Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.41 OF 2011

Dated: 01st March, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member,

In the Matter Of

Sulochana Cotton Spinning Mills Pvt Ltd
Through its Managing Director
Door No.424, 426,
Kamaraj Road,
Tirupur-641 604
Tamil Nadu

Appellant(s)

Versus

1. Tamilnadu Electricity Board
   144, NPKRR Maaligai
   Chennai-600 002

2. The Superintending Engineer,
   Coimbatore Electricity Distribution Circle
   South Coimbatore,
   Coimbatore-641 012

3. Tamil Nadu Electricity Regulatory Commission
   19, A Rukmini Lakshmipathy Salai (Marshalls Road),
   Egmore,
   Chennai-600 008

Respondent(s)

Counsel for the Appellant : Mrs. V. Mohana

Counsel for the Respondent : Mr. S. Vallinayagam for TNEB

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Sulochana Cotton Spinning Mills Private Limited is the Appellant. The Tamil Nadu Electricity Board (Board) as well as the Supdt Engineer, Coimbatore Electricity Distribution Circle are the Respondent 1st and 2nd respectively. Tamil Nadu Electricity Regulatory Commission is the 3rd Respondent.

2. The Appellant filed a Petition before the State Commission seeking for a direction to the Tamil Nadu Electricity Board to adjust the generated units by its Wind Energy Generator banked with the 1st Respondent Board by the Appellant. The Tamil Nadu State Commission after, hearing both the parties dismissed the said Petition on the ground of delay and latches.

3. Aggrieved by the above order, the Appellant has preferred this Appeal before this Tribunal seeking to set-aside the impugned order and to issue a consequential direction to the Board, the First Respondent to adjust the unutilized banked units. The short facts are as under:

(i) Sulochana Cotton Spinning Mills Private Limited, the Appellant was started with the object of conversion of cotton into yarn and to manufacture, trade and distribute other related machine equipments and spares etc. One of the other objects of the Appellant Company is to establish, operate and commissioning of the WEG for generation of electricity.

(ii) The Appellant Company on 28.3.2004, entered into an Private Wind Mill Agreement with the Electricity Board (R-1) for setting up a Wind Energy Generator. As per the Agreement, the Appellant Company would generate power by installing the wind mill of 750 KW capacity at Gomangalam village Coimbatore on the condition that 1x750 KW Wind energy will be synchronised with the Board's grid at 22 KV. The Wind Mill Agreement had provisions regarding wheeling of power from WEG location to the Appellant's premises on payment of wheeling charges and also banking of unutilised energy with the Board on payment of 5% banking charges. The Appellant had opted for wheeling and banking arrangement and the Board (R-1) permitted the Appellant to wheel the energy generated from their WEG to their own consumption and to bank the surplus power available after adjustments.

(iii) As on 31.8.2005, the Appellant had about 236996 unutilised banked units to their credit. However, the said banked units as on 31.8.2005 were not carried forward for adjustments in the subsequent bills. The Appellant was under the genuine impression that the banked units have been adjusted in the subsequent bills.

(iv) From the subsequent audit objection, the Appellant came to know that the banked units as on 31.8.2005 were not reflected in the Bills nor given credit by the Electricity Board (R-1). Therefore, the Appellant sent a letter on 11.6.2009 to the Electricity Board (R-1) requesting for adjustment of the 236996 units banked with the Board during 2005-06 which had not been accounted for by the Board with the Appellant's bills. Though the Board in its reply dated 28.1.2010 admitted that the banked units as on 31.8.2005 had been inadvertently omitted and had not been adjusted against the consumption of the Appellant in subsequent bills, it refused to adjust the same on the ground that the same had elapsed on 31.3.2006 itself i.e. by the end of financial year as per the terms of the Wind Mill Agreement entered into between the parties.

