

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 128 of 2012**

**Dated: 03<sup>rd</sup> July, 2013**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**In the matter of:**

**The Kerala High Tension and Extra  
High Tension Industrial Electricity  
Consumers' Association  
Productivity House  
Jawaharlal Nehru Road  
Kalamassery – 683 104  
Cochin, Kerala**

**...Appellant(s)**

**Vs**

- 1. Kerala State Electricity Regulatory  
Commission  
C.V. Raman Pillai Road, Vellayambalam,  
Thiruvananthapuram – 695 010, Kerala**
- 2. The Kerala State Electricity Board  
Vydhyuthi Bhavan, Pattom  
Thiruvananthapuram – 695 004  
Kerala**

**...Respondent(s)**

**Counsel for the Appellant (s): Mr. Joseph Kodianthara, Sr. Adv.  
Mr. M.P. Vinod  
Ms. Neelam Saini**

**Ms. Usha Nandini**

**Counsel for the Respondents (s): Mr. Ramesh Babu,  
Mr. Aneesh James for R-1  
Mr. M.T. Goerge &  
Ms. Kavitha for R-2**

**JUDGMENT**

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

The Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association is the Appellant herein.

2. The Appellant, aggrieved by the impugned order dated 30.4.2012 passed by the Kerala State Electricity Regulatory Commission ("State Commission") refusing to issue direction for the refund of Service Connection Charges which were unauthorisedly levied and collected by the Kerala State Electricity Board.

3. The short facts are as follows:-

4. The Appellant is an Association of Industries principally of High Tension and Extra High Tension Industrial consumers of electricity in the State of Kerala. The 1<sup>st</sup> Respondent is the State Commission. The 2<sup>nd</sup> Respondent is the Kerala State Electricity Board.

5. After coming into force of the Electricity Act 2003 and the Kerala Electricity Supply Code, 2005, dispute was raised by the Appellant Association through the petition dated 22.12.2009 filed before the State Commission with respect to the Service Connection Charges being illegally levied and collected from the members of the Appellant Association by the Kerala State Electricity Board. The State Commission, after hearing parties, passed order dated 8.9.2010 holding in favour of the Appellant to the effect that the collection of Service Connection Charges by the State Electricity Board from 2.3.2005 onwards, i.e. the date on which Supply Code

came into force, was not legal and directing the Electricity State Board not to collect the Service Connection Charges from the consumers anymore i.e. from the date of the order namely 8.9.2010. In the said order, the State Commission observed that with regard to the question of refund of Service Connection Charges already collected after 2.3.2005 upto 7.9.2010, the matter would be taken up in separate proceedings.

6. Thereupon, the State Commission separately took up the issue of refund and heard the parties.

7. Ultimately the State Commission passed the impugned order dated 30.4.2012 holding that although the collection of Service Connection Charges after 2.3.2005 was not legal, the said charges collected from the HT/EHT consumers till 7.9.2010 need not be refunded as these amounts were already treated as revenue and the ARR/ERC of the Electricity Board was already approved.

8. Aggrieved by this order dated 30.4.2012, the Appellant has filed this Appeal.

9. The Learned Senior Counsel for the Appellant has urged the following grounds assailing the impugned order.

“A. The impugned order of the State Commission denying refund of Service Connection Charges levied on the HT/EHT consumers till 7.9.2010 is contrary to the categorical finding of the State Commission in its earlier order dated 8.9.2010 that the collection of Service Connection Charges from 2.3.2005 was not legal.

B. The impugned order has resulted in the undue benefit to the State Electricity Board and the loss to the HT/EHT consumers who have been admittedly subjected to the illegal levy and therefore the denial of the refund of such illegally collected amount from them is not valid in law.

C. Merely because the ARR/ERC of State Electricity Board had already been approved or the Service Connection Charges collected were already treated as revenue could not deny them the refund as it is unreasonable and illegal.”

10. On these grounds, the Appellant has prayed for setting aside the impugned order dated 30.4.2012 and grant the consequential reliefs to the Appellant.

