

GUJARAT HIGH COURT

Hon'ble Judges:Rajesh H.Shukla, J.

Modern Petrofils Versus Gujarat Electricity Regulatory Commissioner

SPECIAL CIVIL APPLICATION No. 12829 of 2012 ; *J.Date :- SEPTEMBER 23, 2014

- GUJARAT ELECTRICITY REGULATORY COMMISSION (SECURITY DEPOSIT) REGULATIONS, 2005
- [CONSTITUTION OF INDIA](#) Article - [14](#), [19\(1\)](#), [226](#)
- SECURITY DEPOSIT (REMOVAL OF DIFFICULTIES) ORDER, 2008
- [ELECTRICITY ACT, 2003](#) Section - [47](#)

Electricity Act, 2003 - S. 47 - Security Deposit (Removal of Difficulties) Order, 2008 - Gujarat Electricity Regulatory Commission (Security Deposit) Regulations, 2005 - Constitution of India - Art. 14, 19(1), 226 - petitioner No. 1 company had executed an agreement with respondent No. 1 and the contract demand was fixed at 4000 KVA and also enhanced to 10000 KVA - when the petitioner purchase power from IEX through Open Access, the consumption of power by petitioner No.1 from respondent No. 2 MGVCL is reduced - demand (security) is insisted in respect of electricity purchased through IEX from any other supplier and not from respondent No. 2 - respondent No. 2 is asking for security deposit in purported exercise of powers under the Electricity Act, 2003 read with the provision of GERC Regulations and also the Security Deposit (Removal of Difficulties) Order, 2008 - petition - held, provision is S. 47 which empower making a demand for security - security could be asked for in respect of the power or energy which is supplied or to be supplied by respondent No. 2 - therefore, respondent No. 2 cannot make a demand for the security deposit in respect of power or energy supplied by somebody else through IEX as it does not have anything to do with the transaction of supply of energy/electricity by private individual through IEX to the consumer like petitioner - it cannot claim any kind of regulation or control in respect of a third party transaction merely because it is also one of the licensees and claim to be a public company - claim for security deposit towards the charges for electricity or energy could be taken care of on the same footing like any other licensee under the Act and the regulations are applicable for all licensees - therefore, the GERC is given the powers under Chapter 5 of the Regulations 2005 to remove difficulties meaning thereby it may pass appropriate order or directions to the

licensee to take suitable measures to remove the difficulties for the purpose of implementation of the Act and the Regulations - it cannot go beyond the statutory provision in the main statute like S. 47 of the Electricity Act - it is a provision to the extent of supply by licensee like respondent No. 2 and it can demand for security deposit only to the extent of contracted demand or actual supply and cannot raise demand for security deposit even though there is no transaction for purchase of electricity by the consumer with respondent No. 2 - therefore, any such demand for security deposit cannot be sustained - order passed by respondent No. 1 and also impugned Notices issued by respondent No. 2 quashed and set aside - petition allowed.

Imp.Para: [[17](#)] [[19](#)] [[20](#)]

Cases Referred To :

1. Ferro Alloys Corporation Limited V/s. A.P. State Electricity Board & Anr., 1993 Supp4 SCC 136
2. Madeva Upendra Sinai And Ors. V/s. Union Of India And Ors, 1975 3 SCC 765

Equivalent Citation(s):

2015 (3) GLH 139 : 2014 AIJEL_HC 233191

JUDGMENT :-

1 Rule. Service of rule is waived by learned advocate Shri Gaurav Mathur for respondent No. 1 and learned advocate Shri Premal Joshi for respondent No. 2.

2 The present petition has been filed by the petitioners under Articles 14, 19(1)(g) and 226 of the Constitution of India as well as under the Gujarat Electricity Regulatory Commission (Security Deposit) Regulations, 2005 (hereinafter referred to as the GERC Regulations) read with the Security Deposit (Removal of Difficulties) Order, 2008, for the prayers, inter alia, that appropriate order or direction may be issued quashing and setting aside the order dated 11.4.2008 passed by respondent No. 1 and also that appropriate writ, order or direction may be issued quashing and setting aside the impugned Notices dated 6.6.2012, 21.7.2012 and 14.9.2012 issued by respondent No.2 on the grounds stated in the memo of petition.

