THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

<u>Writ Petition No.5227 of 2006</u>

ORDER:

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioner impugning the final order of demand *vide* proceedings, dated 05.01.2006, issued by the 1st respondent, The A.P. Eastern Power Distribution Company Limited (APEPDCL) for an amount of Rs.83,093/-.

2. I have heard the submissions of *Sri P. Narasimha Rao*, learned counsel for the writ petitioner, and of *Sri M. Ravindra*, learned Standing Counsel for APEPDCL. I have perused the material record.

3. The petitioner is the Managing Partner of Sri Uddharaju Ananda Raju Company (a registered firm), which is registered for the purpose of rice milling and trade business at Bhimavaram. The said rice mill is having electricity service *vide* connection no.7100/021817 under Low Tension Category-III. A three phase electric meter was installed in the rice mill. On 18.11.1999, the rice mill was inspected by the Assistant Divisional Engineer, Detection of pilferage of Energy Sub-Division-I, Eluru, (hereinafter 'ADE'). The said ADE tested the electric meter of the rice mill and found that the meter is not displaying any reading. He submitted inspection notes and report about the functioning of the metre. On that basis, the Assistant Divisional Engineer (Operation), Bhimavaram, issued a provisional notice of demand for Rs.83,093/- for the period from 07.08.1999 to 16.09.1999 as a supplemental bill on account of the defective working of the electric meter of the rice mill. By submitting the representation, dated 24.01.2000, the petitioner filed a detailed memorandum of objections contesting the validity of the supplemental bill. Six years after filing of the objections, on 24.01.2000, the final order, dated 05.01.2006, was passed and communicated to the petitioner

On 07.02.2006 and the 1st respondent demanded payment of the said amount of Rs.83,093/- *vide* supplemental bill within 15 days from the receipt of the final order, under the threat of disconnection of power supply to the rice mill. It is stated in the said demand that an appeal lies to Superintendent Engineer on payment of 100% of the amount stated in the final order.

4. In this setting of background facts, the case of the petitioner, in brief, is this:

It is the statutory duty of the respondents to maintain the electric meter and ensure that it works without any error. This petitioner did not individually interfere with the working of the meter in any manner whatsoever. The subordinate officials of the 1st respondent are taking monthly readings and issuing current consumption bills and the petitioner is paying all the bills regularly. There is no malpractice or pilferage and there are no such cases against the rice mill of the petitioner. When a provisional notice was issued, the petitioner is not furnished with copy of inspection notes and report of the ADE. The Assistant Divisional Manager (Operation), Bhimavaram, worked out the average consumption at 39,815 units and after deducting the units already billed, the estimated number of units of electricity from 07.08.1999 to 04.10.1999 was arrived at and an amount of Rs.1,362/- at 6% on the units of 22,703 towards assessment of electricity duty was also included in the impugned final order. Terms nos.22.3.3.1 to 22.3.3.4 indicate the procedure in case of defective working of electrical meters. Since the inspection was made in the year 1999, the provisions of Indian Electricity Act, 2003, which have no retrospective application, are not applicable and the provisions of the repealed Electricity Act, 1910, are relevant and applicable to the case of the petitioner. Under Section 26(6) of the 1910 Act a specific procedure is provided and the authority to adjudicate the dispute relating to the defective working of the meter is also specified. According to the said Section, electrical inspector appointed by the Government shall act as an umpire/arbitrator between the consumer and the department. Unless the defectively working meter is referred to the electrical inspector by the supplier who installed the meter to the consumer, the supplier would lose his right to demand or make any supplemental billing. This petitioner has not waived his right either expressly or impliedly and has not given consent to remove the defective meter by the 1st respondent through his subordinates and not to refer the defective meter to electrical inspector. Therefore, the final order issued in violation of the law laid down under Section 26(6) of the Electricity Act, 1910, is illegal, arbitrary and is liable to be set aside.

5. On the other hand, the case of the 1st respondent as stated in the counter of the then Divisional Electrical Engineer (Operation), in brief, is as follows:

At the time of inspection made by the ADE, the following incriminating points were noted: 'Average units proposed for the meter reading display period is less and not in accordance with the working pattern of the rice mill. Hence, back billing case is booked. Further, while reviewing the past consumption particulars of the service subsequent to the inspection of the service by DPE wing on 18.11.1999, it is observed that on 08.09.1999 the electric meter display has failed and new meter was fixed on 04.10.1999. As per the Section Officer records, an average of 19401 units are recommended for CC bill for the month of 9/99 which was revised by ADE(Operation) Bhimavaram, to 17112 units for the period from 07.08.1999 to 16.09.1999 following the representation from the consumer stating that they had milled 5704 quintals during the said period. However, as per the production figures furnished by the consumer, it is found that production units/quintals varies from about 2 units/quintal to 3.2 units/quintals between a period of four months from 5/99 to 8/99. The sole nature of business of the rice mill is milling of paddy and such extreme variation in number of units/quintal production is irrational. The managing partner of the rice mill stated that they are not maintaining exclusive paddy inward register for the rice mill. The production figures did not tally with the per unit production of the rice mill. The rice mill is also engaged in rice trading activity. The short fall units have been proposed duly taking the average consumption for the months of 6/99, 7/99 and 8/99.' Based on the inspection report, the back billing amount was assessed at Rs.83,093/-. The ADE (Operation) issued provisional assessment notice, dated 14.12.1999, and an opportunity is given to the rice mill/consumer to make a representation within 15 days. A representation was made by the petitioner, on 24.01.2000. After consideration of the representation and observing the production particulars of the rice mill enclosed by the petitioner, the DE (Operation), Bhimavaram, found that the consumption per quintal is not uniform and varies from 2.03 units to 4.16 units and that no paddy inward register was being maintained by the rice mill and that it is not possible to assess the consumption during no display period based on the production figures and the assessment based on quantity of trading activity is not correct. Therefore, the DE (Operation), Bhimavaram, on facts and circumstances, came to conclusion and issued final assessment order, dated 05.01.2006, for Rs.83,093/- and informed the petitioner that against the final order an appeal lies before the Superintendent Engineer (Operation), Eluru, within 30 days after due payment of 100% of the amount contained in the final order. Neither the amount was paid nor was an appeal preferred. Clause nos.22.3.3.1, 22.3.3.2, 22.3.3.3 and 22.3.3.4 read as under:

> 22.3.3.1: The quantity of electricity supplied during the period in which the meter ceased to function or became defective, shall be determined by taking average of the electricity supplied during the preceding three months preceding the month in which the said meter ceased to function or became defective provided that conditions in regard to use of electricity during the said three months were not different from those which prevailed during the period in which the meter ceased to function or became defective.

> 22.3.3.2: If the conditions in regard to use of electricity during the periods as mentioned above were difference, assessment shall be made on the basis of any consecutive three months during the preceding 12 months when the conditions of working were not difference.
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> 22.3.3.3: where it is not possible to select a set of three months as indicated in sub-clause 22.3.3.1 or 22.3.3.2 hereof, or if meter is not at all installed, quantity of electricity supply shall be assessed by the Asst.Divil.Engineer/Divil.Engineer of the area on the basis of connected load and hours of usage of electricity by the consumer. However, in the case of industrial consumers due regard shall be given to the production figures and conditions of working in the period under question.
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> Asst.Divisional Engineer/divisional Engineer/Operation, shall furnish the assessment report to the concerned Superintending Engineer/Operation. On receipt of the Assessment report the Superintending Engineer/Operation shall issue show cause notice to the consumer indicating in detail the basis on which the assessment is made and advising the consumer to file his representation, if any, within fifteen days from the date of receipt of the notice. The consumer shall also be permitted to represent his case to the Superintending Engineer in person if he so desires and he may be informed accordingly in the said notice itself. After due consideration of the material furnished in the reply to the show cause notice, representations made available if any, during personal hearing and the facts and material of the case on record, the Superintending Engineer/Operation shall then pass an order in the case.
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> 22.3.3.4: The consumer, if aggrieved by the order of the Superintending Engineer/Operation, may appeal to the zonal Chief Engineer Electricity within thirty days of the order of the Superintending Engineer/Operation, or within such further time as he may be in his own discretion deemed fit to allow and his decision shall be final. Provided however that no such appeal is maintainable by and aggrieved person unless he deposits with the Superintending Engineer the disputed amount covered by the impugned assessment order. In the event of the appeal being allowed either in full or in part, the consumer is entitled for adjustment of the amount lying in deposit with the Superintending Engineer, towards future consumption charges.
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> The powers which have been conferred earlier on S.E, have been confirmed on D.E, and the S.E, is made the appellate authority is the Superintending Engineer.

As per the terms and conditions of GTCS in 7.3.5 when the meter is found to be slow/fast beyond permissible limits, as specified in Rule 1956 and the consumer does not dispute the accuracy of the test, the consumer as the case may shall replace/rectify the defective meter as per APERC (Licensees standards of performance) Regulation 2004 (No:7 of 2004). Consent of the petitioner is not required for removing a defective meter. Hence the writ petition may be dismissed.