11. In reply to the above grounds, the Learned Counsel for the State Commission as well as the State Electricity Board elaborately explained the various circumstances under which the State Commission was constrained to pass the impugned order denying the refund to the Appellant. They also pointed out the serious consequences if the claim made by the Appellant before the State Commission is allowed in their favour.

12. In the light of the above rival contentions made by both the parties, the questions that may arise for our consideration in this Appeal are as follows:

- (i) Having held in the order dated 8.9.2010 that the collection of Service Connection Charges from 2.3.2005 onwards by the Electricity Board was not justified, is it proper for the State Commission to deny the refund of Service Connection Charges which was found to be collected illegally?
- (ii) Whether the reasonings contained in the impugned order for denying the refund to the Appellant consumers till 7.9.2010 are legal and sustainable?

13. Before dealing with these questions, it would be better to quote the analysis and finding given by the State Commission by the order dated 30.4.2012 on these issues.

They are as follows:

### **“3. Analysis**

*Service connection charge was introduced by the Board w.e.f. 1.10.1998 to enable the Board to recover a portion of the cost incurred by the Board in its back end system for giving its service connection. The Board had to invest huge amounts to strengthen its generation, transmission and distribution networks to meet the enhanced electricity demand. Hence a consumer when applying for power connection had to bear a part of the cost incurred by the Board for developing/increasing capacity of transmission and distribution system. After the enactment of the Electricity Act, 2003, Kerala Electricity Board can recover expenses only as authorized by the State Commission. The Board also cannot recover any charges which are not consistent with the provisions of the Electricity Act, 2003. There is no legal basis on which the demand for Service Connection Charges was made by Kerala State Electricity Board. The demand of any amount by the Board from a consumer should be traceable to a provision either in a contract or a statute. There is no provision of Service Connection Charges either under Electricity Act, 2003 or in any provision of power supply*



*agreement or any order or Regulation of the Commission. In view of above the Commission uphold the order that KSEB is not entitled to realize Service Connection Charges from any consumer.*

*Now coming to the question of refund of Service Connection Charges collected during the period 2/3/2005 to 8/9/2010, though Commission is not convinced of the arguments of KSEB that these charges are part recovery of cost of developing upstream electrical systems and that the Licensee is authorized to collect such charges under section 46 of the Electricity Act, 2003 etc, it cannot also overlook the fact that the refund of Service Connection Charges (approximately Rs. 556 crores) is not an issue that can be examined in isolation. There is merit in the argument of the Board that the ARR & ERC of these years and the Truing up of accounts up to 2008-09 have already been finalized by the Commission and the deficits and surpluses are already arrived at, where the income on account of Service Connection Charges is also included. So also from the petition No. OP 15/2011 it has come to the notice of the Commission that there was under recovery of cost of providing electric*

*connections to certain category of LT consumers, levying nominal service connection charges, which was again not covered by any regulations or schemes approved by the Commission. Continuing capital subsidy schemes like Minimum Guarantee etc, which did not have any regulatory sanction, were also brought before the Commission. Thus while on the one hand there was collection of unauthorized charges from certain category of consumers, unauthorized concessions were extended to some other categories on the other. The question is whether at this point of time we need to put the clock back. Recovery of any concessions already extended to any group of consumers in the past may not be a practical measure. So also in case refund of Service Connection Charges collected during the period 2/3/2005 to 8/9/2010 alone is resorted to, that expenditure has to be allowed as pass through in the ARR of the year in which such disbursement takes place, resulting in tariff hike to that extent. Taking in to account all the above issues Commission issues the following order.*

#### **4. Orders of the Commission**

*1. Service Connection Charges, levied if any, from HT/EHT consumers after 8.9.2010 and LT consumers after 10.11.2011 shall be refunded within 30 days from the date of issue of this order without waiting for any application from the concerned consumers.*

*2. Service Connection Charges levied from HT/EHT consumers till 7.9.2010 and from LT consumers till 9.11.2011 need not be refunded since these amounts were already treated as revenue of the Licensee and tariff so adjusted.*

*3. In the circumstances, the commission decides to drop further action under section 129, 130 and 142 as mentioned in the order dated 8-9-2010.”*

14. The crux of the reasonings for the finding in the impugned order is given as below:-

A. There is no provision for levying Service Connection Charges either under Electricity Act 2003 or in the Power Supply Agreement or in the Regulations of the

Commission. In view of the above, the State Commission uphold the earlier order dated 8.9.2010 by reiterating that the State Electricity Board was not entitled to collect Service Connection Charges from any consumers.

