

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

WRIT PETITION No.19012 of 2007

ORDER:

In the present writ petition, challenge is to the order passed by the 2nd respondent, Chief General Manager, O&P&MM, Southern Power Distribution Company of A.P., Ltd., Tirupati, Chittoor District, communicated to the petitioner vide Lr.No.CGM/O&P&MM/GM/EA/SPDCL/TPT/F.No./D.No.662/07, dated 03.08.2007. The petitioner is a company engaged in aqua culture and it has HT power supply connection. Pursuant to the inspection conducted in the premises of the petitioner, the Assistant Divisional Engineer, Operation, APSPDCL, Bapatla, Guntur District, 4th respondent herein, issued a notice vide Lr.No.ADE/OSD/BPT/F.No.DOC/D.No.1325/06, dated 18.01.2006, estimating the value of the alleged energy pilferaged as Rs.50,55,871/- while asking the petitioner to pay half of the said amount and supervision charges of Rs.300/- and reconnection charges of Rs.300/-. Questioning the validity of the said notice, dated 18.01.2006, the petitioner earlier filed W.P.No.1248 of 2006 before this Court. By way of an order, dated 25.02.2006, this Court disposed of the said writ petition and the operative portion of the said order reads as under:

“Having regard to the facts and circumstances of the case, the impugned notice is to be treated as show cause notice and petitioner is directed to file objections within one week from the date of receipt of a copy of this order and on filing such objections the respondents may consider the same and pass appropriate final order under Section 126 of

the Electricity Act, 2003. Till then, the respondents are directed to restore power supply to the petitioner's service connection No.HT-GNT-592 under Category HT-1 forthwith without insisting upon the payment of the provisionally assessment pilferage charges.

The writ petition is accordingly disposed. No costs."

Subsequently, the petitioner submitted objections to the notice, dated 18.01.2006, and the Superintending Engineer, 3rd respondent herein, passed the final assessment order vide proceedings No. SE/A/TPT/FAO/F.No.--/(GNT)/2006/D.No.982/06, dated 20.02.2006, fixing the amount as Rs.1,78,259/-. Thereafter, the 2nd respondent, Chief General Manager, vide Lr.No.567, dated 06.09.2006, asked the petitioner to show cause as to why the above said amount should not be enhanced to Rs.18,54,087=20 ps. On 13.11.2006, the petitioner submitted its objections and thereafter the 2nd respondent, by way of an order under challenge, directed the petitioner to pay a sum of Rs.18,54,087=20 ps.

In the above background, the present writ petition came to be filed assailing the validity and legality of the said order. While ordering Rule Nisi on 07.09.2007, this Court in WPMP.No.24442 of 2007 granted interim suspension of the impugned order on condition of the petitioner depositing a sum of Rs.4,00,000/- within a period of four weeks from the date of receipt of the said order.

Heard and perused the material available on record.

Submissions and contentions of the learned counsel for the petitioner:

- 1) The questioned order is highly illegal, arbitrary, unreasonable, without jurisdiction and violative of Articles 14 and 19(1)(g) of the Constitution of India.
- 2) The 2nd respondent failed thoroughly to consider the objections submitted by the petitioner which obviously resulted in passing the order under challenge.
- 3) The 2nd respondent did not record any findings on various issues raised by the petitioner including the jurisdiction of the 2nd respondent to initiate the impugned action.
- 4) The 2nd respondent failed to consider the impact of new regulations which came into force with effect from 06.01.2006 and according to which the 2nd respondent has no jurisdiction nor power to initiate the impugned action.
- 5) The findings of the 2nd respondent that the assessment order of the Superintending Engineer is to be revised as it is not in order as per the order in W.P.No.1248 of 2006 is highly erroneous and not in consonance with the material available on record and the said order was passed on 25.01.2006 i.e., much prior to the final order passed by the Superintending Engineer on 20.02.2006.

- 6) Under Sections 126 and 127, the 2nd respondent is not the prescribed authority to pass the impugned order.
- 7) The impugned order is based on presumptions and surmises.
- 8) No personal hearing as sought in objections, dated 13.11.2006, was given and as such it is in contravention of the principles of natural justice.

Submissions and contentions of the learned Standing counsel for the respondents:-

- 1) There is no illegality nor there is procedural infirmity in the impugned action and in the absence of the same, the impugned action is not amenable for judicial review under Article 226 of the Constitution of India.
- 2) The 2nd respondent considered all the objections raised by the petitioner and passed the impugned order by assigning valid and convincing reasons.
- 3) The petitioner cannot complain violation of the principles of natural justice, as the 2nd respondent afforded opportunity to the petitioner to raise objections.
- 4) The contention that the 2nd respondent has no jurisdiction is neither sustainable nor tenable.

