

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

In the matter of admissibility hearing of petition reviewing the order dated 16-09-2011 of the Commission in petition No. 82 of 2010, where in M/s. Little Flower Hospital, Angamaly was the petitioner and Kerala State Electricity Board was the respondent in the matter of exceeding Contracted load/ Contract Demand by M/s. Little Flower Hospital, Angamaly

Petitioner : **Kerala State Electricity Board Ltd.,**
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram,
Represented by Shri B.Pradeep.

Respondent : **M/s Little Flower Hospital, Angamali**
Represented by Advocate Sri Haridas

Present : **Shri Mathew George, Member**

Order dated 28.10. 2014

Background

1.This review petition is filed by KSEB Ltd for reviewing the order dated 16-09-2011 of the Hon. Commission in petition No.TP 82 of 2010, wherein M/s. Little Flower Hospital, Angamaly was the petitioner and Kerala State Electricity Board was the respondent, as per regulation 67 of the KSERC (Conduct of Business) Regulations, 2003. There was a delay due to administrative reasons in filing the review petition as explained by KSEB Ltd in the petition. KSEB Ltd is requesting to condone the delay and to admit the petition to meet the ends of justice.

Prayer of the petitioner

2. KSEB Ltd has requested the Commission to condone the delay in filing the petition to review the order of the Commission dated 16-09-2011 in T.P. No. 82 Of 2010 and to allow review of the order of the Commission and revise orders under para 5.2 and 5.4 of the order dated 16-09-2011 in T.P. No. 82 of 2010 by deleting the 2nd sentence of para 5.2 and the portion “as penalty for connecting additional load under Section 126 of the Electricity Act and also” of para 5.4 of the order

Summary of averments in the petition

3.The main submissions and arguments submitted by the petitioner on various issues are quoted below:

“1. This review petition is filed for reviewing the order dated 16-09-2011 of the Hon. Commission in petition No. 82 of 2010, wherein M/s. Little Flower Hospital, Angamaly was the petitioner and Kerala State Electricity Board was the respondent, as per clause 67 of the KSERC (Conduct of Business) Regulations, 2003. There is a delay due to administrative reasons in filing the review petition as explained in the following paragraphs, which the Hon. Commission may kindly condone and may admit the petition to meet the ends of justice.

2. The Hon’ble High Court in WP(C) No.22806/2008 filed by M/s. Little Flower Hospital, Angamali had directed the petitioner as well as the Kerala State Electricity Board to approach the Regulatory Commission for settling certain specific issues. Having considered the matter in detail, the Hon. Commission had passed an order dated 16-09-2011 in Petition No.TP 82/2010. The above said order was received on 29-09-2011 by the review petitioner (Kerala State Electricity Board). After detailed examination of the above said order at different levels, a legal opinion of the Legal Adviser and Disciplinary Enquiry Officer was sought on 11-10-2011 by the Chief Engineer (Commercial & Tariff). After detailed examination of the issue, a considered legal opinion was tendered on 19-12-2011 by the Legal Adviser and Disciplinary Enquiry Officer for filing a review petition before the Regulatory Commission and if it is not allowed it was advised to file a Writ Petition before the Hon’ble High Court of Kerala in view of the grounds enumerated therein.

3. Based on the above legal advice, the matter was placed before the Full Time Members of the Board on 23-12-2011 for decision. The Full Time Members decided to file a writ petition on 25-01-2012. Based on the above Full Time Members decision, the matter was taken up with the Joint Secretary (Law) on 01-02-2012 for initiating further steps for filing a Writ Petition. Consequently Board order dated 28-02-2012 was issued to file Writ Petition and the matter was specifically entrusted with Adv. T.R. Rajan, Standing Counsel for Kerala State Electricity Board.

4. As requested by the Standing Counsel for KSEB, a certified copy of the order in TP No.82/2010 was called for filing the Writ Petition on 01-03-2013. The Chief Engineer (Commercial & Tariff) procured the same from the Hon. Commission and was transmitted to the Office of the Legal Adviser and Disciplinary Enquiry Officer on 27-05-2013 and the same was transmitted to the Legal Liaison Officer, Office of the Standing Counsel for KSE Board, Power House, Kochi on 28-05-2013.

5. On perusal of the entire issue, the Standing Counsel has asked for a copy of the petition and objection filed by the Kerala State Electricity Board Limited on 12-06-2013, which was also forwarded to the Standing Counsel on 25-06-2013.

6. On 08-11-2013, Adv. T.R. Rajan, Standing Counsel for Kerala State Electricity Board Limited rendered a legal advice that the appropriate remedy is to file a review petition against the order in TP 82/2010, since there is an apparent error on the face of records itself.

