

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. No.267 of 2013

AFR

***M/s. S.N.M. Business Pvt. Ltd.,
Balasore***

....

Appellant

-versus-

***The Executive Engineer (Elect.),
Central Electrical Division, NESCO,
Balaasore and another***

....

Respondents

Advocates appeared in the cases:

For Appellant

:

Mr. U. C. Mohanty, Advocate

For Respondents

:

Mr. Prasant Kumar Tripathy,
Advocate for Respondent No.1

CORAM:

THE CHIEF JUSTICE

JUSTICE CHITTARANJAN DASH

JUDGMENT

14.09.2022

Dr. S. Muralidhar, CJ.

1. The challenge in this writ appeal is to the judgment dated 17th May, 2013 passed by the learned Single Judge allowing W.P.(C) No.972 of 2012 filed by the Executive Engineer (Electrical), Central Electrical Division, NESCO, Balasore (Respondent No.1), which in turn sought the quashing of an order dated 20th

September, 2011 passed by the Appellate Authority-cum-Deputy Electrical Inspector (T & D), Balasore (Respondent No.2) setting aside an assessment order 10th June, 2011.

2. The learned Single Judge held that the order of the Appellate Authority (AA) had been passed in gross violation of the statutory provisions contained in the Electricity Act, 2003 ('the Act') and the Orissa Electricity Regulatory Commission (OERC) Distribution (Conditions of Supply) Code, 2004 (OERC Code).

3. While directing notice to issue in the present Appeal on 16th July 2013, it was directed by this Court that any action taken pursuant to the impugned order of the learned Single Judge would be subject to the result of the writ appeal.

4. The background facts are that the Appellant executed an agreement with Respondent No.1 on 7th April, 1999 for availing power supply with a contract demand (CD) of 83 KW for setting up a rice mill. The CD was enhanced to 160 KVA in August, 2001, to 260 KVA with effect from November, 2003 and to 600 KVA on 30th May, 2012.

5. It is stated that on 5th April 2011, the NESCO intimated the Appellant that as per the records of NESCO, the consumption of electricity by the Appellant was 522 KVA in January, 2011, 498 KVA in February, 2011 and 348 KVA in March, 2011, which

exceeded the CD of 340 KVA. NESCO accordingly requested enhancement of CD with reference to Clause 72 of the OERC Code within 15 days of execution of fresh agreement by depositing additional security.

6. According to the Appellant, it deposited the additional security amount on 7th April, 2011 and requested the NESCO for early execution of the agreement. The Appellant stated that it also submitted the details of premises at which the power was proposed to be used by it i.e. private resident, factory, home industry, irrigation pump, domestic, cinema, workshop, restaurant or mill and processing of paddy extraction and refining of oil with its allied and ancillary activities.

7. According to the Appellant, it paid the electricity bills as per the previous meter reading for the period from January to April, 2011. The officials of NESCO undertook a surprise check at the premises of Appellant on 10th May, 2011 at around 10.10 am and found that the Appellant had given an extended load to an under-construction oil refinery unit adjacent to it, for which it used a black colour 35 mm. sq. 3½ core cable; it had availed power supply from a Distribution Panel Board existing at the premises of the Appellant at a distance of 200 meters. This was found to be in violation of Clauses 34, 104, 105 and 106 of the OERC Code.

8. A provisional assessment order was passed by the Executive Engineer, CED, Balasore, NESCO on 13th May, 2011 under Sections 126 (1) and 126 (2) of the Act alleging unauthorized use of electricity and directing the Appellant to file its objection within 7 days. The provisional assessment was for Rs.15,48,370.88.

9. On 30th May 2011, the Appellant filed its objection and claimed that the allegations raised by NESCO was misconstrued factually as well as legally.

10. The above objection was disposed of by Respondent No.1 on 10th June, 2011 excluding the cost of cubical meter from the provisional assessment and directing an amount of Rs.11,98,934.88 to be paid as final assessment within 15 days.

11. Aggrieved by the above assessment order, the Appellant filed an appeal under Section 127 of the Act before Respondent No.2 AA. On 27th September 2011, the said appeal was allowed, setting aside the final assessment order and directing NESCO to refund 50% of the penal assessment amount deposited with the NESCO by the Appellant or to adjust the same in the subsequent bills.

12. Against the order of the AA, NESCO filed W.P.(C) No.972 of 2012 in this Court on 16th January, 2012. Even while the writ petition was pending, the CD of the Appellant was enhanced from

340 KVA to 600 KVA by communication dated 30th May, 2012 on which date an agreement was entered into between the parties.