3 The facts of the case, briefly summarized, are as follows:

3.1 It is the case of the petitions that petitioner No. 1 is a company engaged in the business of manufacturing and production of POY, dyed and grey textured yarn for which it requires electricity. Petitioner No. 1

company had executed an agreement with respondent No.1 (the then Gujarat Electricity Board (GEB) on 22.8.1995 for the power requirement of the petitioner company as stated in detail and the contract demand was fixed at 4000 KVA and also enhanced to 10000 KVA. However, the petitioner company started procuring electricity from exchanges under the Short Term Open Access Regulation of respondent No. 1 after obtaining permission from respondent No.2 since 2010. The petitioner company entered into a commercial agreement with Knowledge Infrastructure Systems Pvt. Ltd. (for short KISP) which is rendering services of power trading for purchase of electricity on/from Indian Energy Exchange (IEX). It is stated that KISP is a clearing member of IEX and the petitioner is purchasing such power. However, when the petitioner purchase power from IEX through Open Access, the consumption of power by petitioner No..1 from respondent No.2 MGVCL is reduced. It is the case of the petitioners that by the impugned order, respondent No. 2 demanded additional security in the form of bank guarantee for the total consumption even though the electricity is not supplied or purchased from the MGVCL and it is purchased directly through IEX from other suppliers. In other words, the demand (security) is insisted in respect of electricity purchased through IEX from any other supplier and not from respondent No. 2. Thus, even though electricity is not purchased or consumed, supplied by respondent No. 2, but it is purchased through IEX under Open Access, respondent No. 2 is asking for security deposit in purported exercise of powers under the Electricity Act, 2003 read with the provision of GERC Regulations and also the Security Deposit (Removal of Difficulties) Order, 2008.

4 An affidavit-in-reply is filed on behalf of respondent No.2 contending that the idea behind the security deposit is clear, that is, to protect the licensee of possible financial risks and exposure in case of default on the part of the consumer. It is contended that the object of the security deposit is to secure payment of the financial commitment of the petitioner and is to be at a level which covers the possible total consumption of electricity of the petitioner from the answering respondent No. 2. It is also contended that respondent No.2 is also a licensee under the Electricity Act, 2003 and it is under an obligation to make supply of electricity and to maintain the supply position it has to maintain the power availability position based on the demand of consumers. Thus, the arrangement has to be made with regard to possible average consumption of the consumer like the petitioner for which the security is demanded.

5 Reliance is placed by respondent No.2 on the judgment reported in 1993 Supp (4) SCC 136 in the case of Ferro Alloys Corporation Limited v. A.P. State Electricity Board & anr. Reliance is also made on the GERC Regulations which has been also amended on 11.4.2008. Therefore, it is contended that it is only by way of security the demand is made and not the actual payment is insisted.

6 Affidavit-in-rejoinder is filed by the petitioners reiterating the same contentions and also an affidavit-in-sur-rejoinder is filed by respondent No. 2. The affidavit is also filed by respondent No. 1 contending, inter alia, that after the introduction of Open Access regulations it came to the notice that often through Open Access the consumers draw excess electricity than what is scheduled or injected by the seller. Therefore, the excess consumption in light of the arrangement results in the contract demand. Therefore, it is contended that when unscheduled drawal of electricity takes place, the bill is required to be raised and therefore even though electricity is received by the consumer through the Open Access, respondent No. 2 licensee with whom contract is made is also required to have the arrangement for supply of the committed energy. Therefore, as per the regulations, the person who receives power from the distribution licensee is required to pay the security deposit based on average consumption during the previous 12 months and it is in the form of bank guarantee instead of cash security deposit. It is therefore contended that it is for the smooth functioning of the distribution system as well as for the safety and security of the licensee the demand is made for such security deposit.

