

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.-4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

**Present: Shri U. N. Behera, Chairperson
 Shri S. K. Parhi, Member**

Case No. 08/2019

M/s. Pooja Sponge Pvt. Ltd.

..... Petitioner

Vrs.

The E.E (Elect.), RED, Rajgangpur, WESCO Utility and another ---- Respondents

**In the matter of: An application under Sections. 142 & 146 of the Electricity Act, 2003
 for violation of tariff order of the Commission for the financial Year
 2018-19 passed in Case Nos. 79, 80, 81 & 82 of 2017.**

For Petitioner: Shri P. K. Pradhan, authorized representative.

For Respondents: Shri Prashant Kumar Tripathy, Advocate.

ORDER

Date of hearing: 17.09.2019

Date of order: 31.10.2019

The petitioner-M/s. Pooja Sponge Pvt. Ltd., Kalunga, Rourkela has filed the present petition under Sections 142 & 146 of the Electricity Act, 2003 for violation of tariff order of the Commission for the financial Year 2018-19 passed in Case Nos. 79, 80, 81 & 82 of 2017.

2. The authorised representative of the petitioner stated that the petitioner company is a large industrial consumer under RED, Rajgangpur of WESCO Utility bearing Consumer No-293(L), RRKL/03-0126 and Contract Demand (CD) of 500 KVA. The petitioner had made an application to the Respondent-Executive Engineer, RED, Rajgangpur on 24.08.2016 for enhancement of the CD from 500 KVA to 650 KVA. The respondent vide his letter dated 13.10.2016 permitted the petitioner for enhancement of CD as requested and asked them to execute an agreement subject to compliance of certain conditions mentioned therein. The petitioner has submitted that since compliance of the said conditions for enhancement of CD was violative of OERC Supply Code, it was not possible on the part of the consumer to comply the said

conditions and hence no fresh agreement was executed in this regard. The petitioner-company had made an overdrawal exceeding the CD of 500 KVA for the months of August, September and December of 2017 and January, February, April, May and June of 2018. For the above overdrawal the Respondent had claimed overdrawal penalty as per prevailing tariff order in the energy bills for those months and those were paid by the petitioner company along with the respective bill amount without any question. All of a sudden on 26.09.2018 the petitioner received a provisional assessment under 126 of the Electricity Act, 2003 amounting to Rs.28,38,046/- for the aforesaid months in one go, alleging unauthorised abstraction of power in terms of Section 126 of the Electricity Act, 2003. The petitioner vide its reply on 03.10.2019 to the assessing officer submitted the objection that as he has already paid the overdrawal penalty for the alleged excess drawal of power, the assessment made under Section 126 of the Electricity Act, 2003 is not sustainable. The assessing officer without considering the objection of the petitioner communicated the final assessment order to the petitioner on 31.12.2018 of the same amount. Again the petitioner filed an application before the assessing officer on 02.02.2019 to reconsider the matter citing therein that as per the tariff order, the petitioner is not liable to pay double penalty on demand as well as the energy. Without disposing of the said representation of the petitioner, a notice was served on the consumer on 16.02.2019 for disconnection of power supply, if the assessed amount was not paid within 15 days.

3. The petitioner has submitted that as per Clause 6 of the agreement with the licensee, the consumer shall pay the demand and energy charges supplied under this agreement and other charges in accordance with the provision of OERC Supply Code, 2004 and as notified in tariff orders from time to time. Para-485 of the RST order for the FY 2018-19, which deals with the penalty for overdrawal, is as follows:-

“Demand charge shall be calculated on the basis of 80% CD or actual MD whichever is higher during period other than off peak hour. The overdrawal penalty shall be charged on the excess of drawal over the 120% CD during the off-peak hours. The penalty rate is Rs.250/KVA.

No off peak overdrawal benefit will be available if one overdraws beyond off peak hours. In such circumstances, the overdrawal penalty @ Rs.250/KVA shall be levied on the drawal in excess of the CD irrespective of the hours it occurs.

This penalty for overdrawal in all the above cases shall be over and above the normal demand charges where no other penalty due to overdrawal has been levied.”

