IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.12735 of 2019

The Executive Engineer, Electrical (NESCO Utility) Baripada Electrical Divn, Baripada, Dist-Mayurbhanj.	**………**	***Petitioner*** Mr. S.C. Dash, Adv.

-Versus-

M/s Kamadhenu Agro based Ind. (P) Ltd;, Mayurbhanj	**……....**	***Opp. Party***

CORAM:
JUSTICE S. TALAPATRA
JUSTICE M.S. SAHOO

ORDER
26.08.2022

Order No.

10.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).

2. Heard Mr. S.C. Dash, learned counsel appearing for the petitioner. Despite due notice, none appears for the Opposite Parties. But the Opposite Party No.1 is the principal Opposite Party. It is evident from the records that at no point of time, there was representation from the Opposite Party No.1 who is alone concerned with the controversy raised in this writ petition against the decision of Opposite Parties No.2 and 3. On 26.10.2021 the notice on admission was issued on the Opposite Party No.1 by Registered Post with A.D. showing the returnable date on 01.12.2021. From the Registry's note dated 26.10.2021, it transpires as follows:

"A.D. returned from Opposite Party No.1 after valid service."

3. The petitioner herein represents the NESCO UTILITY, the Distribution Licensee. By means of this writ petition, the petitioner has challenged the final order dated 11.12.2018 passed by the Grievance Redressal Forum (in short the G.R.F), Balasore in Complaint Case No.197/2018 and the Judgment and order dated 24.05.2019 by the OMBUDSMAN-II of Electricity, Bhubaneswar in Consumer Representation Case No.OMB(II) and-O4 of 2019.

4. Briefly stated the case of the petitioner is that Opposite Party No.1 as a prospective consumer approached the petitioner to avail Electricity of 15KW to his business premises. At the time of availing the power supply for a load of 15 KW, LT metering was done in the LT side of the consumers transformer since HT meter was not readily available at that point of time. Thus, the transformer loss were being added in the energy bill of the consumer (the Opposite Party No.1) hereinafter referred as the consumer every month, as per the Regulation 93(9) of OERC Distribution (Condition of Supply), 2004.

5. The said Regulation 93(9) of the said code regulations provides that in case of High Tension supply, if HT metering set cannot readily be provided and installed, LT metering set shall be provided and connected on the LT side of the consumer's transformer. To the reading of such metering set, will be added the average losses in the transformer being calculated as follows:

(a) Energy loss in transformer in units per month = (730 X rating of the transformer in KVA) /100

(b) Demand loss in transformer in KVA = One percent of the rating of the transformer in KVA

6. Subsequently, the contract demand was enhanced at the instance of the Consumer and it was enhanced to 555 KVA with installation of 630 KVA [capacity]. Transformer at the cost of the consumer on obtaining permission from the Licensee's designated Engineer. There had been reduction of CD from 555 KVA to 440 KVA on 08.07.2012. It has also been brought on record by the petitioner that there had been replacement of 33 KV metering unit on 04.10.2014 as well as the burnt 33 K.V. C.T. (Current Transformer) on 21.10.2014. After a long lapse of time, the consumer approached the G.R.F., Balasore by filing the complaint Case No. 09/2018 for direction on the petitioner to withdraw the Transformer loss units for the construction period with C.D of 15 KW under GPS Tariff, refund of the check meter cost with meter rent from the month of initial power supply till date and refund of the costs deposited against the burnt 33 KV, C.T as well as the Cubicle Meter (2nd Time).

7. The said complaint case was dismissed for default on 20.03.2018. The said order dated 20.03.2018 was challenged by the consumer in Representation Case No.35/2018 before the OMBUDSMAN-II of Electricity, Bhubaneswar. But the said representation case was time barred as the same was filed much after 30 days, the period of limitation as prescribed. The Representation Case was filed after 175 days. The OMBUDSMAN-II however was persuaded to entertain the Representation Case and to direct the Opposite Party No.1 file a fresh complaint case before the G.R.F. and thus the Complaint Case No.197 of 2018 before the G.R.F. was instituted. The petitioner raised strong objection against the relief as prayed in the Complaint Case no.197 of 2018, which are identical to the relief as prayed in Complaint Case No.09/2018.

