IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

CWP No.16149 of 2016
Date of Decision : 27.9.2016

Dakshin Haryana Bijli Vitran Nigam ......Petitioner

Vs.

Electricity Ombudsman, Haryana Electricity Regulatory Commission and another ......Respondents

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CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

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Present : Mr. K.K. Yogi, Advocate for the petitioner.

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RAMESHWAR SINGH MALIK, J

Present writ petition is directed against the order dated 14.12.2015 (Annexure P-8) passed by the Electricity Ombudsman, Haryana, whereby appeal of respondent no.2 was allowed, directing the petitioner not to charge the consumer twice over and even for the period, during which no power was supplied to the consumer.

Heard learned counsel for the petitioner.

Learned counsel for the petitioner places reliance on the official communication dated 14.2.2012 (Annexure P-1), whereby additional load was sanctioned in favour of respondent no.2-consumer. The relevant part of this official communication, which deserves to be noticed here, reads as under :-

> "Your office memo no.ch-86/GCFC-4 dated 13.2.2012.
>
> In view of consumer request dated 2.2.2012 as well as recommendation made, vide your memo under reference, permission is hereby granted to release additional

(extension) 4 MVA load on 66 KV side as already sanctioned vide this office memo No.Ch-32/WO/Drg-1430/FBD dated 10.2.2012 from 22.00 hrs to 09.00 hrs daily subject to following conditions :

1. Concerned SDO (O)) should regularly monitor the system, which should not be overloaded. In case of overloading the facility shall be withdrawn till normalization of system.
2. The facility shall be withdrawn immediately without any notice, in case of violation of this permission as well as Nigam instructions.

All other terms and conditions as mentioned in the sanctioning memo referred above will remain unchanged."

During the course of hearing, when confronted with the above said condition no.1, as to whether the petitioner Power Supply Corporation, as a matter of fact, had been supplying electricity uninterruptedly from 2200 hrs to 0900 hrs daily, he had no answer and rightly so, it being a matter of record. Once the petitioner itself was unable to comply with the above said terms and conditions, it had no authority to charge the consumer, even for that period, during which the consumer did not receive the power supply qua additional load duly sanctioned.

Petitioner might have a bonafide reason not to supply full sanctioned load during the relevant time, but in such a situation, petitioner cannot be permitted to draw any benefit out of his wrong, thereby causing a manifest injustice to the consumer. Having said that, this court feels no hesitation to conclude that the Electricity Ombudsman was well within his jurisdiction to pass the impugned order and the same deserves to be upheld.

After discussing all the relevant aspects of the matter, Ombudsman recorded cogent findings before arriving at his legally justified conclusion and the relevant operative part of the impugned order, reads as under :-

> " Based on the written as well as verbal submission, rival submissions and arguments by both the parties, the case has been analysed on the following points :-
>
> a) It is true that respondent and CGRF have unnecessarily mixed up the earlier issue of MDI penalty on cross subsidy surcharge component with the present case and tried to confuse the matter. Present complaint/appeal does not have any relevancy with the earlier case no.749/2013 before CGRF and appeal No.14/2015 before Electricity Ombudsman. The contention of the appellant consumer in this regard is accepted.
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> b) The appellant consumer have given definition and mechanism of recording MDI in an effort to establish that MDI has exceeded in the fringe time periods overlapping with the permitted time slot and it does not call for levy of MDI penalty. The load survey sheets as received from respondent SDO clearly indicates that MDI has exceeded during non-permitted period, hence

the contention of the appellants is rejected.

c) Appellant consumer has been allowed 10 MVA (CD) with the rider that during day time (0900 hrs to 2200 hrs) load upto 6 MVA can be used and during night time (2200 to -0900 hrs) full sanctioned contract demand of 10 MVA can be availed. This arrangement has been done as there were system constraints during day time. The appellant consumer is governed by Two-Part-Tariff mechanism which separates the fixed charges (based on capacity requirements) and energy charges (based on variable costs). In order to optimally utilize under loaded system during night hours consumer has been allowed 10 MVA load which will lead to higher utilization factor, better revenue to the department and lowering of average per unit cost for the consumer thereby safe guarding interest of both the licensee as well as the consumer.