7. In view of the opinion rendered by the Standing Counsel, the matter was again taken up with the Board along with a legal opinion rendered by the Legal Adviser and Disciplinary Enquiry Officer on 28-11-2013. As instructed by the Chairman, a note to the Full Time Directors was submitted on 11-12-2013. Finally, it was decided to file a Review Petition on 30-01-2014 before the Kerala State Electricity Regulatory Commission. Thereafter, the Chief Engineer (Commercial & Tariff) was requested to file Review Petition by the Legal Adviser and Disciplinary Enquiry Officer on 11-02-2014. On 05-03-2014, the Chief Engineer (Commercial & Tariff) requested the Legal Adviser and Disciplinary Enquiry Officer to furnish the grounds for condonation of delay, which was obtained on 21-03-2014.

8. From the above sequence of action taken, it is apparent that Board has consistently followed up for legal remedies on the matter and there are no laches occurred on the part of the Review Petitioner (the Board) in filing the Review. There are valid grounds to condone the delay, since the Board has taken earnest and sincere efforts to prosecute the matter diligently. If the Review Petition is not allowed the review petitioner will be put to irreparable loss and hardship.

GROUND FOR REVIEW OF THE ORDER OF THE HON. COMMISSION DATED 16-09-2011 in T.P. NO. 82 OF 2010

9. It is respectfully submitted that error apparent on the face of records have crept into the order dated 16-09-2011 of this Hon. Commission in T.P. No. 82/2010.

10. It is humbly submitted that Hon. Commission is not empowered by any law to entertain petitions filed by individuals and the same has been consistently held by the Apex Courts of the country – The Appellate Tribunal for Electricity and the Supreme Court of India in various cases. Hon. Commission does entertain petitions filed by individuals, only upon

remanding the same to the Hon. Commission by any other judicial forum of the country.

11. *The petitioner in petition No. T.P. 82 of 2010 had approached the Hon. Commission based on the judgment dated 17-10-2007 of the Hon. High Court of Kerala in W.P.(C) No. 22806 of 2006 (M) wherein the major issues for consideration and determination of the Hon. Commission were:*

(a) Whether the APTS proceedings pending the application of the petitioner for allocation of power were sustainable in law?

(b) Whether the capacity of the transformer of the petitioner has any impact on deciding the amount that could be levied in terms of the law applicable to the petitioner?

12. *Hon. Commission in the analysis part of the order had in fact deliberated on the above two issues and concluded that*

(a) There is nothing illegal in the inspection conducted by APTS on 04-04-2005, while the application is pending.

(b) The amount if any to be collected in proportion to connected load in any premises, cannot be limited or decided based on Transformer Capacity as a general rule.

13. *It is respectfully submitted that the Hon. Commission, while disposing the petition No. T.P. 82 of 2010 filed by M/s. Little Flower Hospital, Angamaly, had considered various other aspects of the petition and had travelled beyond the jurisdiction granted by the Hon. High Court of Kerala in W.P. (C) No. 22806 of 2006.*

14. *In view of the apparent error cited above, Hon. Commission may consider review of the order dated 16-09-2011 of this Hon. Commission in T.P. No. 82/2010.*

15. *In respect of the facts of the petition to be considered for review, It is humbly submitted that the Kerala Electricity Supply Code, 2005 came into force on 02-03-2005.*

16. *Regulation 30 of the Kerala State Electricity Supply Code, 2005 mandates that licensee shall submit to the Commission for approval the draft terms and conditions of supply.*

17. *In terms thereof the Kerala State Electricity Board Terms and Conditions of Supply, 2005 has been formulated. The Kerala State Electricity Board Terms and Conditions of Supply, 2005 came into force with effect from 01-02-2006 only.*

18. *Regulation 42 of the Conditions of Supply of Electrical Energy, was amended on 18-09-2002 as:*

(iii) in the case of HT and EHT consumers the penalty for unauthorised additional load shall be levied at the rate of twice the demand charges per kVA for additional load till the unauthorised additional load is removed or regularised as per rules.

*In the definition section (Regulation 1(p)) of the Conditions of Supply of Electrical Energy, 1990 'contracted load' is defined as follows:-
'Contracted load/Contract demand' means the maximum kVA/KW for supply of which the Board undertakes to provide a facility from time to time.*

'Connected load' is defined as follows:-

'Connected load' means the sum total of the installed capacities of all the energy consuming devices on the consumer's premises connected to the system which can be operated simultaneously.

Section 185(2)(a) of the Electricity Act, 2003 reads as follows:

185(2) Notwithstanding such repeal:-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made.....under the repealed laws shall insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

19. In the instant case, the surprise inspection was conducted by the APTS at the premises of the consumer on 04-04-2005 and the total connected load at the hospital premises was found to be 638.49 KW wherein 345 kVA was the unauthorized load.

20. Accordingly the special officer (revenue) issued penal bill for Rs. 10,83,600/- under section 126 of the Electricity Act, 2003.