- B. However, the State Commission cannot overlook the fact that the refund of Service Connection Charges cannot be an issue that can be examined in isolation. In fact, the ARR and ERC of all these years and the truing up of accounts up to 2008-09 have already been finalized by the State Commission. The deficit and surplus are already arrived at where the income on account of Service Connection Charges was also included. Thus, there was a collection of unauthorized charges from some category of consumers. Similarly there was unauthorized concession extended to the other categories of the consumers.

- C. Hence at this point of time, recovery of any concession already extended to group of consumers for the purpose of refund to the other category of consumers cannot be practical measure.
- D. In case the refund of Service Connection Charges collected from the one category of consumers during the period from 2.3.2005 to 7.9.2010 is resorted to, then the said expenditure has to be allowed a pass through in the ARR of the year. In that event, it will result in tariff hike to that extent.
- E. Therefore, the Service Connection Charges levied on HT/EHT consumers before 7.9.2010 cannot be directed to be refunded. However, the Service Connection Charges collected after 8.9.2010 can be directed to be refunded within 30 days by the Electricity Board. Accordingly directed.

F. It is made clear that the Service Connection Charges levied on HT/EHT Consumers from 2.3.2005 up to 7.9.2010 need not be refunded since these amounts have already been treated as revenue of the Licensee and tariff so adjusted.

15. The above finding would make it evident that in view of the consequences that would follow if the refund of the Service Connection Charges collected between 2.3.2005 and 7.9.2010 is ordered and hence the claim for refund for that period had been denied. However, the State Commission directed the State Electricity Board to refund the Service Connection Charges collected after 8.9.2010 i.e. the date of earlier order to the consumers within 30 days from the impugned order dated 30.4.2012.

16. The main argument that has been advanced by the Appellant is that merely because the ARR/ERC was earlier

approved and just because the account had already been trued up, it cannot automatically render the earlier order dated 8.9.2010 as empty formality, where in fact it was held that such income got collected by State Electricity Board illegally.

17. Let us now examine the decision of the State Commission in its order dated 8.9.2010 on the petition dated 22.12.2009 filed by the Appellant:

*“(1) It is ordered that collection of service connection charges by KSEB from 2-03-2005, the date from which Kerala Electricity Supply Code, 2005 became effective, is not in order. Service Connection Charges shall not be collected from consumers from the date of this order. KSEB shall display the charges and fees approved by the Commission for providing service connection to all categories of consumers in the notice boards of all Electrical Section Offices. This should also be displayed in the web site of the Board. The Commission will also publish the same in its web site for the benefit of*

*consumers. This order will be made applicable to all licensees in Kerala.*

*(2) The Commission after the hearing is satisfied that action under Sec 142/ Sec 146 is called for and shall be proceeded with. Refund of service connection charges collected after 2-03-2005 and penal action shall be taken up as separate proceedings following Section 129 and 130 of Electricity Act, 2003”.*

18. Thus, the State Commission by its order dated 8.9.2010 decided that the collection of service connection charges by the Electricity Board from 2.3.2005, the date from which the Supply Code, 2005 became effective was not in order and the service connection charges would not be collected from the consumers. The State Commission further decided that the matter regarding refund of service charges collected after 2.3.2005 and penal action against the Electricity Board would be taken up by the State Commission in separate proceedings.



19. Thereafter, the State Commission decided to proceed suo motu on the question of refund of service connection charges from 2.3.2005 to 8.9.2010 and finally decided by the impugned order dated 30.4.2012 not to refund the service connection charges unauthorisedly collected by the Electricity Board.

20. The reasons given by the State Commission for not allowing refund of the service connection charges wrongly collected by the Electricity Board are:

- i) The ARR & ERC of the Board for the period for which service connection charges were collected i.e. 2.3.2005 to 8.9.2010 and True up of accounts upto 2008-09 have already been finalized by the State Commission in which the income of the Board on account of service connection charges was also included.