8. According to the petitioner, such claim has not legally justified and tenable.

9. On hearing, the G.R.F. by the order dated 11.12.2018 (Annexure-4 to this writ petition) has directed the Opposite Party (the petitioner herein) (NESCO) to not claim the Transformer Loss from the consumer and to refund the cost of check meter by way of adjustment with the energy bill also to refund the cost of the meter to the complainant. But they might claim the meter rent provided the meter has been installed at their cost in the premises of the consumer. It has been further observed in the said order that according to the Section 47 (1) of the Electricity Act, 2003, a consumer is required to give security for the price of the meter, provided by the Distribution Licensees, in terms of the regulation, notified by the State Commission.

10. Before the petitioner approach the Court, the consumer approached the OMBUDSMAN-II of Electricity, Bhubaneswar by filing the Consumer Representation Case No.04 of 2019 urging for implementation the GRF order dated 11.12.2018 (Annexure-4 to this writ petition). The petitioner filed the objection but the OMBUDSMAN-II by the Judgment and order dated 24.05.2019 (Annexure-6 to this writ petition) directed the petitioner (NESCO) to implement the GRF order dated 11.12.2018 within 30 days and report compliance within 45 days. According to the petitioner, the orders of the GRF and the OMBUDSMAN-II are perverse.

11. Both the forum, according to the petitioner, have acceded their jurisdictional limit. Even the OMBUDSMAN-II has entertained a time-barred Consumer Representation Case.

12. It has been quite emphatically asserted that while examining the question of Transformer loss as charged in terms of Regulation 93 (99) of the OERC Distribution (Condition of Supply) Code, 2004, the

GRF has compared the consumer with the general class of consumers who avail power supply from the common transformer of the licensee and are billed without transformer loss. As far as the claim for refund of the Check Meter cost is concerned, it has been asserted by the petitioner that in terms of the provisions of Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006, if the Check Meter is installed by the Consumer at his own expenses in the incoming line, in case of difference in reading of the licensee's meter and the Consumer's Check Meter, the licensee cannot collect the Check Meter cost is unsustainable. As far as the question of refund of the cost of 33 K.V. C.T, cubicle meter and meter rent etc. are concerned, the GRF has ignored the fact that the entire supply system dedicated one for the consumer only, being constructed at his own cost through a Licensed Electrical Contractor of his own choice in order to avail uninterrupted Power Supply from the independent source. In the event of any burnt/damage to any of the electrical apparatus/appliances, those are to be replaced at his own cost, not at the cost of the licensee.

13. Mr. Dash, learned counsel has submitted that the licensee (the petitioner herein) does not have any liability to refund the cost or the meter rent and as such the impugned order of the GRF is grossly perverse. However, according to the petitioner, the GRF while passing the order to refund the cost to the meter to the consumer, also passed the order to collect security for the price of the meter from the consumer as per Section 47 (1) of the Electricity Act, 2003 and not to collect meter rent. Thus, Mr. Das, learned counsel has urged this Court to interfere with the impugned Judgment. For purpose of appreciating the challenge, we may refer to the complaint filed by the

Consumer. From the complaint, it appears that, the consumer had admitted that it had taken 15KW load from the petitioner. The petitioner billed the consumer under LT, GPS tariff with transformer loss. Which according to the consumer is illegal. Hence, the GRF directed to refund the transformer loss taken for the construction period and adjust the excess amount in the forth-coming bill of the complainant.