(v) The Appellant again sent a letter to the Board on 9.2.2010 stating that since the omission was on the part

of the Board, the Board cannot claim that the period already got elapsed particularly when there was no provision in the wind mill agreement to the effect that the balance units that have been omitted to be adjusted during the year 2005-2006 by the Department would get elapsed and therefore, the Board may consider the request favourably. On receipt of this letter, the Electricity Board (R-1) sent a reply dated 20.3.2010 again rejecting the request on the reason that the balance unadjusted energy units had not been claimed within a period of 02 years under Regulation 21 (ii) of the Tamil Nadu Electricity Supply Code and as such the claim is barred by time.

(vi) Aggrieved by the above reply, the Appellant filed a Petition challenging the said refusal before the State Commission. The State Commission after hearing both the parties, passed the impugned order dated 20.1.2011 dismissing the Petition on the ground of delay and latches in making the claim. On being aggrieved, the Appellant has presented this Appeal challenging the order impugned and seeking to set-aside the said order.

4. According to the Learned Counsel for the Appellant, there was no delay on the part of the Appellant since the Appellant came to know about the mistake committed by the Electricity Board

only in 2009 during the course of audit and immediately thereafter, the Appellant sent a letter to the Board on 11.6.2009 and pursued the matter till the end and as such, the State Commission wrongly dismissed the Petition filed by the Appellant, on the ground of delay, especially when the Electricity Board itself had admitted that they had inadvertently failed to account for the banked surplus units and that hence the impugned order is liable to be interfered with.

5. In reply to the above submissions, the Learned Counsel for the Electricity Board (Respondent) in justification of the impugned order, submitted that the banked units had elapsed on 31.3.2006 by virtue of Clause 3 of the Wind Mill Agreement. He further submitted that that the limitation of two years has been prescribed under Regulation 21 (ii) of the Tamil Nadu Electricity Supply Code and since the claim of the Appellant had been made after three years and two months, the same cannot be entertained and so, the Appeal is liable to be dismissed.

6. In the light of the rival contentions, the following questions would arise for consideration:

(i) "**Whether the Appellant is entitled for the adjustment/refund of the banked units after a period of two years in view of the Wind Mill**

Agreement and Regulation 21 (ii) of the Tamil Nadu Electricity Supply Code ?

(ii) Whether explanation given by the Appellant with regard to the delay in making a claim is satisfactory or not ?

7. Before dealing with these questions it would be appropriate to refer to the facts which are not disputed:

(a) On 28.3.2004, the Appellant entered into an Agreement with the Electricity Board for providing Wind Mill Generation of electricity by which the Appellant would generate power by installing Wind mill of 750 KW of capacity and the same will be synchronised with the Electricity Board's grid and that the Appellant is permitted to wheel the energy generated from their wind energy generating station to their own concern and to bank surplus power available after adjustments.

(b) As on 31.8.2005, the Appellant had at about 236996 units unutilised to their credit. It is the duty of the Electricity Board to record the readings and generate the bills and show excess in their statements after measuring the units utilised by the Appellant. But the booked wind energy of 236996 units were omitted to be adjusted during 2005-2006. The Appellant did not

notice the same but paid the amount as per the bills which were issued by the Board without adjusting the balance of wind energy banked into the grid.

(c) Only on 11.6.2009, the Appellant sent a letter to the Electricity Board requesting for inclusion of omitted banked units stating that they recently came to know that the banked units were not adjusted. Again on 9.2.2010, the Appellant sent a letter stating that the mistake was on the part of the Electricity Board in not adjusting the balance units and therefore, the claim by the Appellant is justified. For both these letters, the Board sent the reply letters on 28.1.2010 and 20.3.2010 rejecting their request on the ground that the balance unadjusted energy had not been claimed by the Appellant within the period of limitation of two years as per the Supply code and hence, the claim cannot be entertained. Therefore, in July, 2010, the Appellant filed a Petition against the refusal by the board and for a direction to adjust the banked units.

(d) The State Commission after hearing the parties held that even though the limitation Act would not apply to the present case, the claim made by the Appellant cannot be entertained as there was a long delay and latches on the part of the Appellant.