The load has been sanctioned with the condition that facility can be withdrawn (which can be either total disconnection or disallowing extended 4 MVA load) in case system gets overloaded. At the time of crossing of the MDI system was not overloaded, a fact admitted by the respondents also. There was no emergent technical compulsion for disallowing running of additional load. As such respondent SDO did not resort to the withdrawing of the facility.

d) The contention of the respondents that though system was not overloaded but as per Sales Manual Instruction (SMI) No.1.11 issued by the respondent department, MDI penalty has to be charged as per clause 6 of the ibid SMI which reads as under :-

> "MDI shall be treated as exceeded for day time and night time separately after comparing the same with the permitted MDI for both the periods. It is clarified that in case the MDI is exceeded for day time or night time or both by more tan 5% then 25% penalty shall be charged for total power drawn by the consumer including Open Access Power if there is a system constraint instead of supply constraint."

It is very clearly stated in the above provision that MDI penalty has to be charged only if there are system constraints, hence respondent contention is not acceptable.

e) The appellant have contended that SMI 1.11 of the respondent department has not been approved by the Haryana Electricity Commission. Section 45 of the Indian Electricity Act, 2003 provides that charges for electricity shall be fixed in accordance with the methods and the principles as may be specified by the State Commission. Even HERC has been repeatedly directing the state distribution licensees not to issue any instructions or sales circulars without its approval which has any financial implications. Reference of few such orders of the HERC are given here under :-

i) PRO-6/2010 dated 25.3.2010-JSL and Star Wire Vs. DHBVN

ii) Order dated 3.12.2010-JSL Vs. DHBVN, UHBVN and HVPN.

iii) HERC/PRO-62 of 2014 & HERC/PRO-63 of 2014 dated 7.5.15.

SMI 1.11 under reference has not been approved by HERC as such MDI penalty cannot be charged in the instant case.

f) The appellant consumer is being charged fixed charges in lieu of capacity being made available by the respondent department. These fixed charges are for round the clock facility and in case it is curtailed then full fixed charges cannot be charged. In the instant case the appellants are paying full fixed charges for the 10 MVA load meant to run round the clock. At the most in case there are system constrains during any period of the day, the respondents can disallow running of the load to save the integrity of the system. But in no case penalty can be charged so long the consumer remains within its sanctioned contract demand and paying all charges for it. This provision has been rightly laid in the original sanctioned letter dated 14.2.12. Moreover, the respondent SDO action as per provision in this ibid letter dated

14.2.12 has put the appellant consumer on notice vide his letter no.1274 dated 24.8.12 and 257 dated 2.11.12 stating that facility shall be withdrawn till normalization of the system. Hon'ble Supreme Court has also in case no.1976 AIR 1100 SCC (2) 877 Northern Indian Iron & Steel Vs. State of Haryana, has also ruled that due to inability of the Board to supply electric energy due to power cut or any other circumstances beyond its control as per the demand of the consumer according to the contract, the demand charges will have to be reduced proportionately.

As per law of natural justice one cannot be punished twice for the same offence i.e. you charge penalty also and at the same time withdraw the facility and do not allow to run the extended load. In the instant case the consumer is paying full fixed charges as such charging of MDI penalty so long he remains within his extended contract demand is not justified. The respondent licensee however remains at liberty to disallow running of the load that too if the system loading does not permit which is the preamble of the sanctioning arrangement.

Keeping in view the above discussions, material on record, submission and arguments by both the parties, appeal is allowed and the respondent department is directed not to charge penalty for exceeding MDI during day time by the appellant consumer. No orders for the payment of interest as demanded by the appellant."

Again, during the course of hearing, when confronted with the above said specific and categoric findings recorded by the Electricity Ombudsman in the impugned order, learned counsel for the petitioner could not point out any patent illegality or perversity, warranting any interference at the hands of this court, while exercising its writ jurisdiction, under Articles 226/227 of the Constitution of India.

Once the petitioner itself had failed to comply with the above said settled terms and conditions between the parties, which were having binding force between the parties to the litigation, it can be safely concluded that the petitioner was not entitled to charge the consumer, even for that period during which petitioner could not maintain supply of power, qua additional sanctioned load. Inspite of the fact that the petitioner was at fault, Electricity Ombudsman did not grant payment of interest in favour of the consumer, with a view to strike balance between the parties. Under these undisputed facts and circumstances, it is unhesitatingly held that the Electricity Ombudsman did not commit any error of law, while passing the impugned order and the same deserves to be upheld, for this reason as well.

No other argument was raised.

Keeping in view the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this court is of the considered view that the present writ petition is wholly misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out.

Resultantly, with the above said observations made, present writ petition stands dismissed, however, with no order as to costs.

27.9.2016 (RAMESHWAR SINGH MALIK)
GS JUDGE

Whether speaking/reasoned Yes/No
Whether Reportable Yes/No