

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (C) No. 651 of 2009

M/s Aditya Rice Mills Pvt Ltd, Hazaribagh
Versus
Jharkhand State Electricity Board and others

Petitioner
Respondents

CORAM: HON'BLE MR. JUSTICE D.G.R. PATNAIK

For the Petitioner: Mr. Ajit Kumar, Advocate
For the Respondent JSEB: Mr. A.K. Sinha, Sr. Advocate and Mr. Rajesh Shankar,
Mr. A. Prakash and Mr. D. Kumar, Advocates
For the Respondent No. 2: Mr. Sudarshan Srivastava, Advocate

CAV ORDER

Reserved On: 17.3.2009

Pronounced On: 20.03.2009

5.2e .3.2009 Petitioner in this writ application, has prayed for issuance of an order quashing the Inspection Report dated 31.01.2009, the provisional assessment and the corresponding Bill dated 03.02.2009, issued by the respondent nos. 4 and 5 respectively. A further prayer has been made for issuance of an order restraining the respondents from proceeding against the petitioner under the provisions of section 126 of the Electricity Act, 2003. Prayer has also been made for a direction upon the respondents to restore forthwith the electric supply to the petitioner's premises without imposing any condition for payment of any amount.

2. The petitioner being a company incorporated under the Indian Companies Act, 1956, had obtained HT electric connection from the respondent Electricity Board and has been availing the contract demand of 200 KVA of electric energy. The petitioner has been paying electricity charges for the energy consumed, as per the recordings in the meter installed within it premises. The average consumption of electric energy, as claimed by the petitioner is 20,000 Units per month.

The concerned authorities of the respondent JSEB used to make regular inspection of the meters installed in the premises of the petitioner and on no such occasion, did they find any irregularity or anomaly in the recordings of the Units in the meters. The last such inspection was made on 10.9.2008.

3. The contention of the petitioner is that when it detected that the transformer oil was leaking from the transformer installed in its premises, a report to that effect was lodged with the concerned authorities of the respondent JSEB, but they did not take prompt step to rectify the damage.

Yet, on 31.01.2009, few officers of the respondent Board, all of whom below the rank of respondent no. 4, namely, the Electrical Superintending Engineer, visited the petitioner's premises on the plea that they had come to repair the damage of the transformer. After carrying out the purported inspection, that too in absence of the responsible officers of the petitioner, the inspecting team prepared a report of inspection and on the allegation that certain numbers of seals affixed on secondary LT of the distribution transformer, were found to be duplicate and holding the petitioner

responsible for affixing the duplicate seals and by drawing inference thereby that the petitioner had committed unauthorized use of electric energy, they lodged an FIR on 1.2.2009 against the petitioner for alleged offences under section 379 of the IPC and also under sections 126, 135 and 138 of the Electricity Act, 2003. The electric connection to the petitioner's premises was snapped on the same day.

A provisional Bill on the basis of the assessment of the loss caused due to the alleged pilferage of electric energy to the tune of Rs. 24,29,520/-, was raised by the respondent Board against the petitioner.

4. The petitioner has challenged the manner in which the inspection was carried out by the officers of the respondent Board, and the Inspection Report prepared and submitted by them, on the ground that the inspection having been carried out in absence of any authorized representative of the petitioner, it is illegal and contrary to the prescribed Rules and therefore, the Inspection Report is illegal and of no consequence to the respondent Board.

Petitioner has also challenged the provisional Bill on the ground that the manner of assessment is totally erroneous and contrary to the Rules prescribed and it has been raised without recording any finding as to whether unauthorized use of power has been made by the consumer. Reference in this context has been made by the petitioner to the Judgments reported in AIR 2007 Delhi 85 and AIR 2006 Calcutta 59.

5. Shri Ajit Kumar, learned counsel for the petitioner, would argue that even in absence of any authorized representative of the consumer at the time of inspection, or upon refusal of the consumer to sign upon the Inspection Report, it was incumbent upon the inspecting team to obtain the signature of any independent person after carrying out the inspection in presence of such independent person. This procedure having not been adopted or adhered to by the officers of the inspecting team, both the inspection as well as the Inspection Report cannot be relied upon, nor can the same be based upon to proceed against the petitioner under the provisions of section 126 of the Electricity Act.

Learned counsel argues further that even admittedly, loss has been purportedly assessed for a period of five months i.e. from the date of last inspection which was made in the month of September 2008, till January 2009. The average consumption of the petitioner, even as admitted by the respondent Board, was never more than 20000 Units per month. Even if assessment is made on the basis of average consumption, yet, by no stretch of imagination, could a sum of Rs. 24,29,520/- be assessed as amount of loss. Learned counsel has also raised dispute regarding the method of assessment applied by the respondent Board, contending that the said method which used to be applied in accordance with the tariff prevalent in 1993, has since been repealed by notification issued by the respondent JSEB by way of Electricity (Removal of Difficulties Order), 2005.