8. In the light of above undisputed facts, we are to bear in mind the two important aspects:

   (a) Even though, the State Commission did not accept the plea of the Electricity Board that it was time barred by holding that the Limitation Act would not apply to the instant proceedings, the State Commission dismissed the petition filed by the Appellant on the ground that the said claim cannot be entertained due to "Delay and Latches" on the part of the Appellant in making the said claim.

   (b) The State Commission gave a finding in the impugned order that the said delay has not been explained and as such, the claim is belated and has to be rejected.

9. In regard to the first aspect indicated above, the State Commission has given a categorical finding that limitation would not apply to the proceedings before the Commission. This finding has not been challenged by the Board. In the light of the said findings given by the Commission the Board now cannot contend that the claim was barred by time since it was made after a lapse of two years, prescribed under Regulation 21 (2) of the Tamil Nadu Electricity Supply Code and unutilised banked energy had elapsed on 31.3.2006 itself as per clause 3 of the Wind Mill Agreement.

10. Not withstanding the finding of the Commission that limitation would not apply to the proceedings before the Commission, we would like to address the issue on merits and conclude accordingly. First contention taken up by the Learned Counsel of the Board (R-1) is that the unutilised banked energy would get elapsed by the end of financial year in terms of Clause 3 of the Wind Mill Agreement dated 28.3.2004. Let us quote Clause 3 of the Agreement dated 28.3.2004:

> *"3. If wheeling is adopted for by the Company, for which Board conveys that it is agreeable, then 5% of gross energy generated by the wind mill shall be deducted towards wheeling charge and the balance be made available to the HT Industry at the place where power is required. If banking is also adopted for, for which Board conveys that is agreeable for it, then 5% of the energy shall be deducted towards banking charge. The banking period shall be from 1st April to 31st March of the financial year, after which any unutilised banked energy shall be deemed to have lapsed at the end of the financial year".*

11. In order to understand the import of this clause, we have to understand what is banked energy and what would be unutilised banked energy. Generation from Wind Mill depends upon wind and therefore, unpredictable. At certain times, it may be generating to full capacity and other times, it may not be generating at all. It is quite possible that during a particular month the captive mind mill generated more than the consumption by the captive consumer. In such case, any

surplus energy generated by the captive wind mill is “banked” with the licensee for future utilisation. In case such surplus banked energy could not be utilised by the Company during the year, it will be termed as unutilised banked energy and would elapse at the end of the year. Question here is as to whether the ‘banked’ energy as on 31.8.2005 and not accounted for and to reflected by the Board (R-1) in subsequent bills be termed as unutilised banked energy. We are of the opinion that the unutilised banked energy in terms of clause 3 of the agreement is the banked energy which the Company could not be utilised due to adequacy of its own consumption. In this case, the bills of subsequent period clearly shows that the consumption of the Appellant was more than the quantum of energy in dispute and the Appellant could have utilised had it been reflected in its bill by the Board. This energy could not be utilised by the Appellant as the same was not adjusted by the Board and the Board has admitted that they inadvertently missed out to adjust the same in future bills. Thus, the banked energy in dispute cannot be termed as unutilised and Clause 3 of the Agreement is not applicable.

12. Let us now examine the second contention of the Respondent Board that the claim of the Appellant is time barred in terms of Clause 21 of the Supply Code, Section 50 of the Electricity Act,

2003 mandates the Commission to frame Supply Code. Section 50 of the Act is reproduced below:

> *"Section 50-The Electricity Supply Code- The State Commission shall specify an Electricity Supply Code to provide for recovery of electricity charges, intervals for billing of electricity charges, disconnection of supply of electricity for non-payment thereof, restoration of supply of electricity, measures for preventing tampering, distress or damage to electrical plant or electrical line or meter, entry of distribution licensee or any person acting on his behalf for disconnecting supply and removing the meter, entry for replacing, altering or maintaining electric liens or electrical plants or meter and such other matters:*