14. According to the consumer, it had deposited cost of two meters i.e. 33KV cubicle, 15/5Amp the consumer deposited is Rs.3,84,590/- as the total cost. According to the consumer, in addition to any meter which may be placed for recording the electricity consumed by the consumer, the licensee may connect additional meters, M.D. Indicator or other apparatus as the licensee thinks fit for purpose of ascertaining or regulating either the quantity of electricity supplied to the consumer. Thus, it has been contended that the cost of the Check Meter taken by the Opposite Party is illegal and unjustified. The petitioner should refund the check meter cost i.e. HT metering unit and adjust the same from the energy bills of the consumer. Even after payment of costs of the two meters, the petitioner had been regularly realizing the meter rent at Rs.1,000/- per month which is grossly illegal and unjustified. Therefore, the petitioner is liable to refund those rents collected illegally from the consumer. The consumer has also deposited the full cost of the cubicle meter. But due to damage of one C.T. the petitioner had demanded a sum of Rs.26,963/- towards the cost of the C.T. for replacement and the consumer had deposited the same to continue his unit. In terms of Regulation 58(3) of the said Act, 2003, where the meter has been supplied by the licensee and the meter becomes defective in service, the engineer shall remove the meter and test the same as provided under Regulation 58(1). There is any ambiguity as regards the provisions of Section 58 (3) of the Act, 2003 in as much as it provides as follows:

(3) Where the meter has been supplied by the licensee and the meter becomes defective in service, the engineer shall remove the meter and test the same as provided in Regulation 58(1).

15. It has been further directed in the OERC Code, 2004 that if after testing, the meter is found defective, not due to tampering or deliberate damage, the defective meter shall be replaced by another test meter without any charge to the consumer within 30 working days from the date of removal of the meter from the consumer's premises. If the meter is found to be missing, or after inspection or testing, if the meter is found to have tampered with, or damaged, the Engineer may call upon the consumer to deposit the cost of the replacement within 7 working days. The licensee shall install a tested meter within 15 working days of deposit as would be made by the consumer. Those are the premises the consumer before raised the GRF. The petitioner filed their counter-affidavit to contend that at as per the terms and conditions as laid down in the permission letter (Annexure-1 to their counter-affidavit). Under Clause-11, it is clearly provided that the consumer has to bear the cost of the Check Meter, to be installed at either side of the transformer. By admitting the terms and conditions, the complainant [the Opposite Party No.1] had executed agreement with the licensee and accordingly the power has been supplied to the unit of the consumer. The claim of refund of the cost of the check meter cannot be maintained. It has been further contended in their counter that the licensee had replaced several times *viz.* 09.01.2013, 07.05.2013 and 06.09.2013 the cubicle meter after installation of the CT. According to them [the licensee] after 3 time replacement of CT due to deliberate damage, the cost of the CT was claimed as per the sanctioned estimate vide No.23/14-15 dated 21.10.2014 and 18.11.2014. The CT was changed but the consumer did not pay the cost of the same. Hence, the question of paying the cost of CT does not arise, as claimed by consumer.

16. After 33 KV metering cubicle of the consumer got burnt in 2017, the licensee did replace the same on 12.01.2017. Therefore, the claim that the licensee is under obligation to provide the said metering cubicle without cost is not tenable. The GRF in the order dated 11.12.2018, on due scrutiny of the Condition of Supply has observed that the suitable meter will be installed by the licensee on L.T. side of the consumer's transformer and the reading of the meter shall be added by the average loss on the transformer by the formula, as quoted before. It has been also observed that the clause is applicable for H.T. consumer only for tariff purposes. Thereafter, it has been observed in Para 13 of the said order as follows:

"T*he State Commission specifies GP consumer < 70KVA will be treated as LT consumer for the tariff purposes. The Distribution licensee is not claiming any transformer loss from identical class of consumer who is obtaining power from transformer provided by them and the transformer loss is claimed by them from the consumer who has installed his own transformer."*

There is no further reference in the said order. In such premises, it has been held that: "*the forum is of the opinion that the respondent cannot claim the transformer loss from the consumer"*.