6. Before proceeding further, it is profitable to refer to Section 26 of the 1910 Act.

> "Section 26 - Meters. – (1) In the absence of an agreement to the contrary, the amount of energy supplied to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, and the licensee shall, if required by the consumer, cause the consumer to be supplied with such a meter:
> Provided that the licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter.
> (2) Where the consumer so enters into an agreement for the hire of a meter, the licensee shall keep the meter correct, and, in default of his doing so, the consumer shall, for so long as the default continues, cease to be liable to pay for the hire of the meter.
> (3) Where the meter is the property of the consumer, he shall keep the meter correct and, in default of his doing so, the licensee may, after giving him seven days' notice, for so long as the default continues, cease to supply energy through the meter.
> (4) The licensee or any person duly authorised by the licensee shall, at any reasonable time and on informing the consumer of his intention, have access to and be at liberty to inspect and test, and for that purpose, if he thinks fit, take off and remove, any meter referred to in sub-section (1); and, except where the meter is so hired as aforesaid, all reasonable expenses of, and incidental to, such inspecting, testing, taking off and removing shall, if the meter is found to be otherwise than correct, be recovered from the consumer, and, where any difference or dispute arises as to the amount of such reasonable expenses, the matter shall be referred to an Electrical Inspector, and the decision of such Inspector shall be final:
> Provided that the licensee shall not be at liberty to take off or remove any such meter if any difference or dispute of the nature described in sub-section (6) has arisen until the matter has been determined as therein provided.
> (5) A consumer shall not connect any meter referred to in sub- section (1) with any electric supply-line through which energy is supplied by a licensee, or disconnect the same from any such electric supply-line, but he may by giving not less than forty-eight hours' notice in writing to the licensee require the licensee to connect or disconnect such meter and on receipt of any such requisition the licensee shall comply with it within the period of the notice.
> (6) Where any difference or dispute arises as to whether any meter referred to in sub-section (1) is or is not correct, the matter shall be decided, upon the application of either party, by an Electrical Inspector; and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not, in the opinion of such Inspector, have been correct; but save as aforesaid, the register of the meter shall, in the absence of fraud, be conclusive proof of such amount or quantity:
> Provided that before either a licensee or a consumer applies to the Electrical Inspector under this sub-section, he shall give to the other party not less than seven days' notice of his intention so to do.
> (7) In addition to any meter which may be placed upon the premises of a consumer in pursuance of the provisions of sub-section (1), the licensee may place upon such premises such meter, maximum demand indicator or other apparatus as he may think fit for the purpose of ascertaining or regulating either the amount of energy supplied to the consumer, or the number of hours during which the supply is given, or the rate per unit of time at which energy is supplied to the consumer, or any other quantity or time connected with the supply:
> Provided that the meter, indicator or apparatus shall not, in the absence of an agreement to the contrary be placed otherwise than between the distributing mains of the licensee and any meter referred to in sub-section (1):

> Provided also that, where the charges for the supply of energy depend wholly or partly upon the reading or indication of any such meter, indicator or apparatus as aforesaid, the licensee shall, in the absence of an agreement to the contrary, keep the meter, indicator or apparatus correct; and the provisions of sub-sections (4), (5) and (6) shall in that case apply as though the meter, indicator or apparatus were a meter referred to in sub-section (1).
> Explanation.—A meter shall be deemed to be "correct" if it registers the amount of energy supplied, or the electrical quantity contained in the supply, within the prescribed limits of error, and a maximum demand indicator or other apparatus referred to in sub-section (7) shall be deemed to be "correct" if it complies with such conditions as may be prescribed in the case of any such indicator or other apparatus."

7. Learned counsel for the petitioner mainly contended that the provisional notice and final notice issued in violation of Rule Section 26(6) of the 1910 Act are illegal and arbitrary and are liable to be set aside. In support of the said contentions, he placed reliance on the following decisions:

1. Klayman Porcelains Limited v. Superintending Engineer, Operation, Mahabubnagar Circle[1];
2. H.D.Shourie v. Municipal Corporation of Delhi and another[2];
3. Belwal Spinning Mills Ltd., v. U.P.State Electricity Board and another[3];
4. Bombay Electric Supply and Transport Undertaking v. Laffans (I) Pvt.Ltd., and another[4];
5. M.P.E.B and others v. Smt Basantibai[5].