Further, at Para-335 of the RST order for the FY 2015-16, the Commission had observed as follows:-

“Many objectors submitted that DISCOMs are penalizing consumers under section 126 of EA 2003 for defective meter even though they fail to replace meter in timely manner. They also submitted that undue enrichment by DISCOMs should be stopped under application of Section 126 of Indian Electricity Act 2003. It has become a common practice by the DISCOMs to disconnect power supply under Section 135 simultaneously levying penalty under section 126 due to over drawl by a consumer instead of levying overdrawal penalty under the plea of Supreme Court decision vide Civil Appeal No 5589 of 2011 wherein overdrawal has been equated to unauthorized use of electricity. In this context it is mentioned here that use of Section 126 or Section 135 for occasional overdrawal by a consumer is an action to be carefully examined by officers since there is a provision to deal with overdrawal in the tariff order. Such actions should only be justified in cases where the licensees are satisfied that the overdrawal by the consumers is unauthorised to evade the enhancement of contract demand. Accordingly the DISCOMs are advised to exercise due diligence while using penal provision like use of Section 126 or Section 135 of the Act.”

The petitioner has submitted that as per Section 142 of the Electricity Act, 2003, the Commission may impose penalty on any person who contravenes any provisions of the Act or the Rules or Regulations made thereunder, or any direction issued by the Commission. DISCOMs are to follow the procedures as prescribed by the Commission in the above tariff orders while determining/calculating the overdrawal charges on the consumers. In case the licensee violates any of the conditions of the tariff order he is liable for penalty and action as per the provisions under Section 142 and 146 of the Electricity Act, 2003.

4. The petitioner submitted that in the instant case the Utility has claimed the overdrawal penalty first along with the current bills which has already been paid and subsequently after a laps of about one year, an assessment was made against the petitioner under Section 126 of the Electricity Act, 2003 notwithstanding the fact that the petitioner has paid overdrawal penalty for the said periods, which is in violation of the norms of

Electricity Act, 2003 and RST order of the Commission. Once the overdrawal penalty has been paid for excess drawal of load beyond the CD, the overdrawal made is deemed to have been regularised and consumer is not liable to pay any other amount as per the said RST order of the Commission. The assessment made by the respondent under Section 126 of the Electricity Act, 2003 amounts to charging double penalty to the petitioner for said drawal of excess load. In addition threatening for disconnection of power supply to the petitioner's plant for non-payment of the illegally assessed amount is a clear violation of the conditions of the tariff order. Therefore, the petitioner has prayed the Commission to set aside the final assessment order dated 31.12.2018 and direct the respondent not to disconnect the power supply to the petitioner's plant pending adjudication of the matter. The petitioner has also prayed the Commission to take action against the respondent under Sections 142 & 146 of the Electricity Act, 2003 for violation of the tariff orders issued by the Commission from time to time.

5. The counsel on behalf of the Respondent has submitted that the petitioner is a consumer of WESCO Utility under the category of large industry having CD of 500 KVA. On various occasions the drawal of maximum demand of the consumer was found in excess of 120% of CD. Since consumption of such unauthorised excess load was in violation of Regulation 106 of OERC Supply Code, 2004, the consumer was notified many times to restrict the load, failing which supply will be disconnected. Despite repeated requests the consumer went on consuming excess load. Since such overdrawal was unauthorised within the true scope and meaning of Section 126 of the Act, assessment proceeding was initiated against the petitioner considering the overdrawal during the months of August, September & December, 2017 and January, February, April, May & June, 2018. The provisional assessment order amounting to Rs. 28,38,046/- was issued on 26.09.2018 along with a request to file the objections, if any within seven days. Accordingly, the petitioner filed its objection on 03.10.2018 and the Assessing Officer after considering the objections and providing opportunity of hearing, passed the final assessment order on 31.12.2018 requesting the petitioner either to pay the assessed dues or prefer an appeal before the Appellate Authority within 30 days from the date of final assessment. Surprisingly, the petitioner without preferring appeal before the Appellate Authority under Section 127 of the Electricity Act, 2003, filed an objection to the final assessment order before the Assessing Officer which is against the provisions in the statute. Since, the petitioner neither preferred any

appeal before the Appellate Authority nor paid the assessed dues along with the arrears accumulated to the tune of Rs.37,79,037/-, disconnection notice was issued to the petitioner on 16.02.2019. Only after issuance of disconnection notice, the petitioner filed the present petition before this Commission.