17. As regards the refund of the check meter cost, the GRF has referred to the Central Electricity Authority (Installation and Operation of Meters) Regulations, 2006. Regulation 2 defines *"Consumer Meter"* which means a meter used for accounting and billing of the electricity supplied to the consumers but excluding those consumers covered under interface Meters. Even the consumer meter was installed by the licensee at the premises of the consumer. It was so installed after due checking. Having referred to Regulation 22 of the said Regulations, it has been observed that there is provision in the Regulation for installation of the check meter in the premises of the consumer. Hence, the forum is of the opinion that the amount collected towards the check meter is unlawful and liable to be refunded.

18. So far the refund of the cost 33KV CT, the cubicle meter and meter rent is concerned, the forum has made reference to various Sections of the Electricity Act and thereafter, referred to Regulation 56 of the said Code of 2004, Regulation 56 (2)(B) provides that where it has been provided that alternatively, the consumer may choose to pay the full cost of the meter provided by the licensee. No meter rent shall be chargeable in such cases. It has been further observed that if the meter is provided by the Distribution Licensee, the consumer is required to give the security against the meter provided by the Distribution Licensee. In that event, the consumer has to pay the rent as per the rate as prescribed by the State Electricity Regulatory Commission. If the consumer provides the meter then, no security money and no rent can be charged by the Distribution Licensee from the Consumer. Thereafter the GRF has observed in Para 45 of the said order dated 11.12.2018 as follows:

"*There is no provision in the Electricity Act, 2003 for recovery of cost of meter from the consumer and the Act only empowers the Distribution Licensee to take security for meter specified by the State Commission.*"

Having observed thus, the petitioner has been directed to refund the cost of the meter. However, it has been observed that the petitioner may realize the meter rent in case the meter is provided by them. The crux of the direction has already been referred. At the cost of repetition we would like to encapsulate that the GRF (a) restricted the petitioner from claiming the transformer loss from the consumer and (b) directed the petitioner to refund the cost of the meter of the consumer, however with the rider that the petitioner can claim the meter rent from the consumer if the meter is provided by them. From the date as is specified by the State Electricity Regulatory Commission. That apart, it has been observed that a consumer is required to give the security against the meter provided by the Distribution Licensee. 30 days time was provided for implementation of the said order [of the GRF] but it was not implemented. As a result, the consumer knocked the door of the OMBUDSMAN-II Electricity, Bhubaneswar by filing the Consumer Representation Case No.OM-II(N) 04 of 2019 (Annexure 5 to this writ petition). The said representation case was filed for implementation of the said order dated 11.12.2018. The same was disposed of by the Judgment dated 24.05.2019 on directing the petitioner to implement the order dated 11.12.2018 with immediate effect. The above observation is made subject to the outcome of the order of this Court.

19. Mr. Dash, learned counsel has correctly contended that, the purpose of filing of the said Consumer Representation Case was to get the order of the GRF implemented. The question of implementation as reflected by the OMBUDSMAN-II will be the subject to the outcome of the proceeding. But, so far the question of maintainability of the consumer's action before the OMBUDSMAN-II is concerned, it may be answered at the outset. The Odisha Electricity Regulatory Commission (Grievance Redressal Forum and OMBUDSMAN) Regulations, 2004 provides under Regulation 7 (1) that any consumers if aggrieved by the non-redressal of the grievances by the forum, may make a representation to the OMBUDSMAN within 30 days *"from the date of the decision of the forum or within 30 days from the date of the expiry of the period within which the forum was required to take decision and communicate the same to the complainant"*.

The said provision is qualified by the following proviso:

"Provided that the Ombudsman may entertain consumer representations, after expiry of the said period of thirty days if the Ombudsman is satisfied that there was sufficient cause for not filing it within that period."