13. Having heard learned counsel for the parties, the learned Single Judge in the impugned order framed as many as six issues for considerations including the question of maintainability of the writ petition. The critical question however was whether the use of electricity by the Appellant at an under-construction oil refinery unit would amount to an unauthorized use of electricity under Explanation (b) (iv) of Section 126 of the Act and violative of Clause 106 of the OERC Code?

14. It was held by the learned Single Judge that the conclusion reached by the AA that "some procedural lapses have been committed by both the Appellant and Respondent in the matter of verification of premises and request for enhancement of CD which bears no weight at this stage in view of the core of allegations made by the Respondent and objections raised by the Appellant against the same", to be not supported by any reasoning whatsoever. Relying on the decisions of the Supreme Court of India in *S. N. Mukherjee v. Union of India AIR 1990 SC 1984* and *Vasant D. Bhavsar v. Bar Council of India (1999) 1 SCC 45*, it was held that the findings of the AA with regard to spot verification of the premises of the consumer were not sustainable in law.

15. The learned Single Judge then turned to the question of the unauthorized use of electricity by the Appellant. Reference was made to Section 126 of the Act and Regulations 105 and 106 of the OERC Code and it was held that "use of electricity other than the purpose for which the same was authorized or for the premises or area other than those for which the supply of electricity was authorized amounts to unauthorized use of electricity for which the consumer is liable to be assessed under Section 126 of the Act, 2003."

16. Reference was made to the decision of the Supreme Court in *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) v. Sri Seetaram Rice Mill (2012) 2 SCC 108*. It was concluded that even assuming that the extension of load given by the Appellant for the purposes of an under-construction oil refinery unit was within the knowledge and consent of Respondent No.1, "it cannot absolve the consumer from being assessed under Section 126 of the Act." It was held that there was no estoppel against law; it was concluded that the extension of load given by the Appellant amounted to unauthorized use of electricity in terms of Explanation (b) (iv) of Section 126 of the Act as well as Clause 106 of the OERC Code. It was further held that the extension of 69 KVA load by the Appellant to the adjacent premises for construction purposes also amounted to unauthorized use of electricity.

17. The learned Single Judge upheld the assessment order under Section 126 of the Act on the ground of both the unauthorized use of electricity for a purpose other than for which it was authorized to be used and further, use in premises other than the premises for which the supply was authorized. Accordingly, the appellate order was set aside by the learned Single Judge.

18. Mr. U.C. Mohanty, learned counsel for the Appellant submitted that the proposal of the Appellant by its letter dated 7th April, 2011 to Respondent No.1 in response to the latter's letter dated 5th April, 2011 should be deemed to be a "concluded contract" within the meaning of the provisions of the Indian Contract Act, 1872 (IC Act). According to Mr. Mohanty, this contract attained finality when the final agreement was executed between the parties on 30th May, 2012. Since the Respondent No.1 had failed to act as per Clause-104 of the OERC Code, it should be deemed to have waived its right to act thereunder. It was submitted the assessment under Section 126 of the Act was an abuse of the process of law and a deliberate attempt to humiliate the Appellant when there was no financial material loss to Respondent No.1. According to learned counsel for the Appellant, Respondent No.1 permitted the Appellant to novate the contract and enhance the CD. However, the inspection report dated 10th May, 2011 was with an "ulterior motive and mala fide intention" and, therefore, the learned Single Judge ought not to have interfered with the well reasoned order of the AA. Inasmuch

as, provisions of Section 126 (5) of the Act and Clauses-104 to 106 of the OERC Code had not been adhered to, the impugned order of the learned Single Judge was contrary to the principles laid down by the Privy Council in *Nazir Ahmed v. King Emperor* **AIR 1936 PC 253** viz., that where a power had been given to do a certain thing in a certain way, it must be done in that way or not at all. Mr. Mohanty sought to distinguish the decision of the Supreme Court in *Sri Seetaram Rice Mill (supra)* on the ground that it was on a different set of facts.

19. Mr. Prasant Kumar Tripathy, learned counsel for Respondent No.1, on the other hand, defended the order of the learned Single Judge by pointing out that the undisputed fact was that the Appellant had diverted electricity to the neighbouring under-construction unit and this was not the purpose for which the connection was given in the first place or the load enhancement of the CD took place. Without awaiting the formal increase in the CD, the Appellant had diverted the electricity and, therefore, Section 126 of the Act was straightaway attracted. There was no error committed by the learned Single Judge, therefore, in setting aside the impugned order of the AA and restoring the final assessment order.