21. At that point of time the Conditions of Supply of Electrical Energy, 1990 was in force. The KSEB Terms and Conditions of Supply came into force with effect from 01-02-2006 only.

22. In view of section 185 (2) (a) of the Electricity Act, 2003, Regulation 42 (iii) of the Conditions of Supply of Electrical Energy, 1990 will be in force till 01-02-2006 - the date of coming into force of the KSEB Terms and Conditions of Supply, 2005, since there is no inconsistency between Regulation 42 (iii) of the Conditions of Supply of Electrical Energy, 1990 and any other provision of the Electricity Act, 2003.

23. As such, the finding of this Hon. Commission to the effect that KSEB cannot charge penalty for connecting additional connected load in the case of HT and EHT consumer from 02-03-2005 - the date from which the Kerala Electricity Supply Code, 2005 became effective is an apparent error on the face of record itself. The relief granted to that effect also cannot thus be sustained.

24. It is further submitted that the finding of this Hon. Commission to the effect that unauthorised additional load has not been included as an

item under unauthorised use of electricity under section 126 also cannot be sustained in view of the decision of the Hon. Supreme Court of India reported in 2011 KHC 4978 (The Executive Engineer and another versus Sri Sitaram Rice Mill) wherein the Hon. Supreme Court in categorical terms held that the cases of excess load consumption than the connected load inter alia would fall under explanation (b)(iv) to Section 126 of the Electricity Act, 2003 besides it being in violation of Regulations 82 and 106 of the Regulations and terms of the agreement.

25. *It is further submitted that the Hon. High Court in the judgment in the Writ Petition (C) No 22806/2006 remitted the matter to this Hon. Commission and directed as follows:-*

Having regard to what is aforesaid, it can be easily noticed that the controversy is not as to the extraction of energy by theft as is ordinarily understood but the statutory content of the relevant provisions in the backdrop of the application of the petitioner for allocation of additional power, which was pending needs to be considered. It also needs to be considered whether the capacity of the transformer of the petitioner has any impact on deciding the amount that could be levied in terms of the law applicable to the petitioner.

26. *In that view of matter it is most respectfully submitted that this Hon. Commission went beyond the directions of the Hon. High Court of Kerala. In view thereof as well it is submitted that the order of this Hon. Commission is to be reviewed.”*

Issue of notice

4.It was decided to have an admissibility hearing and notice was issued to the petitioner and the respondent on 21-05-2014 fixing the hearing on 27.06.2014.

Summary of written statement submitted by respondent

5.The main submissions and arguments submitted by the respondent are quoted below:

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1. *It is submitted that the respondent M/s Little Flower Hospital received the notice No 719/CT/2014/KSERC/535 dated 26-05-2014 for deciding the admissibility of the petition filed as per Clause 26(1) of the Kerala State Electricity Regulatory Commission (Conduct of the Business) Regulations, 2003.*

2. *It is respectfully submitted that as per Regulation 67(1), an application / petition is to be filed within 90 days of the making or issuing of the decision, direction or order. The order of the Hon. Regulatory Commission in petition No.82/2010 is dated 16/9/2011 and received by the review petitioner on 29/9/2011. Therefore a review petition as per law ought to have been filed by any of the aggrieved party against the order in T.P. No.82/2010 within a period of 90 days from 29/9/2011. The review petition is filed not within the period of 90 days as per Regulation 67(1)*

and the same was filed only on 21/4/2014, that is much after the statutory period for filing the review petition.

3. It is respectfully submitted that there is no enabling provision in KSERC (Conduct of Business) Regulations 2003 to condone the delay in filing a review petition. It is very plain and clear from Regulation 67 that a review petition ought to have filed within 90 days from making or issuing of the decision and that in the absence of a provision to condone the delay; the delay cannot be condoned and this Commission has no power to condone the delay beyond the period permitted as per Regulation. The above review petition is filed by the review petitioner with inordinate delay of more than 850 days and hence the same is not maintainable. For easy reference the Regulation 67(1) is reproduced herewith:-

“Powers of Review, Revision etc.- (1) The Commission may, either on its own motion or on an application made by any interested or affected party, within 90days of the making or issuing of any decision, order, notice or other document or the taking of any action in pursuance of these Regulations, review, revoke, revised, modify, amend, alter or otherwise change such decision, direction, order, notice or other document issued or action taken by the Commission or any of its officers”.

It is pertinent to note that there is no provision enabling the Hon. Commission to entertain an application which is filed beyond the statutory period. Hence it is respectfully submitted that the above application is filed by the review petitioner is not maintainable and liable to be dismissed in limine.