- ii) There was under recovery of the cost of providing electricity to certain category of LT consumers by the Electricity Board and recovery of any concessions already extended to them may not be practical.
  
- iii) If the refund of service connection charges collected from 2.3.2005 to 8.9.2010 alone is resorted to, the expenditure has to be allowed as pass through in the ARR of the year in which such disbursement takes place resulting in tariff hike to that extent.

21. We feel that the above grounds for not allowing the refund of service connection charges for the period 2.3.2005 to 8.9.2010 are not valid for the following reasons:

- i) Finalization of ARR & ERC and true up could not be a reason for not allowing the refund. The State Commission itself in its order dated 8.9.2010 while

deciding the collection of service connection charges as illegal instead of allowing the refund of the charges collected unauthorisedly decided to take up this issue in a separate proceeding. The separate proceeding was initiated after sometime and the impugned order was passed only on 30.4.2012 i.e. after about one and a half years of the original order. In the meantime if the accounts have been trued up by the State Commission, the Appellants could not be penalized by denying the refund which is due to them.

- ii) There is no need to open up the finalized ARR and ERC and truing up of accounts for the past period. The amount is ordered to be refunded to the Appellants now and the same could be included as an expenditure in the ARR of the Electricity Board for the year in which the disbursement

takes place and is passed on to the consumer in the tariff for the subsequent period.

- iii) The amount which is due to the Appellants legally cannot be denied because it would have an impact on the retail supply tariff of the Electricity Board.
- iv) The issue of under recovery by the Electricity Board from certain category of LT consumers could not be linked to the issue of refund to the Appellant. The issue of under recovery by the Electricity Board from certain LT consumers was not challenged before the State Commission and has since attained finality. The Appellant could not be denied the relief due to them just because the Board unauthorisedly gave same concessions to some other consumers.

22. It is pertinent to point out that the Appellant had first filed a representation before the Ombudsman against the

unauthorized collection of service connection charges by the Electricity Board. The Ombudsman by its order dated 15.6.2009 directed the Appellant to approach the State Commission. Accordingly, the Appellant filed a petition before the State Commission on 22.12.2009.

23. Thus, the Appellant has been diligently pursuing the matter first before the Ombudsman and then before the State Commission and could not be denied the refund of amount collected unauthorisedly by the Board for no fault or lack of diligence on their part just because during the process of obtaining the final order from the State Commission, the ARR and true up of accounts of the Electricity Board have been finalized.

24. Learned counsel for the Electricity Board has extended the arguments regarding legality of the service connection charges which have been set aside by the State Commission. We are not inclined to go into the legality of

the service connection charges as the State Commission in its earlier order dated 8.9.2010 has held that collection of these charges was not in order as it was not in consonance with the supply code,2005. The Electricity Board has not challenged the earlier order of the State Commission dated 8.9.2010 and the findings of the State Commission have since attained finality. The Electricity Board has also not filed any Appeal against the impugned order dated 30.4.2012 in which the earlier decision of the State Commission was reaffirmed.

25. Learned counsel for the Electricity Board has referred to judgment of the Hon'ble Supreme Court in 1997(5) SCC 536 in the matter of Mafatlal Industries Ltd. & Ors. vs. Union of India & Ors., in which it was held that a claim for refund whether made under the provisions of the Act or in a suit or writ petition can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person or other persons and his refund claim

can be allowed to decreed only when he establishes that he has not passed on the burden of duty or to the extent he has not passed on as the case may be.

26. In our opinion, the above case is not relevant to the present Appeal. In the referred case the Appellant was claiming refund of excise duty and it was held that where the burden of duty has been passed on to buyers, the claimant cannot say that he has suffered any loss or prejudice. In the present case, there is no issue of any refund of duty or tax which has been passed on by the Appellant to the purchaser of goods or services from them.