7 Heard learned Sr. Counsel Shri Mihir Joshi appearing with learned advocate Shri Anuj Trivedi for the petitioners. Learned Sr. Counsel Shri Joshi referred to the background of facts and sec. 47 of the Electricity Act. He pointedly referred to the provision and submitted that it refers to the security in respect of electricity supplied to such persons. He referred to sec. 181 which refers to the power of the State Government to make the regulations in purported exercise of such powers under sec. 181 (2) (v). He emphasized the provision, "reasonable security payable to the distribution licensee under sub-sec. (1) of sec. 47." Learned Sr. Counsel Shri Joshi also referred to the GERC Regulations and referring to such Regulations he submitted that it provides for the power to require security.

8 Learned Sr. Counsel Shri Joshi submitted that the statute does not empower any such demand by way of security for the energy/electricity purchased through IEX and not from respondent No. 1. He tried to submit that, otherwise, based on the average monthly consumption, the consumer like the petitioner even though substantially he has purchased through IEX and not from respondent No. 2, is required to give the security deposit without any liability or any supply of energy/electricity by respondent No.2. He submitted that the recourse is made under Chapter-5 of the GERC Regulations which provides for "Power to remove difficulties". Learned Sr. Counsel Shri Joshi submitted that in the guise of resorting to such provision of the power to remove difficulties the power cannot be exercised which is not provided in the main statute like the Electricity Act and therefore any such demand is without any jurisdiction and authority or rather it is arbitrary and illegal.

9 In support of his contentions, learned Sr. Counsel Shri Joshi has referred to and relied upon the judgment of the Hon ble Apex Court reported in (1975) 3 SCC 765 in the case of *Madeva Upendra Sinai and ors. v. Union of India and ors.* He emphasized the observations,

"...the power conferred by Section 6 of Act 67 of 1949 is a power to remove a difficulty which arose in the application of the Indian Income-tax Act to the merged States : it can be exercised in the manner consistent with the scheme and essential provisions of the Act and for the purpose for which it is conferred. The impugned Order which seems in purported exercise of the power, to remove a difficulty which had not arisen was, therefore, unauthorised." He also emphasized the observation,

"...it will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed and its use is conditioned and restricted. The existence or arising of a "difficulty" is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the "difficulty" contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty."

10 Per contra, learned Advocate General and Sr. Counsel Shri Kamal Trivedi appearing with learned advocate Shri Premal Joshi for respondent No. 2 referred to the papers for the purpose of having a background with regard to the system by which after the Open Access, the consumer is permitted to purchase electricity from anywhere including private suppliers. Learned Advocate General & Sr. Counsel Shri Trivedi, therefore, submitted that pursuant to the contract with respondent No. 2 for demand of the electricity, it is committed for supply of the electricity as it is a licensee obliged to supply under the Act. He, therefore, submitted that respondent No.2 as a licensee is under an obligation to supply the energy/electricity as per the contract demand. He submitted that with the Open Access , the consumer may have a difficult option and even after the agreement with the licensee like respondent No.2 it may purchase substantial energy from private persons or other licensees resulting in a situation that respondent No.2 as a licensee is required to maintain the provision for supply of such electricity at any time to the consumer like the petitioner and on the other hand the consumer may purchase from other suppliers. At the same time, the consumer may purchase or sometimes there is excess drawal of electricity for which the provision has to be maintained by the licensee like respondent No. 2. It is in such circumstances, in order to secure the payment in respect of the supply of energy, particularly when respondent No. 2 is a public utility or a public company, it has to safeguard the aspect of charges for the supply of energy/electricity. He submitted that to see that the company like the

petitioner which is already under the BIFR may not cause any loss to the licensee like respondent No.2 such provision has been made to secure the payment in larger public interest.