20. As from the order of OMBUDSMAN-II [Annexure-6 to this writ petition], we have failed to find out that in the counter affidavit any objection was raised as regards the limitation in filing the said Consumer Representation case by the consumer for non-implementation of the order dated 11.12.2018. In the said proceeding the direction has been made to implement the said order within 30 days from the date of receipt of it. Even though in this petition, that issue relating to limitation has been raised but we do not find the details when the order from the GRF was received by the petitioner and when the stipulated period of 30 days for implementation had expired and when the consumer had filed the Consumer Representation Case before the OMBUDSMAN-II or anything material whether the OMBUDSMAN-II had taken any exercise or whether the OMBUDSMAN-II had satisfied with the explanation if there was any delay at all. Therefore, we discard this challenge on the basis of delay. However, we hold that on the basis of sustainability of the order dated 11.12.2018 as passed by the GRF, operability the order of the OMBUDSMAN-II would depend. On 26.10.2021, this Court had passed interim order of stay in respect of the orders of the GRF and the OMBUDSMAN-II subject to conditions in I.A. No. 10093 of 2019 arising from this petition. The interim order reads as follows;

"As an interim measure, it is directed that, there shall be interim stay of operation of the impugned order in G.R.F. C.C. No.197 of 2018 of the Grievance Redressal Forum, vide Annexure-4 & Judgment dated 24.05.2019 of the OMBUDSMAN-II, O.E.R.C., Bhubaneswar in Consumer Representation Case No.Omb(II) N-04 of 2019, vide Annexure-6, till the next date, subject to the condition that, there should not be disconnection of power to the unit of Opposite Party No.1, if he goes on paying the current dues."

The said interim order continues till date.

21. There has been no meaningful examination of the observation and direction of the GRF so far the transformer loss is concerned. The G.R.F. has observed that in terms of the Regulation 93(3) of the OERC Distribution (Condition of Supply Code), 2004 the G.R.F has raised its finding only by placing the consumer [the Opposite Party No.1] at par with the general class of consumers who get electricity from the common transformer. But it is an admitted fact that the consumer has installed his own dedicated transformer with due permission. As such, the loss for transmission of electricity through the dedicated transformer has to be accounted and for that purpose, in the condition of supply, the formula available under Section 93 (3) of the said code has been adopted. The bills are raised and those are paid by the consumer till the complaint had raised the objection. The controversy could emerge because at the relevant point of time, the HT Meters were not available. Therefore, the charges of the electricity used to be deduced in terms of the reading of the meters installed in the premises of the consumer by adding the said transformer's loss. As such, the inference is drawn by the GRF that no transformer loss can be levied on the consumer in as much as the consumer is drawing the power below 70 KVA. Hence, the transformer loss cannot be added in the energy bills any more.

22. The observation, as referred above, is grossly erroneous as there is no controversy that the consumer has been drawing the electricity from HT line through their own dedicated transformer. When there was no HT meter, admittedly, before the transformer but only the LT meters was installed in the premises of the consumer after the transformer, the transformer loss is sought to be gathered by the formula provided under Regulation 93 (9) of the said Code, 2004 and only after acceptance of the said formula as the Condition of Supply, the supply commenced.

23. In this regard, we may refer to Regulation 54 (3) of the Code, 2004 which provides that in the case of all new high-tension supplies, HT metering units shall be provided and installed. In case where LT metering unit is provided at L.T. side, all L.T. metering units shall be converted to H.T. metering units. For existing L.T. metering units connected on the L.T side of the consumer's transformers, the reading of such metering units, shall be added with the average loss in the transformers calculated in terms of the formula given thereunder. As such, the opinion that no transformer loss can be charged on the consumer if it is below 70 KVA is without any tangible basis. Even it has not been demonstrated that the consumer had asked for reassessment on terminating the conditions of supply.

24. The petitioner as the Distribution Licensee started supplying Electricity confirming to the conditions of supply. Such finding of the GRF is therefore, interfered and struck down.