6. He has further submitted that during the pendency of the matter before this Commission, the petitioner challenging the order of the final assessment, approached the Hon'ble High Court of Orissa in W.P.(C) No. 6658/2019 and the Hon'ble High Court vide order dated 27.03.2019 disposed of the matter with a direction to prefer an appeal before the Appellate Authority. Thereafter, basing on the direction of the Hon'ble High Court, the petitioner has preferred an appeal under Section 127 of the Electricity Act, 2003 before the Appellate Authority/ Superintending Engineer-cum-Electrical Inspector, Rourkela in A.F.O Case No. 02/2019-20 on the self same grounds as raised in the present petition. The petitioner has suppressed the aforesaid material fact before this Commission, but admitted the same when the issue was raised by the respondent.
7. The respondent has submitted that regarding the application of the petitioner for enhancement of CD from 500 KVA to 650 KVA, the petitioner was asked to execute fresh agreement in compliance to the Regulations 72 & 73 of OERC Supply Code, 2004. The contention raised by the petitioner in this regard is devoid of merit and without any substance. Making an application for load enhancement without complying the conditions, the consumer has no authority to draw such enhanced load from the distribution licensee, as such any excess drawal is unauthorised. Further, the licensee has issued assessment order to the petitioner after providing sufficient opportunity of hearing and considering its objections. The contention of the petitioner for non-consideration of his objections is baseless and devoid of merit. Further, the reliance made by the petitioner on Para-485 of the RST order for the FY 2018-19 is purely misconceived and untenable in the eyes of law. As per the Para-485 of the RST order for the FY 2018-19, the overdrawal penalty shall be charged on the excess drawal over 120% CD during off-peak hours. If a consumer overdraws beyond off peak hours, the overdrawal penalty shall be levied in excess of CD irrespective of the hours it occurs and this penalty for overdrawal in all the above cases shall be over and above the normal demand charges where no other penalty due to overdrawal has been levied. In the instant case the energy bills for the disputed periods had already been served to the

consumer reflecting the overdrawal penalty @Rs.250/KVA. The assessment proceeding was initiated much after the said period after issuing warning letters to the consumer and the same is also the admitted position of fact. Hence, the reliance of Para-485 by the petitioner is not applicable in the instant case. Here the assessment has been made against overdrawal of energy by levying only energy charges calculated in the manner as prescribed under Section 126 (5) of the Act, 2003, so payment of demand charges does not stand in the way of assessment proceeding. Further, the licensee has initiated assessment proceeding after affording sufficient opportunity to the petitioner to restrict its load within the CD which is in conformity with Para-335 of the RST order for the FY 2015-16. Therefore, the licensee has acted within the framework of the tariff order. Hence, the contention of the petitioner that the licensee has violated the conditions of tariff determined by the Commission is altogether false and frivolous without any basis.

8. In its rejoinder the petitioner has submitted that from Para-485 of the RST order for the FY 2018-19 it is clear that in case of demand exceeding the CD beyond 120% only one penalty is to be levied on the consumer i.e. either for exceeding the CD or for energy consumption beyond the CD. The petitioner has submitted that in the instant petition his prayer is limited to violation of the RST order of the Commission for the FY 2018-19. In its rejoinder the petitioner has further submitted that they have approached this Commission for early hearing of the matter with a prayer to direct E.E (Elect.), RED, Rajgangpur not to disconnect the power supply pending adjudication of the matter. Since neither hearing was made nor any direction was issued for non-disconnection and constant threat was made by the Utility for disconnection of power supply, the petitioner had no alternative than to deposit 50% of the assessed amount with the respondent with an intention to appeal before Appellate Authority. Again notice was issued by the Utility in the next month for disconnection of supply unless balance 50% of the assessed amount was deposited. Finding no other way the petitioner had moved to the Hon'ble High Court and Hon'ble Court vide order dated 27.03.2019 in W.P.(C) No. 6658 of 2019 have disposed of the matter with a direction to prefer an appeal before the Appellate Authority. Accordingly, the petitioner has filed the appeal before the Appellate Authority against the final assessment order made by the respondent under Section 126 of the Electricity Act, 2003. Thus, no suppression of facts has been made before the Commission as alleged by the respondent.

9. The petitioner has further submitted that Hon'ble Supreme Court of India in the matter of Executive Engineer, SOUTHCO Utility and another Vrs. M/s. Seetaram Rice Mill reported in (2012) 2 SCC 108 at Paragraph 67 has held that :-

“On the cumulative reading of the terms and conditions of supply, the contract executed between the parties and the provisions of the Act, 2003, we have no hesitation in holding that consumption of electricity in excess of the sanctioned/connected load shall be an “unauthorised use of electricity “in terms of section 126 of the Act, 2003. This, we also say for the reason that overdrawal of electricity amounts to breach of the terms and conditions of the contract and the statutory condition, besides such overdrawal being prejudicial to the public at large, as it is likely to throw out of gear the entire supply system, undermining its efficiency, efficacy and even increasing voltage fluctuations”.