Inviting attention to the impugned Circular (Annexure-5) issued by the JSEB on 29.1.2009, addressed to all General Manager-cum-Chief Engineers, All Electrical Superintending Engineers, All Electrical Executive Engineers, All Assistant Executive

Engineers and AI Assistant Electrical Engineers, learned counsel submits that by this Circular, the respondent Board has directed its officers to make assessment of loss in case of unauthorized use of electricity by specifying a particular method of assessment. Learned counsel argues that the respondent Board has no authority or jurisdiction whatsoever to issue any such Circular notifying the specified formula for making assessment of loss of the electric energy. Such authority, according to the learned counsel, is vested only with the State Electricity Regulatory Commission (respondent no. 2) under the provisions of section 50 of the Electricity Act, 2003 read with the provisions of Electricity (Removal of Difficulties Order), 2005. Learned counsel points out that since the Assessing Officer is the Electrical Executive Engineer, the directive given in the Circular would certainly weigh upon him and he would be bound to adopt the procedure as directed in the Circular and thereby, even if the petitioner would prefer his objection against the provisional Bill to the Assessing Officer, the petitioner would not get any justice since the Assessing Officer would invariably have to make assessment as per the direction contained in the Circular.

Learned counsel adds further that by raising an arbitrary amount by way of provisional assessment, and by virtue of the impugned Circular, putting constraints upon the Assessing Officer to exercise his discretion independently in the matter of assessment in the grounds of objection raised by the petitioner, the respondent JSEB has virtually frustrated the right of the petitioner under the Electricity Act to claim relief against the exorbitant and arbitrary provisionally assessed amount.

6. A counter-affidavit has been filed on behalf of the respondent Board. Shri Anil Kumar Sinha, Sr. Advocate, appearing on behalf of the respondent Board, would argue that the instant writ application is not maintainable in view of the fact that the petitioner has not exhausted the remedy available to it under the provisions of section 126 of the Electricity Act. Learned counsel would explain that as it appears from the prayer of the petitioner in the writ application, petitioner's grievance is against the provisional Bill. Referring to the provisions of sections 135 of the Electricity Act read with section 126 of the Electricity Act, learned counsel argues that it was within the authority and competence of the respondent Board to disconnect the electric supply on detection of the pilferage of the electricity committed by the petitioner. It was also within the competence of the authorized officers of the respondent Board to make assessment of the loss caused to the Board on account of the unauthorized use of electricity and raise a provisional Bill calling upon the consumer to pay the amount and get the electricity restored. The provision also provides that if the consumer does not accept the amount of provisional Bill, he may file an objection thereto within seven days from the date of service of provisional Bill and such objection shall be considered and disposed of by the Assessing Authority within one month from the date of objection. Learned counsel explains that mere raising a provisional Bill, is not a final act. Rather, it provides only a base assessment against which the consumer has a right to object before the Assessing Authority and if the consumer feels aggrieved by the final assessment made by the Assessing Authority, the consumer has a remedy of

appeal as provided under section 127 of the Electricity Act. Learned counsel submits that the petitioner, instead of filing objection to the provisional Bill within seven days from the date of service of the Bill, has straight away approached this court by filing the instant writ application. Learned counsel argues further that the writ jurisdiction of this court cannot be invoked against the provisional Bill unless the petitioner has exhausted all the alternative remedy available to him under the Act.

As regards the impugned Circular, learned counsel would explain that the Circular is only by way of guidelines to the authorized officers of the Board for making assessment and this is only by way of reiteration of the established procedure which has been uniformly adopted throughout the country in every State.

7. A counter-affidavit has been filed on behalf of the respondent no. 2, Jharkhand State Electricity Regulatory Commission. A Preliminary objection has been taken on behalf of the Commission on the ground that the Jharkhand State Electricity Board is neither a 'State', nor its instrumentality under Article 12 of the Constitution of India and as such, the present writ application is not maintainable. However, in course of submission, this ground has not been pressed seriously and therefore, this court would prefer not to record all the grounds raised on which the preliminary objection was sought to be raised.