13. Perusal of the above Section would clearly indicate that the Supply Code framed by the Commission would relate to various rights of the licensee including recovery of charges by the licensee from the consumer. Clause 21 of the Supply Code which has been relied upon by the Respondent Board, reproduced below, would make this aspect amply clear:

> *21. DISCONNECTION OF SUPPLY*
>
> *Section 56 of the Act with regard to disconnection of supply in default of payment reads as follows :*
>
> *"(1). Where any person neglects to pay any charge for electricity or any sum other than a charge for electricity due from him to a Licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the Licensee or the generating company may, after giving not less than fifteen clear days notice in writing, to such person and without prejudice to*

his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such Licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off and reconnecting the supply, are paid, but no longer:

Provided that the supply of electricity shall not be cut off if such person deposits, under protest,—

(a) an amount equal to the sum claimed from him, or

(b) the electricity charges due from him for each month calculated on the basis of average charge for electricity paid by him during the preceding six months, whichever is less, pending disposal of any dispute between him and the Licensee.

(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due

14. Bare reading of the clause 21 would make it clear that the clause is nothing but reproduction of Section 56 of the Act and it clearly states that limitation period of two years is applicable only when sum is due from the consumer and not otherwise.

15. In view of the above, we conclude that the contention of the Respondent Board on this point, is not tenable and is to be rejected.

16. Now we would take up the second aspect namely the “delay and latches” on the part of the Appellant in making the claim, which is said to be not explained, in the light of the factual background of this case.

17. According to the Appellant, the banked energy had not been adjusted in the bills as on 31.8.2005 to the tune of 236996 units and when it came to know of the same during the audit objection, the Appellant sent a letter on 11.6.2009, requesting for the inclusion of the omitted banked units for the unadjusted 236996 banked units and though the Board specifically admitted that the balance units had been inadvertently omitted to be adjusted, refused to adjust the same contending that the same had lapsed and it was time barred.

18. The Learned Counsel for the Appellant elaborately argued that the delay has been properly explained by the Appellant, but the same has not been taken into consideration by the State Commission.

19. In the light of the above submission, we will now consider as to whether the explanation has been offered by the Appellant and the same is satisfactory or not. The main reason for the delay given by the Appellant before the State Commission is that the Appellant came to know that the balance energy of 236996 units which was the banked energy as on 31.8.2005 was not adjusted

in the bills, only during the time of inspection of the accounts by the Auditors on being pointed out and immediately thereafter, the Appellant sent a letter on 11. 6.2009 to the Board requesting for inclusion of the omitted banked units. There was no immediate reply from the Board. Only, after about 6 months i.e. on 28.1.2010, the Board sent a reply rejecting the said claim as elapsed and time barred. However, the Electricity Board admitted that the balance wind energy units were inadvertently omitted to be adjusted.

20. Again on 9.2.2010, the Appellant sent another letter intimating that there was no provision in the Wind Mill Agreement that the balance units which have been omitted to be adjusted will get elapsed when the mistake was on the part of the Board and that clause 21 (2) of the Supply Code would not be applicable as the said period prescribed would relate to the recovery of the amount by the Department from the claimant only and not by the claimant from the Department. The Board sent again reply on 20.3.2010 i.e. after one and half month without referring to the aspect of non applicability of Supply Code reiterating that the claim was not made within the period of two years and hence the claim cannot be entertained. Only thereafter, in July, 2010, the Appellant filed a Petition before the State Commission. The above factual details would indicate that the Appellant was not sleeping over its rights for a long time.

21. As a matter of fact the plea had been specially made by the Appellant before the State Commission that it came to know about the mistake committed by the Board, only after audit objection in 2009. Neither, the State Commission dealt with the said plea nor there was any denial to the said plea by the Electricity Board.

22. As indicated above, from the beginning through its letters as well as through its counter filed before the State Commission, the Electricity Board though admitted their mistake by not adjusting the booked units, was going on harping on the point that the claim was barred by Limitation. Admittedly, the Electricity Board has not pleaded and established before the State Commission that the Appellant knew about the failure of the Board to adjust the banked units even in the year 2006 and even then the Appellant kept quite without bringing to the notice of the Electricity Board about its failure immediately.