The above finding of the Hon'ble Apex Court casts no manner of doubt that overdrawal is unauthorised within the meaning of Section 126 of the Act, 2003. The judgment of the Hon'ble Apex Court is binding on all Courts in view of Article 147 of the Constitution of India. This self-same issue was brought before the Commission in Case No. 30/2014 (M/s. Sponge Udyog Private Ltd. Vrs. WESCO Utility and Others), where the Commission after detailed analysis reached a logical conclusion that parallel proceeding for the self-same cause of action was not permissible and hit by principle of Res-Judicata and accordingly was not inclined to interfere with the issue.

10. The respondent has submitted that the present application filed by the petitioner under Section 142 & 146 of the Electricity Act, 2003 is not maintainable as the Respondent has not violated the said RST orders of the Commission and liable to be dismissed under following grounds:
- a. That, against the final assessment order under Section 126, appeal lies with the designated Appellate Authority under Section 127 of the Electricity Act, 2003. This Commission lacks jurisdiction to entertain the matter on the issue of assessment proceeding initiated under Section 126 of the Electricity Act, 2003.
 - b. Applicability of the order of this Commission passed in Case No. 30/2014 (M/s. Sponge Udyog Private Ltd. Vrs. WESCO Utility and Others)
 - c. Suppression of material fact by the petitioner by not disclosing the filing of writ petition on the self-same ground before the Hon'ble High Court of Orissa in

W.P.(C). No. 6685/2019 and disposal of the said writ petition by the Hon'ble Court on 27.03.2019 directing to the petitioner to approach the Appellate Authority.

- d. Suppression of the material fact of filing appeal before the Appellate Authority by virtue of the aforesaid order dated 27.03.2019 of the Hon'ble High Court and pendency of the said matter before the Appellate Authority.
 - e. Procedural lapses in filing the application before the Commission under the Contempt of Courts Act, 1971 as is evident from the cause title itself and the said Act is not applicable before this Commission.
 - f. Procedural lapses in filing the application against the person concerned which is hit by Section 168 of Electricity Act, 2003.
 - g. Participation in the assessment proceeding and subsequent challenge is after thought.
11. Heard the parties. Their written submissions were taken into record. We observe that the petitioner company has overdrawn power exceeding its contract demand at different times during FY 2017-18 and 2018-19 without fresh agreement on load enhancement. After repeated warnings the respondent has undertaken assessment proceeding against the petitioner under Section 126 of the Electricity Act, 2003, which has been admitted by both the petitioners in its submissions. We further observe that the Commission in their order dated 10.06.2014 passed in a similar Case No. 30/2014 (M/s. Sponge Udyog Private Ltd. Vrs. WESCO Utility and Others), have observed the following:-

“After hearing the parties and perusal of the case records, we observe that, Section 126 prescribes procedure for assessment for unauthorised use of electricity. In a recent judgement Apex Court in Civil Appeal No. 5466 / 2012 (UP Power Corporation Ltd. Vrs. Anish Ahmed) has held that after notice of provisional assessment to the person indulged in unauthorised use of electricity, the final decision by an Assessing Officer who is a public servant on the assessment of unauthorised use of electricity is a ‘quasi judicial’ decision. In the present case the Petitioner was also entitled to file objection against the provisional assessment before the Assessing Officer who could have passed a final order after affording a reasonable opportunity to the Petitioner under Section 126 (3) of the Act. Instead the Petitioner has moved the Commission under Section 142 of the Act. As per the Submission of the respondent in the meantime the final assessment order has been passed. Once the final order of the assessment is passed by

the assessing officer the Petitioner is expected to pay the said assessed amount or if he is aggrieved by the said order, he should prefer an appeal u/S. 127 of the Act, 2003 against the said final assessment order. When one proceeding under particular section of the Act is already initiated before a quasi judicial authority it should reach its logical conclusion. Initiating parallel proceeding for same cause of action is not permissible and hit by principle of Res Judicata. Therefore, we are not inclined to interfere in the final assessment order of the Assessing Officer at this stage. The Petitioner is at liberty to agitate this matter through statutory appeal under Section 127 of the Act within one month from today and the Appellate Authority is directed to accept the appeal if filed by the petitioner within 30 days from today and adjudicate same in accordance with law.”

12. In view of the above observation of the Commission, since the matter is under consideration of Appellate Authority under the direction of Hon'ble High Court the jurisdiction of this Commission is barred under the Act. Therefore, we are not inclined to interfere with the matter.

Sd/-

(S. K. Parhi)
Member

Sd/-

(U. N. Behera)
Chairperson