Placing reliance on the above decisions, it is contended as follows: 'In the instant case the dispute relates to whether the electric meter is defective or not or it is faulty or not and whether it is not recording the actual electrical energy consumed by the rice mill and that, therefore, the dispute squarely falls within the scope of Section 26(6) of the 1910 Act. Therefore, the question is to be investigated by the inspector and the department is obligated to refer the meter to the electrical inspector and obtain the opinion of such inspector; and, that inspector is also obligated to estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply during the

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[1] AIR 2002 (AP) 19
[2] AIR 1987 DELHI 219
[3] AIR 1997 SC 2793
[4] AIR 2005 SC 2486(1)
[5] AIR 1988 SC 71(!)

disputed period not exceeding 6 months; and, without the electrical inspector inspecting the meter and furnishing his opinion, the provisional demand or final demand on the basis of average consumption cannot be sustained and the back billing for the subject period could not be raised for non compliance with the provision of Section 26(6) of the 1910 Act. (See: also Bombay Electric Supply and Transport undertaking [4 supra]).'

8. I have gone through all the decisions. Further it is apt to now refer to the recent decision of the Supreme Court in Western Electricity Supply Co. of Orissa Ltd., v. M/s.Baba Baijanath Roller and Flour Mill (P) Ltd[6]. The facts of the cited case show that the writ petitioner which is a registered company is carrying on its business under the name and style of M/s. Baba Baijnath Roller and Flour Mill Pvt., Ltd., and that on an inspection conducted by the appellant-electricity company at the premises of the writ petitioner it was found that HT meter, TP box's inner door and meter terminal cover quick seals, plastic seals and paper seals were tampered and that therefore the penal charges were levied on the writ petitioner; apart from other contentions, the writ petitioner urged that the penal bill had been issued in violation of principles of natural justice and that the allegations of tampering with the seals of the meter and outer seal of TP box are unsustainable and the penal bill could not have been raised since the meter was defective and was not recording proper consumption; electricity company contended that an alternative remedy was available to the writ petitioner and that in the case on hand there was no question of alleging that the meter is defective and it is a clear case of theft of electricity by the consumer and that Section 26 of the 1910 Act has no application. The Supreme Court having considered the provisions and decisions including the various Sections of the 1910 Act, held as follows: 'It appears to us that Section 26 is relevant only when there is any difference or a dispute arises in connection with correctness of a meter, in that case the matter

6 AIR 2014 SC 1605

shall be decided, upon being applied by either party, by an Electrical Inspector and in the opinion of the Inspector if it is found that the meter is defective, the Inspector shall estimate the amount of energy supplied to the consumer or the electrical quantity contained in the supply during such time not exceeding six months but if there is a question of fraud in tampering with the meter, in that case there is no question of applicability of Section 26 of the said Act in such a matter. In the instant case, we have asked the learned counsel appearing for the respondent whether following Section 26(6), the respondent ever asked or applied for checking of the meter by the Electrical Inspector on the ground of defective meter. The answer was in the negative. Therefore, it shows that the ingredients of Section 26(6) were not followed by the respondent to meet the necessity of checking the meter in question in accordance with the said provision.'

9. A plain reading of the ratio in the decision would show that in a case of the present nature before relying upon the ingredients of Section 26(6) of the 1910 Act, the consumer like the petitioner shall apply and make a request for checking of the meter by the electrical inspector. In the case on hand, admittedly, the petitioner did not follow the ingredients of Section 26(6) by making an application with a request for checking of the meter by the electrical inspector. Hence, the contentions of the petitioner advanced before this Court, which are devoid of merit, need no countenance.

10. Before parting, it is to be noted that what remains to be considered is the correctness of the quantum of amount assessed by the authority concerned. A plain perusal of the material record would indicate that the conclusions in regard to assessments are conclusions of fact arrived at by a reasonable and fair method of calculation after referring to the various aspects including the information supplied by the petitioner. The petitioner could not show that the said assessment is arbitrary and is based on unscientific methods.

A representation was made by the petitioner, on 24.01.2000. The assessment was made after consideration of the representation and observing the production particulars of the rice mill enclosed by the petitioner and on the DE (Operation), Bhimavaram, finding that the consumption per quintal is not uniform and varies from 2.03 units to 4.16 units and that no paddy inward register was being maintained by the rice mill. Therefore, the DE (Operation), Bhimavaram, on facts and circumstances, came to conclusion and issued final assessment order, dated 05.01.2006, for Rs.83,093/- and informed the petitioner that against the final order an appeal lies before the Superintendent Engineer (Operation), Eluru, within 30 days after due payment of 100% of the amount contained in the final order. Neither the amount was paid nor was an appeal preferred. On a careful examination, the assessment of the quantum appears to be on reasonable and explicable basis. In that view of the matter, this Court finds that the petitioner is not entitled to any relief and that the writ petition, which is devoid of merit, is liable to be dismissed.

11. In the result, the Writ Petition is dismissed.

Miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

JUSTICE M. SEETHARAMA MURTI

20.04.2017
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