In the above background, now the issue that emerges for consideration of this Court is –

“Whether the order passed by the 2nd respondent as communicated vide Lr.No.CGM/O&P&MM/GM/EA/SPDCL/TPT/F.No. -/D.No.662/07, dated 03.08.2007, asking the petitioner to pay a sum of Rs.18,54,087=20 ps is sustainable and tenable.”

The information available before this Court discloses that earlier when the Assistant Divisional Engineer served a provisional notice, dated 18.01.2006, for a sum of Rs.50,55,871/-, the petitioner assailed the same in W.P.No.1248 of 2006, wherein this Court passed a final order on 25.01.2006 and pursuant to which, after receiving the objections from the petitioner, the Superintending Engineer, 3rd respondent, passed a final order on 20.02.2006, fixing a sum of Rs.1,78,259/-. There is no dispute that the petitioner paid the said amount. Thereafter, the Chief General Manager, 2nd respondent, *suo motu* issued a show cause notice on 06.09.2006, proposing a sum of Rs.18,54,087=20 ps. After submission of objections on 13.11.2006 by the petitioner, the 2nd respondent passed the order under challenge on 03.08.2007 confirming the amount indicated in the show cause notice.

The first and foremost objection raised by the petitioner for the impugned order is that the 2nd respondent has no power or jurisdiction to pass the order. Elaborating the same, it is the categorical contention of the learned counsel for the

petitioner that under the old regulations the 2nd respondent had the power of review, but the new regulations, which came into force from 06.01.2006, do not confer such power. Even according to the order under challenge, it is very much apparent that the 2nd respondent reviewed and reopened the case under clause 39(11) of the old regulations. Admittedly, the inspection, which formed the basis for the entire controversy, took place on 17.01.2006. It is significant to note that the new terms and conditions of supply approved by the APERC came into force with effect from 06.01.2006. Therefore, necessarily the same can alone be pressed into service by the respondents, but not the old terms and conditions, which were superseded with effect from 06.01.2006 by way of new regulations. Though the power of review was given to the 2nd respondent under the old terms and conditions, there is no clause in the new terms and conditions, which empowers or authorizes the 2nd respondent to resort to the impugned action of review. In fact, no clause under the new terms and conditions, approved by APERC, which confers such power on the 2nd respondent, could be brought to the notice of this Court. Therefore, in the absence of any such power, it can be safely concluded that the impugned action is totally one without jurisdiction and the order under challenge is liable to be declared as void and unenforceable. In fact, this ground touching the jurisdiction of the 2nd respondent was specifically raised by the petitioner

in the objections raised for the show cause notice. The petitioner also raised objection to the said effect by quoting the provisions of Section 126 of the Electricity Act, 2003. Another contention urged by the learned counsel for the petitioner is that though the petitioner raised a number of objections, the 2nd respondent did neither consider the same nor recorded any findings on the same.

A perusal of the copy of the objections, dated 13.11.2006, makes it clear that the petitioner raised the following objections for the impugned assessment:

“7(a) The rules provide for adopting a utilization factor of Unity, which has been contrary to the provisions in Terms and Conditions of supply, where in, for calculation of I.C.D. payable is arrived at by adopting a load factor varying from 0.7 to 0.4 and for this type of industry the same has to be 0.50. Thus the provision made is meant to boost the assessment by 100%. This will have to be rectified while making the Final Assessment by your kind self.

(b) It may be seen that the revised provisional assessment made in the ref.5 cited has been on an assumption of 3 shifts, which has been contrary to the number of shifts furnished in the H.T. Requisition, as one. This has facilitated to boost the provisional assessment by 300%.

(c) Thus the net boosting works out to 6 times or 600%.

(d) Since the terms and conditions have to be scrupulously followed, the total M.D. for the period of assessment has to be taken as 100x6 months=600 and since the recorded M.D. for 6 months is more than 600 KVA, no assessment has to be made for M.D. The provisional assessment has been made for Rs.59,494-50, adopting a wonderful method, not provided in the terms and conditions.

Excess amount assessed in respect of M.D. charges while estimating the cost of pilfered energy.