23. With regard to the plea made by the Appellant that it came to know of the said failure belatedly, we have directed the Appellant to file the Affidavit giving the particulars as to when exactly they came to know about the failure of the Board to adjust the unutilised banked units in the bills. Accordingly, the Appellant through its General Manager, has filed the Affidavit to this effect. The relevant portion of the sworn statements made by the Appellants are as follows:

"2. *This Hon'ble Court after hearing the above Appeal for some time on 3.11.2011 directed the Appellant to clarify as to when they became aware of the error in the Bills.*

3. That remaining excess units available after adjustments in each month's bill will be carried over to next month as Banked Units. This Banked units were also carried over after 5% banking loss. During August, 2005, the banked unit available for carry over was 236996 units. This was known to the Appellant after reconciliation by the auditors in 2009.

4.That it is an admitted fact that from September 2005 onwards Electricity Board Department had bifurcated already generated banked units into three parts i.e. peak hours, non peak hours and others. In the Aug, 2005 bill, due to this bifurcation they have omitted to carry over the banked units outstanding as on August, 2005 i.e. 236996 units. Due to this bifurcation and non availability of exact units adjusted in the bill, the Appellant were not able to check the carried over banked units regularly.

7. That it is mistake on the part of the Respondents for not carrying forward the banked units in spite of consuming the generated unit from the grid. As they used the units to their consumption, it is their duty to pay for same irrespective of the time frame as a fair and reasonable State or its instrumentalities would do.

9. That during the Audit of 2007, the Appellants were pressurized by their Auditors to do the reconciliation and finally, the Appellant thought of getting it from the operators. After so much of persuasions and efforts they

gave the figures and then the Appellant in 2009 could find out that the left out units unadjusted w.e.f August, 2005".

24. These paragraphs would make it evident that the Appellant became aware of the error in the bills only in the month of June, 2009 and thereafter immediately they sent a letter to the Electricity Board requesting for the inclusion of the omitted banked units for the unadjusted 236996 banked units. As indicated above, the said request was rejected by the Board by its reply which was sent after 06 months i.e. on 28.1.2010 after receipt of the letter dated 11.6.2009. Again, the Appellant sent another letter on 9.2.2010 requesting for inclusion. The Appellant received 2nd reply dated 20.3.2010 rejecting the request made by the Appellant on the ground that it was barred by time.

25. It is pertinent to point out that this Affidavit filed by the Appellant through its General Manager regarding the time of knowledge has not been specifically denied by the Respondent Board either through the reply Affidavit or through the written submissions filed by the Respondent Board subsequently.

26. Thus, it became evident that even though the Board admitted that it was a mistake on their part to adjust the unutilised banked surplus units in time, they were not ready to correct their mistake committed by them at least after getting the letter sent to the Appellant requesting for the said adjustment. On the other

hand, the Respondent Board tried to put the blame on the Appellant.

27. It is not disputed by the Board that the unadjusted banked units have been utilised by the Board by supplying to other consumers. When such banked units have been utilised by the Electricity Board, it becomes the duty of the Board to adjust the said banked energy in the future bills of the Appellant. Failure to do the same and refusal to adjust the same in spite of the receipt of letter sent by the Appellant as rightly pointed out by the Learned Counsel for the Appellant, would amount to unjust enrichment.

28. It is not the case of the Electricity Board that the Appellant had contributed to the mistake committed by the Electricity Board. It is purely the work of the Board officials. The preparation of the meter reading and statement and monthly bills are only by the Board. It is the specific case of the Appellant that it bonafide believed on receipt of the subsequent bills that the Board would have taken care of all adjustments in the bills and the Appellant came to know the mistake admittedly committed by the Board, only when the auditors found out and pointed out the same to the Appellant. There is no reason to reject this explanation offered by the Appellant, in the absence of the denial of the same by the Respondent Board.