11 Learned Advocate General and Sr. Counsel Shri Trivedi also referred to sec. 47 of the Electricity Act read with sec. 181. He referred to sec. 181(2)(v) and (w) and submitted that sec. 178 and 179 of the Electricity Act provide for making the regulations. He submitted that in exercise of such statutory powers the regulations are framed which are known as GERC (Security Deposit) Regulations 2005. He submitted that therefore when the regulations provide for certain contingencies the demand which has been made for security cannot be said to be unauthorized or arbitrary or illegal. He submitted that reference to the GERC (Security Deposit) Regulations 2005 Chapter-5 which provide for "Power to remove difficulties" is meant to give effect to the statutory provisions like the Electricity Act, 2003 for the purposes of the Act and therefore it cannot be argued that when it is resorted to it is not applicable. He submitted that when there is a conscious provision providing for such power to remove difficulties, the Regulatory Commission may, by general or special order, provide for such matter like security deposit and in fact such provision is kept to meet with such a situation which may emerge.

12 Learned Advocate General and Sr. Counsel Shri Trivedi, therefore, submitted that it cannot be said that such demand for security deposit is arbitrary and illegal or it is de hors any statutory provision particularly when consciously the provision is made empowering such Regulatory Commission to make such order or direction for implementation of the Regulations. He therefore submitted that the present petition may not be entertained, otherwise, it may cause a great hazard to the licensee which is a public company and it may affect the security for the payment towards the electricity.

13 Learned advocate Shri Gaurav Mathur for respondent No. 1 has also made the submissions adopting the submissions made by learned Advocate General and Sr. Counsel Shri Kamal Trivedi. He has also referred to sec. 47 and also the GERC (Security Deposit) Regulations 2005 and particularly clause 5.1 which provide for "power to remove difficulties" and submitted that such provision is made so that appropriate direction or order could be made to meet with the situation which may demand protection of interest of the licensee and therefore the present petition may not be entertained.

14 In view of these rival submissions, it is required to be considered whether the present petition can be entertained or not.

15 As could be seen from the background of the facts, the real bone of contention is with regard to the demand for security deposit by respondent No.2 as a licensee under the Electricity Act, 2003. Section 47, which is the main enabling provision which empower the licensee to require security, clearly

provides that such security could be in respect of electricity supplied to such person (consumer). Similarly, GERC (Security Deposit) Regulations, 2005 which has been enacted in exercise of statutory power under sec. 47 of the Electricity Act which has also been amended provide for demand for security deposit. However, the demand for security deposit could be in respect of power or electricity which is supplied or to be supplied by respondent No. 2 as a licensee.

16 As could be seen from the facts, after the new Open Access, the consumer like the petitioner has an option to purchase electricity/energy through IEX. It is required to be mentioned that pursuant to the agreement or the contract with respondent No. 2, the security deposit is given by the petitioner in respect of the contracted supply of energy which clearly would suggest that the contracted energy which may be supplied by respondent No. 2 is secured by way of security deposit already. However, the real issue which arises is the demand for the security deposit is made on the basis of average consumption of the consumer like the petitioner, even though a portion or such portion of the energy/electricity is purchased by the consumer like the petitioner through IEX and not from respondent No. 2. Thus, the demand could not be made in respect of the energy or electricity which is never demanded and supplied by respondent No. 2. The law provides for such Open Access and purchase through the IEX and it is the functioning of the internal mechanism or system which would be worked out by the Union of India with appropriate measures including suitable modification in the Regulations so that the rights of the consumer as well as the licensee like respondent No. 2 which is a public company are also taken care of and balanced equally. However, for that matter, there is no justification for respondent No. 2 to raise a demand for security deposit in respect of the power which is not supplied by it, nor is it demanded from it. In other words, there is no justification for respondent No. 2 to claim any security deposit in respect of the power or energy which may be purchased through IEX by the consumer like the petitioner from elsewhere and not from respondent No. 2 and yet the security deposit is demanded in respect of any such transaction of purchase of electricity/energy through IEX.

