading of the judgment of this Court in **KSEB v. State of Kerala (supra)** it can be seen that, it was a case in which the land in question was acquired for Nedumbasseri International Airport and the land owned by the writ petitioners therein in which an industrial unit was functioning and also the land in the surrounding area were acquired. On acquisition of the aforesaid property the electric poles, transmission wires etc. erected by the Board were also removed and in such circumstances, power supply had to be discontinued. It was in such circumstances, the Division Bench of this Court held that, the Board cannot enforce the minimum guarantee agreement against the consumer and say that it must pay for the full period of ten years.

12. In the case on hand, the electric line installed by the respondent Board on the strength of Ext.P1 minimum guarantee agreement is still there and used for distributing electricity to

various consumers. Therefore, the principle laid down in the above judgment of Division Bench cannot be made applicable to the facts of the present case.

13. Relying on the judgment of Apex Court in **State of Karnataka v. S.R.Rice [1987 (2) SCC 160]**, the learned counsel for the petitioner would contend that without quantification of the minimum guarantee agreement amount and other charges payable under the minimum guarantee agreement, the respondent Board is not justified in initiating revenue recovery proceedings, by issuing Exts.P4 and P5 demand notices. In the aforesaid judgment, the Apex Court was dealing with the case in which certain amount was demanded towards damages for breach of contract by making short delivery of rice. Going by the terms of Clause 12 of the agreement, which was the subject matter in the case before the Apex Court, it was held that such quantification of liability should be done before initiating recovery proceedings.

14. But in the case on hand, a mere perusal of Ext.P1 minimum guarantee agreement would show that, the amount payable by the consumer in case he failed to fulfill the conditions stipulated therein is a specified amount namely Rs.3,11,710/- per

year. Therefore, if there is any violation of Ext.P1 minimum guarantee agreement and the petitioner is not consuming the minimum quantity of electricity, the respondent Board is automatically entitled to demand the minimum guarantee amount in terms of the conditions stipulated in Ext.P1. In such circumstances, what is required to be done by the respondent Board is only a demand for the amount which the petitioner is bound to pay in terms of the conditions in the minimum guarantee agreement, which require no quantification other than a mere mathematical calculation. Therefore, the contention raised by the learned counsel for the petitioner relying on the judgment of the Apex Court in **State of Karnataka v. S.R. Rice (supra)** cannot be accepted.

15. The learned Standing Counsel for the respondent Board relying on the judgment of the Division Bench of this Court in **Rajesh v. KSEB [2006 (1) KLT 686]** would contend that the respondent board can demand amount under the minimum guarantee agreement even after disconnection of supply, till the line becomes self remunerative.

16. It cannot be disputed that, going by the terms of Ext.P1 minimum guarantee agreement, the consumer is bound to pay

the minimum guarantee amount till the line becomes self remunerative. But the issue that arises for consideration in this writ petition is that, when the consumer raises a specific contention that the line has already become self remunerative, whether the respondent Board, without producing any materials on record, would be justified in contending that it is for the consumer to show that the line has become self remunerative and in the absence of any such proof, the said contention can only be rejected. When a consumer raises a specific contention that, the line has already become self remunerative, it is for the respondent Board to convince the consumer with reliable materials that the line is yet to become self remunerative, this is a necessary pre-condition for raising a demand in terms of the minimum guarantee agreement when consumer disputes a liability to pay that amount on the ground that the line has already become self remunerative.

In such circumstances, the writ petition is disposed of with the following directions:

(1) Within one month from the date of receipt of a certified copy of this judgment, the Deputy Chief Engineer, Electrical Circle, Kalpetta shall furnish the

petitioner a statement of account together with sufficient materials to show that the line in question has not become self remunerative within a period of seven years from the date of execution of Ext.P1 minimum guarantee agreement, i.e., by 05.01.2012.

(2) On receipt of that statement alongwith supporting materials, the petitioner shall file a detailed objection regarding the dues shown in that statement of accounts.

(3) On receipt of that objection, the Deputy Chief Engineer shall conduct a personal hearing and pass appropriate orders on the liability of the petitioner to pay the minimum guarantee amount in terms of Ext.P1 agreement within a period of three months and communicate a copy of the same to the petitioner.

(4) Any recovery pursuant to Exts.P4 and P5 demand notices will be subject to the outcome of the decision to be taken by the Deputy Chief Engineer as directed above. Till such decision is taken all recovery proceedings pursuant to Exts.P4 and P5 demand notices shall be kept in abeyance.

Needless to say that the amount already deposited by the petitioner pursuant to order dated 30.06.2010 of this Court shall be given credit to while fixing the amount, if any, payable by the petitioner.

sd/-
ANIL K. NARENDRAN,
JUDGE

JV