29. As correctly pointed out by the Learned Counsel for the Appellant , the Electricity Board which is a State under the definition of Article 12 of the Constitution of India cannot escape from its liability in respect of giving credit to the units generated by the Appellant by putting the blame on the Appellant. This conduct of the Board shifting the blame, is very unfair. As mentioned earlier, the Electricity Board itself has admitted in their letters and in their counter before the Commission as well as before this Tribunal that they inadvertently omitted to adjust the amount. When the Electricity Board itself admitted their mistake by stating that they had failed to account for the banked surplus units which had been utilised by them, they should have corrected the said mistake forthwith and they cannot take advantage of its own mistake and say that the claim was belated.

30. The Learned Counsel for the Appellant has cited the following decisions to show that the Statutory Authorities cannot be allowed to raise unjust objections and to behave like some private litigants with profiteering motives:

    (a) 2010 (1) SCC 512-Urban Improvement Trust vs Mohan Lal

    (b) 2009 (1) SCC 540-Corporation Bank vs Saraswati Abharansala and Another

(c) 1959 SCR 1350-Sales Tax Officer Banaras and Others Vs Kanahaiya Lal Mukund Lal Saraf

(d) 1964 (6) SCR 261-State of M.P Vs Bhailal Bhai and Others

(e) 1994(4) SCC 1 Jay Laxmi Salt Wroks (P) Ltd Vs State of Gujarat

(f) 1993 Supp (4) SCC 326-UOI Vs ITC Ltd

(g) 1988 (1) SCC 401-Salonah Tea Co. Ltd and Others

31. In these decisions it is held that the statutory authorities are expected to show remorse or regret when their officers act negligently and when the said act is brought to the notice for which there is no explanation from them or excuse, the least that is expected from them restitution/restoration to the extent possible.

32. In the above decisions, the following principles have been laid down:

(a) It is high time that Government and public authorities adopt the practice of not relying upon technical pleas for the purpose of defeating legitimate claims of citizens and do what is fair and just to the citizens.

(b) Statutory authorities exist to discharge statutory functions in public interest. The should be responsible litigants. They cannot raise frivolous and unjust

objections, nor act in a callous and high handed manner. They cannot behave like some private litigants with profiteering motives. Nor can they resort to unjust enrichment.

(c) *It must be remembered that the State is not an ordinary party trying to win a case against some of its own citizens by hook or by crook. The interest of the State is to meet honest claims and never to score a technical point or overreach a weaker party to avoid a just liability and secure an unfair advantage.*

(d) *Where excess duty was not payable by the party under the provisions of a statute but had in fact been paid under a mistake of law, the party has a right to recover it and there is a corresponding legal obligation on the part of the Government to refund the excess duty so collected because the collection in such cases would be without the authority of law.*

(e) *The taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law.*

33. These principles will squarely be applicable to the present case also.

34. In the instant case there was no dispute with regard to the fact that the banked units of the Appellants have been utilised by the Board and even then the said banked units have not been adjusted as per the agreement thereby they committed a mistake as admitted by them. That being so, the Board cannot wriggle out from its own obligation by making plea of delay of time barred.

35. <u>Summary of Our Findings</u>

1. **Neither Clause 3 of Wind Mill Agreement dated 28.3.2004 nor Clause 21 of the Supply Code would be applicable to the present case. Therefore, the contention of the Respondent Electricity Board that the claim of the Appellant is time barred is not tenable and therefore, liable to be rejected.**

2. **The Appellant has made the claim immediately after the mistake committed by the Respondent Board came to its knowledge only after the audit inspection and as such the explanation for the delay may be accepted as satisfactory.**

36. In view of our above findings, we find that the impugned order suffers from infirmity and hence the impugned order is liable to be set aside. Accordingly, the Appeal is allowed. The impugned order is set-aside. The Respondent Board is directed to adjust the said banked units in the future bills or to refund the amount towards the cost of the said banked unutilized unit of energy along with the interest at short term SBI PLR (Prime Lending Rate).

37. However, there is no order as to costs.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 01st March, 2012

Reportable/Not Reportable