Clause 39.12.1 of Terms and Conditions of supply defines as to how the assessment, in respect of consumption of electricity. The consumption of electricity in respect of L.T is only that in energy while in respect of H.T. services it is consumption in demand and energy.

Clause 39.12.1 is reproduced below.

“The value of energy estimated as a result of pilferage or malpractice shall be charged at special rates as prescribed by the Board notified in Tariff notifications from time to time. These special rates shall include the rate at which energy was already charged for, in the case of malpractices. In the case of pilferage of energy, the special rates shall be levied after excluding the consumption recorded by the meter, from the assessed consumption.”

From the above, it is clear that the consumption (be in demand or energy) to be charged at special rates is to be arrived after excluding the recorded consumption (be in demand and energy).

In the present case of assessment of pilferage of energy in respect of consumption of energy is done after deducting the recorded consumption and hence the principle (but not the details, where the attempt has been there to boost the assessment by 6 times as explained in paras ante) is not questioned except for boosting the assessments with wrong interpretations.

But in respect of demand, the above procedure is not followed and hence erroneous.

There has been an impersion, in some corners like in the present assessment that the above clause is to be applied only in respect of energy and not demand. In fact there are no separate instructions in respect of demand and thus the instructions applicable to energy will have to be applied for demand also. Even otherwise the fundamental principles to be followed have to be arrived at, from the instructions issued in respect of energy, if it is wrongly opined that the instructions are applicable only to energy.

The fundamental principle is that the M.D. that has been treated as pilfered only is to be charged at special rates. The M.D. deemed pilfered can be arrived only by deducting the M.D. already recorded from the M.D. assessed.

In the present case the total M.D. assessed is charged at special rate and the actual amount paid for recorded M.D. deducted. This amounts to treating the recorded M.D. also as pilfered which is against the fundamental principles in arriving at the value of M.D. to be estimated.

Thus proper assessment in M.D. charges has to be done overcoming the faults in the provisional assessment. This is without prejudice to our opinion, that there should be no assessment of assessment in M.D. Charges, as the total recorded M.D. is more than 100 x 6 KVA.

8. If all these things are rectified, the correct provisional assessment would be Rs.1,56,073-68.

9. Now let us submit our representation, with our objections to the proposed provisional assessment, which is

in addition to pointing out the defects in the provisional assessment:-

- (a) As per clause 9.4.1 of the terms and conditions of supply, in vogue as on the date of inspection, after taking into account all the relevant facts and circumstances the assessing officer shall proceed to assess (Final assessment), to the best of his judgment, the electricity charges payable by the consumer, due to the company, on account of such unauthorized use of electricity by the consumer and issue final orders of assessment.
- (b) From the above it is clear that the provisional assessment has to be made based on the formulae in the terms and conditions of supply, properly adopting the number of shifts, M.D. to be adopted etc., as pointed out in paras ante, but the final orders have to be issued only taking into account the relevant facts and circumstances, and to the best of his judgment. Thus it is clear that the final assessment cannot be taking the formulae prescribed for provisional assessment.
- (c) Now let us see what are the relevant facts and circumstances to be taken into account in the present case.”

A perusal of the impugned order clearly and candidly shows that the 2nd respondent did not consider the above objections nor recorded any findings on the sustainability of the said objections. In the considered opinion of this Court, the said exercise undertaken by the 2nd respondent cannot be approved. Having called for the objections and having received the same, the 2nd respondent cannot ignore the consideration of the same for arriving at the conclusions. Having noted the fact that the Assistant Divisional Engineer, Operation, Bapatla, who concluded that the pilferage occurred, did not actually see the wires and having noted the absence of the same, there is no justification on the part of the 2nd respondent to pass the order under challenge. It is the further submission of the learned counsel for the

petitioner that though the petitioner sought personal hearing in the objections, the 2nd respondent did not offer the same. In fact, the impugned order is silent on the said aspect. It is also the submission of the learned counsel for the petitioner that the respondents did not supply the copy of the inspection report as per clause 9.1.2 of the conditions of supply.

The above narration clearly shows that the impugned action on the part of the respondents cannot be sustained in the eye of law.

For the aforesaid reasons, the writ petition is allowed, setting aside the order passed by the 2nd respondent and communicated to the petitioner vide Lr.No.CGM/O&P&MM/GM/EA/SPDCL/TPT/F.No.D.No.662/07, dated 03.08.2007. The amount paid by the petitioner in terms of the interim order shall be adjusted by the respondents in the future bills.

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

A.V.SESHA SAI, J

Date: 21.06.2017
ES