The above legal position has been settled by the Hon. Supreme Court as well as Hon. High Court in umpteen numbers of decisions. The Hon. Division Bench of the High Court in a decision reported in 2005 (4) KLT 828 clearly stated that “Special statute when prescribes a certain period of limitation for filing an application and provides on clear terms that such period on sufficient cause being shown may be extended in the maximum only up to a specified time limit and no further, the appellate authority has no jurisdiction to treat within the limitation an application filed before it beyond such maximum time limit specified in the statute. When the statute has prescribed a time limit for condonation of delay and when the appeal is filed beyond that, appeal cannot entertain by a statutory authority or the Tribunal unless power is conferred on these authorities”. In a latest decision reported in 2014 (1) KHC 21 (DB) the Division Bench of the Hon. High Court while dealing with Building (Lease and Rent Control) Act 1965 clearly in unequivocal terms stated as follows:- “As far as the applicability of Section 5 of the Limitation Act is concerned, it is well settled that it may apply only in respect of Courts and it cannot be said that District Collector, while exercising power under Section 13(6) of the Act, is functioning as a Court. Therefore, the contention of the petitioner is well founded. Herein, without passing any order on the application to condone the delay, final order has been passed in the appeal, by setting aside the order and remanding the matter. No power is conferred under Section 13(6) or under any other provisions to condone the delay in filing the appeal”.

In the light of the above settled legal position it is most humbly prayed that this Hon. Commission may be pleased to dismiss the above petition as not maintainable.

4. *This respondent reserve, its right to file detailed objection on merits to the review petition if it is found by this Hon. Regulatory Commission that the review petition is admissible."*

Analysis and decision

6 .The petition was for reviewing the order dated 16-09-2011 of the Commission in petition No. 82 of 2010, wherein M/s. Little Flower Hospital, Angamaly was the petitioner and Kerala State Electricity Board was the respondent.

The regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 states as follows;

"The Commission may, either on its own motion or on an application made by any interested or affected party, within 90 days of the making or issuing any decision, direction, order, notice or other documents or the taking of any action in pursuance of these regulations; review, revoke, revise, modify, amend, alter or otherwise change such decision, direction, order, notice or other documents issued or action taken by the Commission or any of its officers".

The petition was received in the Commission on 22-04-14 and hence it is badly delayed. The petitioner has requested for condonation of delay on the ground that the Board has taken earnest effort to prosecute the matter diligently as explained in the petition. It is stated in the petition that if the review petition is not allowed the review petitioner will be put to irreparable loss and hardship.

A decision of the apex court in [Commissioner of Sales Tax, U.P. v. Parson Tools and Plants, Kanpur](#) (1975) 35 S.T.C. 413) on the issue of condonation delay is quoted below.

" If the legislature in a special statute prescribes a certain period of limitation for filing a particular application there under and provisions in clear terms that such period on sufficient cause being shown , may be extended in the maximum, only up to a specified time-limit and no further, then the tribunal concerned has no jurisdiction to treat within limitation , an application filed before it beyond such maximum time-limit specified in the statute , by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of s.40(2) of the Limitation Act."

Reference may also be made to the decision of the Bombay High Court in N.B. Golangada v. Union of India (1978 E.L.T. (J. 61 A) wherein plea was raised for condonation of delay under Section 5 of the Limitation Act. Repelling the contention the court held as follows:

"Then the question arises as to whether the appellate authority is competent in law to condone the delay in preferring the appeal. Here again, neither in Section 35 nor in any other provision of the Act or rules framed there under, there is any provision

which empowers the appellate authority to condone the delay in preferring appeals. In the absence of such a provision, the, Collector of Central Excise would have no power to condone the delay. Reference was made to Section 5 of the Indian Limitation Act, 1963 and it was urged that the Collector could have condoned the delay by calling, for an explanation from the petitioner, and on being satisfied that there was reasonable cause for preferring the appeal beyond time. We are afraid, the provisions of Section 5 will not be applicable to appeals provided in the Central Excises and Salt Act, 1944 which is a Special Act which provides for appeals and prescribed a special period of limitation for appeals. The authority exercising power of appellate authority under Section 35 is not a court and, therefore, the provisions of Section 5 could not be invoked. Moreover, in view of the provision of Section 29 also it cannot be said that the provisions of Section 4 and 5 are attracted to appeal provided under Section 35 of the Central Excise and Salt Act 1944. In view of this legal position, the Collector of the Central Excise was justified in rejecting the appeal on the ground of limitation. The revisional authority has merely confirmed the order of the Collector of Central Excise, and we do not think that there is any justification for interfering in this petition."

Under these circumstances the condonation of delay under Section 5 of the Limitation Act is not permissible.

Order of the Commission

The review petition having been filed beyond the period of 90 days, is barred by limitation as specified in regulation 67 of the Kerala State Electricity Regulatory Commission (Conduct of Business) Regulations, 2003 and hence the Commission orders that the petition is not admissible. It is ordered accordingly.

Sd
Mathew George
Member

Approved for issue

Secretary