17 The main section enabling such provision is sec. 47 which empower making a demand for security and as stated above it is very clear that security could be asked for in respect of the power or energy which is supplied or to be supplied by respondent No. 2. Therefore, respondent No.2 cannot make a demand for the security deposit in respect of power or energy supplied by somebody else through IEX as it does not have anything to do with the transaction of supply of energy/electricity by private individual through IEX to the consumer like the petitioner. It cannot claim any kind of regulation or control in respect of a third party transaction merely because it is also one of the licensees and claim to be a public company. The claim for security deposit towards the charges for electricity or energy could be taken care of on the same footing like any other licensee under the Act and the regulations are applicable for all licensees and

therefore the GERC is given the powers under Chapter 5 of the Regulations 2005 to remove difficulties meaning thereby it may pass appropriate order or directions to the licensee to take suitable measures to remove the difficulties for the purpose of implementation of the Act and the Regulations but it cannot go beyond the statutory provision in the main statute like sec. 47 of the Electricity Act.

18 Chapter-4 of the GERC (Security Deposit) Regulations, 2005 provide for security deposit for electricity supplied/to be supplied and it deals with the manner in which the security deposit towards the electricity to be supplied could be claimed and it does not refer to any such power to demand security deposit in respect of electricity purchased by the consumer like the petitioner through IEX from any third party. In other words, it does not empower to demand for any such security deposit in respect of the transaction for purchase of electricity/energy through IEX from other parties as otherwise it would amount to giving the powers to respondent No. 2 to regulate the transactions of the consumer with any third party or other licensees though the Open Access does provide for purchase of electricity at the option of the consumer like the petitioner.

19 The submissions which have been made by learned Advocate General and Sr. Counsel Shri Trivedi with regard to the aspect of financial safety and expressing concern for protecting interests of respondent No. 2 which is a public company is also misconceived inasmuch as it has been provided that it can claim security deposit to the extent of the contract demand meaning thereby so long as the supply of electricity is made as per the contract with respondent No. 2 it is fully secured. It is only in case it exceeds it can raise the bill and make the demand. Again, if after the interval of say 30 days the payment is not secured, respondent No.2 as a licensee is not without any powers and GERC (Security Deposit) Regulations 2005 provide for suitable measures. In fact a close look at the aforesaid Regulations would clearly suggest that it sufficiently protects the interests of the licensee and clause 3.1 is providing for that. However, it is a provision to the extent of supply by the licensee like respondent No. 2 and it can demand for security deposit only to the extent of contracted demand or actual supply and cannot raise demand for security deposit even though there is no transaction for purchase of electricity by the consumer with respondent No. 2. Therefore, any such demand for security deposit cannot be sustained. The submission with regard to Chapter-5 of the GERC Regulations with regard to removal of difficulty which have been made is required to be considered in background of the observations which have been made in the judgment in the case of *Madeva Upendra Sinai and ors.* (supra) where in para 39 it has been observed,

"39. To keep pace with the rapidly increasing responsibilities of a welfare democratic State, the Legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity.

Under conditions of extreme pressure, with heavy demands on the time of the Legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or even a local law. Thus is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a statute, by going through the time-consuming amendatory process, the Legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of difficulty clause", once frowned upon and nick-named as "Henry VIII clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post-independence era."

20 Thus, in light of the discussion made hereinabove, the present petition deserves to be allowed and accordingly stands allowed. Prayer in terms of para 8(a) & (b) is granted. The order dated 11.4.2008 passed by respondent No. 1 and also the impugned Notices dated 6.6.2012, 21.7.2012 and 14.9.2012 issued by respondent No. 2 are hereby quashed and set aside. Rule is made absolute. No order as to costs.

21 After the order was pronounced, learned advocate Premal Joshi for respondent No. 2 has requested for stay of the operation of the order which is refused in the facts and circumstances.