20. The above submissions have been considered.

21. With the enhancement of the CD of the Appellant to 160 KVA with effect from August, 2001, to 260 KVA with effect from November, 2003 and to 340 KVA with effect from November, 2006, the Appellant was reclassified as a consumer under the 'Large Industry' category and the billing was raised on that basis. Since the drawal of load by the Appellant exceeded the CD from January, 2011 onwards, Respondent No.1 had in its letter dated 5th April, 2011 requested the Appellant to apply for enhancement of CD. On 7th April 2011, the Appellant expressed his willingness to enhance the CD to 600 KVA and informed Respondent No.1 that the additional security had already been deposited.

22. While it is true that prior to the sudden inspection on 10th May 2011, Respondent No.1 was aware of the above development whereby an application was being filed by the Appellant for availing load of 600 KVA, the fact remains that during the surprise inspection, it did find diversion of the electricity to an under-construction oil unit in the neighbouring premises, which was clearly without prior permission of the Respondent No.1. This diversion was through a black colour core cable.

23. As explained by the Supreme Court in ***Sri Seetaram Rice Mill*** (*supra*) in terms of the explanation to Section 126 of the Act, the expression "unauthorized use of electricity" would mean "what is stated under that Explanation, as well as such other unauthorized

user, which is squarely in violation of the abovementioned statutory or contractual provisions."

24. In this context, the reference may be made to Section 126 of the Act, which reads as under:

"126. Assessment.—

(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him.

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such

unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.;

(6) The assessment under this section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation : For the purposes of this section,—

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity—

(i) by any artificial means; or

(ii) by a means not authorised by the person or authority or licensee concerned; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was Authorized; or

(v) for the premises or areas other than those for which the supply of electricity was authorised."

25. The Supreme Court in *Sri Seetaram Rice Mill (supra)*

proceeded to clarify the expression 'unauthorised use' as under:

"44. The unauthorized use of electricity in the manner as is undisputed on record clearly brings the respondent 'under liability and in blame' within the ambit and scope of Section 126 of the 2003 Act. The blame is in relation to excess load while the liability is to pay on a different tariff for the period prescribed in law and in terms of an order of assessment passed by the assessing officer by the powers vested in him under the provisions of Section 126 of the 2003 Act."

26. Adopting a purposive construction of the provisions contained under Section 126 of the Act and in particular the expression 'means', the Supreme Court further explained as under:

"61. Unauthorised use of electricity cannot be restricted to the stated clauses under the Explanation but has to be given a wider meaning so as to cover cases of violation of terms and conditions of supply and the regulations and provisions of the 2003 Act governing such supply. 'Unauthorised use of electricity' itself is an expression which would, on its plain reading, take within its scope all the misuse of the electricity or even malpractices adopted while using electricity. It is difficult to restrict this expression and limit its application by the categories stated in the explanation. It is indisputable that the electricity supply to a consumer is restricted and controlled by the terms and conditions of supply, the regulations framed and the provisions of the 2003 Act."

27. The Supreme Court in *Sri Seetaram Rice Mill (supra)* also referred to Regulation 106 of the Conditions of Supply Code and explained as under:

"66. Regulation 106 of the Conditions of Supply reads as under:

"106. No consumer shall make use of power in excess of the approved contract demand or use power for a purpose other than the one for which agreement has been executed or shall dishonestly abstract power from the licensee's system."

67. On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the 2003 Act, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/ connected load shall be an "unauthorised use of electricity" in terms of Section 126 of the 2003 Act. This, we also say for the reason that overdrawal of

electricity amounts to breach of the terms and conditions of the contract and the statutory conditions, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations.”

28. Having perused the appellate order, the Court is inclined to concur with the learned Single Judge that the conclusion reached by the AA about both the Appellant as well as the Respondent No.1 having committed "some procedural lapses" was indeed without any supporting reasoning and, therefore, was unsustainable in law.

29. It is not possible to agree with the contention of the Appellant that merely because Respondent No.1 replied to the offer made by the Appellant by its letter dated 5th April, 2011 and the Appellant accepted it on 7th April, 2011, a concluded contract came into existence. Till such time the agreement was formally signed i.e. on 30th May, 2012, it could not be said that the CD was formally increased to 600 KVA. Till such time, any excess consumption of electricity, contrary to the authorized use either in terms of CD or in terms of premises where the factory was located, would ipso facto attract Section 126 of the Act read with Regulation 106 of the OERC Code.

30. Consequently, the Court is unable to find any error having been committed by the learned Single Judge in setting aside the

order of the AA and confirming the final assessment order passed against the present Appellant.

31. The appeal is accordingly dismissed, but in the circumstances, with no order as to costs.

(S. Muralidhar)
Chief Justice

(Chittaranjan Dash)
Judge

M. Panda