Shri Sudarshan Shrivastava, learned counsel for the respondent no. 2, would however argue that prior to enactment of the Electricity Act, 2003, the State of Jharkhand was the 'Regulator', but after Constitution of the State Regulatory Commission in the State of Jharkhand, the entire activity of the licensees are to be regulated by the Regulatory Commission. The individual licensees are governed by the condition of licensee which is to be regulated by the Regulatory Commission in accordance with the provisions of Electricity Act, 2003. The supply of electricity by a distributing licensee is governed by the 'agreement for supply' entered into between the licensee and the consumers and the Bills have to be raised only on the basis of the tariff order issued by the Regulatory Commission. Sufficient mechanism has been provided in the Act itself for removing any difficulties in this regard. The contention of the learned counsel is that in the light of the issues raised by the petitioner relating to the method of assessment, for raising the provisional Bill, the parties could as well approach the Regulatory Commission for evolving a formula.

8. From the rival submissions, the facts which emerge are that the petitioner's premises were inspected by the officers of the respondent Board on 31.01.2009. In course of inspection, the inspecting team had allegedly found certain illegalities alleged to have been committed by the petitioner, on the basis of which an inference was drawn that the petitioner has been indulging in the act of unauthorized use of electric energy. The assessment of the loss of electric energy so caused to the Board, was made by the concerned officer of the Board to the tune of more than Rs. 24 lakhs and on the basis of such allegations, FIR was lodged against the petitioner while simultaneously disconnecting the electric supply of the petitioner's Unit.

The provisional Bill as raised by the respondent Board was served upon the petitioner calling upon it to file its objections if any, within seven days. The petitioner did not file any objection and has chosen to challenge the provisional Bill by disputing the very method of assessment as applied by the officers of the respondent Board.

The petitioner has also challenged the Circular (Annexure-5) issued by the respondent Board under which a specific formula has been prescribed in the matter of making provisional assessment of loss of electric energy caused to the Board in case of unauthorized use of electric energy.

9. Prominent amongst the grounds raised by the petitioner against the assessed amount of Bill is in respect of the method of calculation applied and also on the ground that by the Rule of Prudence and equity, the authorities of the respondent Board ought to have computed the loss on the basis of the average monthly consumption during the preceding twelve months. These grounds obviously constitutes the petitioner's grounds of objection against the Provisional Bill.

Under the provisions of section 126 of the Electricity Act, 2003, the petitioner has the right to raise objection against the provisional Bill and the dispute could have been referred as per the provisions of section 126 of the Act, to the Assessing Officer. This court would not therefore be inclined to go into the dispute raised by the petitioner, since such dispute has to be addressed by the Assessing Officer, as per the provisions of section 126 of the Electricity Act, 2003.

10. As regards the grievance against the impugned Circular (Annexure-5) issued by the respondent Board, the grounds raised by the petitioner appears to find support from the respondent no. 2 also, on the ground that since after enactment of Electricity Act, 2003 and the constitution of the State Electricity Regulatory Commission, the entire activities of the licensees are to be regulated by the Commission. The Bills towards electric consumption have to be raised on the basis of the tariff order issued by the Regulatory Commission and it is only the Regulatory Commission which is authorized for evolving a formula for making assessment of the provisional Bill in case of unauthorized use of electric energy.

11. The submissions of the learned counsel for the respondent Regulatory Commission has force. The dispute raised by the petitioner in respect of the Circular (Annexure-5) issued by the respondent Board specifying the method of assessment for computing the loss and raising Bill, cannot therefore be ignored as irrelevant. Even though, as explained by the learned counsel for the respondent Board, the Circular was not a directive but it was only a guideline, yet the purported guideline would certainly have its effect on the competent authority namely, the Assessing Officer in deciding upon the objections raised by the consumer against the provisional Bill and in applying his mind independently regarding the method to be adopted for assessment of the loss.

12. Considering the entire facts and circumstances, the petitioner shall file his objections against the Provisional Bill before the Assessing Officer within one week from the date of this order. The Assessing Officer shall consider the objections and

pass a final order of assessment after meeting the objection raised by the petitioner and by applying his mind independently to the issues raised without being influenced in any manner by the directive / guidelines contained in the Circular (Annexure-5). The Assessing Officer shall pass a final order of assessment, within a period of one month from the date of receipt of the objections, after affording reasonable opportunity of hearing to the petitioner. Against the final order of assessment, the petitioner if aggrieved, would be at liberty to avail the statutory remedy of appeal available under the Act.

12. With the above observations, this writ application is disposed of at the stage of admission itself.

Let a copy of the order be given to the learned counsel for the respondent Board.

Ranjeet N.A.F.R.

Sd/- D.G.R. Pattnaik, J

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Dasgupta
26/3/09
Copying Officer

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Vihar
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The 5th chair, 1931
26/3/09