27. Learned counsel for the Electricity Board to press his contention also referred to the judgment of the Hon'ble Supreme Court reported as (1996) 1 SCC 597 in the matter of Kerala State Electricity Board and MRF Ltd., etc., in which it was held that in an action by way of restitution, no inflexible rule can be laid down and it will be the endeavour

of the court to ensure that a party who has suffered on account of decision of the Court, since finally reversed, should be put back to the position, as far as practicable, in which he would have been if the decision of the Court adversely affecting him had not been passed. But in giving such relief, the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take a pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the parties.

28. In our view, the above judgment does not help the Electricity Board. In the above KSEB case, the High Court struck down the tariff increase by the Electricity Board. This order of the High Court was challenged by the Electricity Board before the Hon'ble Supreme Court. No stay was



granted by the Hon'ble Supreme Court and during the period the case was pending before the Apex Court, the order of the High Court remained in vogue. Ultimately the Supreme Court upheld the Electricity Board's order of increase in tariff. Consequently, the Board claimed arrears of payment alongwith interest. The Respondent consumer paid the bill at the enhanced tariff but did not pay interest. The matter regarding payment of interest was challenged before the High Court and the High Court decided that the interest was not payable. The order of the High Court was challenged before the Hon'ble Supreme Court. Hon'ble Supreme Court held that after the decision of the Supreme Court upholding upward revisions of tariffs, the Board's entitlement to draw bills on the basis of upward revisions and consequential enforceability of payment of such bills by the consumers revived with full force. Even though, it was held that in giving the relief, the court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by

way of restitution is taken, the Hon'ble Supreme Court allowed payment of interest by the Respondent consumer to the Board on the unpaid portion of bill drawn on the basis of revised tariffs.

29. In the present case, no hardship will be caused to the Electricity Board in payment of dues to the Appellant as the same will be allowed as a pass through in the ARR and retail supply tariff. Ultimately, the burden of refund of erroneous recovery of service connection charges will be borne by all the consumers as the consumers were the beneficiary of the same in the previous tariff years when such charges were included in the income of the Electricity Board while deciding the ARR and tariff.

30. In view of above, we hold that Kerala State Electricity Board is liable to refund the service connection charges collected during the period 2.3.2005 to 8.9.2010 to the High Tension and Extra High Tension electricity consumers

alongwith simple interest @ 10% per annum from the date of collection of the charges till the date of refund.

**31. Summary of our findings**

- i) The grounds on which the State Commission did not allow refund of the service connection charges illegally collected by the Electricity Board are not valid.**
- ii) Finalization of ARR & ERC and true up could not be a reason for not allowing the refund. The Appellant has been diligently following up the refund of the service connection charges unauthorisedly collected from them. The State Commission itself in its order dated 8.9.2010 while deciding the collection of service connection charges as not in order instead of allowing the refund of the charges decided to take up this issue in a separate proceeding.**

**The separate proceeding was initiated after sometime and the impugned order was passed on 30.4.2012. In the meantime if the accounts have been trued up by the State Commission, the Appellants could not be penalized by denying the refund which is due to them.**

- iii) There is no need to open up the finalized ARR and ERC and truing up of accounts for the past period. The refund which is ordered now could be included as an expenditure in the ARR of the Electricity Board for the year in which the disbursement takes place and passed on to the consumer in the tariff for the subsequent period.**
- iv) The amount which is due to the Appellants legally cannot be denied because it would**

**have an impact on the retail supply tariff of the Electricity Board.**

- v) The above issue should not be mixed up with under recovery from certain category of LT consumers by the Electricity Board as the issue of under recovery by the Board from those LT consumers has not been challenged before the State Commission.**
- vi) Accordingly, the Kerala State Electricity Board shall refund the service connection charges unauthorisedly collected by them from the High Tension and Extra High Tension electricity consumers alongwith simple interest @ 10% per annum from the date of collection of the charges till the date of refund.**

31. In view of above, the Appeal is allowed. No order as to costs.

32. Pronounced in the open court on 03<sup>rd</sup> day of July,  
2013.

(Rakesh Nath)  
Technical Member

(Justice M. Karpaga Vinayagam)  
Chairperson

Dated: 03<sup>rd</sup> July, 2013

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REPORTABLE/NON-REPORTABLE