25. So far the question of refund of cost of Check Meter is concerned, it has been observed by the GRF that it is nowhere mentioned in the Regulation that for installation of check meter in the premises of the consumers the consumer can be changed. This observation is again erroneous as the GRF did not take care of the relevant provisions governing when and how the check meter can be installed. Such provision is available in Regulation 57 on the said Code of 2004. Regulation 57 provides that a consumer may, after giving notice to the Engineer, get a check meter installed at his own expenses in his incoming line by the side of the licensee's meter. In case of the differences in reading between the licensee's meter and the consumer's check meter, the readings of the licensee's meter shall be taken to be conclusive. The consumer may demand the licensee's meter to be tested by the Electrical Inspector whose decision shall be final and binding on the consumer and the licensee. The consumer shall be required to pay a fee for such testing. If the meter is found incorrect after testing, the fee paid by the consumer shall be refunded by the licensee by way of adjustment in the next bill. If the meter is found correct after testing, the fee paid by the consumer shall be forfeited by the licensee.

26. It has been provided further by the proviso below the said Regulation that even if the meter is supplied either by the licensee or by consumer, if the Engineer suspects about the accuracy of the meter, the Engineer may by giving 24 hour notice to the consumer install a check meter tested and duly sealed in a Government Laboratory either by the side of the original meter within the premises of the consumer or at such other places as may be decided by the Engineer to test the accuracy of the meter and in that case, the reading records in the check meter can be treated as of the original meter for the purpose of ascertaining the consumption made by the consumer, which will be conclusive, in the event.

27. On analysis of the above provisions, it appears that there can be two situations broadly-when the meter reading is suspected by the Consumer and the other is the meter reading is suspective by the Engineer. The check meter is installed by the person who suspects the meter reading. If any difference is found in the meter reading, the consumer may demand that the licensee's meter or the meter installed in the premises be tested in the designated laboratory and when the check meter is installed by the engineer, the provision as available in the proviso below Regulation 57 would apply. Therefore, in the considered opinion of this Court, it is the obligation of the person who suspects to provide the check meter and to get it installed. If the check meter is given by the consumer as in the present case, the consumer is not entitled to get back the value of the check meter. However, if the check meter is provided by the Distribution Licensee and realised the value of it, they shall refund the value of the check meter itself to the consumer.

28. In this case, if the check meter has been taken away by the Distribution Licensee, (the petitioner) they must refund the value of the said meter to the consumer in as much as, they were not supposed to take that meter in their possession for a very limited purpose of the sealing and testing before its installation. Therefore, the direction of the GRF is modified in the following terms;

If the check meter has been taken by the Distribution Licensee (the petitioner) value of the same shall be refunded to the consumer or the said value would be adjusted with their energy bills at the option of the Distribution Licensee (the petitioner) but if the check meter has not been taken by the Distribution Licensee (the petitioner), the consumer will not be entitled to get any value of the said check meter.

29. So far the direction in respect of the refund of the cost of the meter and the meter rent are concerned, we would modify the said direction in the following terms:

If the meter that was installed inside or outside of the premises of the consumer was provided by the consumer defraying its cost, no rent for the meter shall be charged by the Distribution Licensee. However, if at any point of time, the meter is installed by the Distribution Licensee (the petitioner), the Distribution Licensee is entitled to realise the appropriate security against the value of the said meter from the consumer. Further the Distribution Licensee (the petitioner) can also realise the meter rent as per the rate as approved by the State Electricity Regulatory Commission. But under no circumstances the Distribution Licensee (the petitioner) can realise the price of the meter from the consumer and thereafter can go for realising the meter rent.

30. The observation regarding Section 47(1) of the Electricity Act, 2003 as returned by the GRF is affirmed as there is no error at all, warranting interference from us.

31. Having observed thus, the writ petition stands partly allowed to extent as observed above.

32. There shall be no order as to costs.

33. Before parting with the records, it is directed that in terms of our order, if anything is required to be implemented and any direction of the GRF as modified by us requires to be implemented, such implementation shall be carried out within a period 30 days from the date of receipt of this order.

34. Urgent certified copy of this order be granted as per rules.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge

Rati Ranjan