(2008) 08 UK CK 0005

In the Uttarakhand High Court

Case No : Writ Petition No. 1859 of 2007

B.T.C. Industries Pvt. Ltd. APPELLANT

Vs

Uttaranchal Power Corporation Ltd. and Others RESPONDENT

Date of Decision : 29-08-2008

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Electricity Act, 2003 — Section 42(5), 42(6)

Citation : (2009) 1 UC 110

Hon'ble Judges : B.S. Verma, J

Bench : Single Bench

Advocate : Sharad Sharma, for the Appellant; B.D. Upadhyay, for Respondent Nos. 1 and 2 UPCL and S.K. Mandal, learned Counsel, for the Respondent

Final Decision : Dismissed

Judgement

1. This writ petition has been filed for the following reliefs:

i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 18.8.2006 passed by Respondent No. 2annexedasAnnexureNo. 11 to the writ petition.

ii) Issue a writ, order or direction in the nature of mandamus commanding the Respondents not to disconnect the electric connection of the Petitioner installed in its Unit.

iii) Issue a writ, order or direction, which this Hon''ble Court may deem fit and proper under the circumstances of the case.

iv) Award the cost of the petition.

2. Brief facts giving rise to the writ petition are that the Respondents through its Managing Director issued an Office Memorandum No. 1277 dated 30-5-2005 whereby a procedure has been laid down for granting the electric connection to new independent/industrial feeders.

3. According to the Petitioner, the Office Memoradum dated 30-5-2005 provided that if electricity is to be tapped from a pre-existing independent feeder and the same is to be given to a new consumer it could be done only after fulfilling certain conditions as enumerated in the said office memorandum. Clause 5 provided that the prospective consumer will take a No Objection Certificate from the principal consumer after sharing the cost which was incurred in the installation of the independent feeder in favour of a pre-existing consumer. Clause 5(B) provided that the tapping from a pre-existing feeder would be possible only when the prospective consumer takes a No Objection Certificate and gives consent in writing. A copy of the Office Memorandum dated 30-5-2005 has been annexed as Annexure No. 2 to the writ petition. The Petitioner unit is situate adjoining to pre-existing unit Shree Bankey Bihari Ispat Pvt. Ltd.-Respondent No. 3 and the Petitioner after applying for connection took consent from the Director of Respondent No. 3 for tapping of the power line from the independent feeder of 33 KV of the Respondent No. 3 and in lieu of the No objection Certificate issued on 8-8-2005 by the Director of Respondent No. 3, it is obvious that Respondent No. 3 has accepted a sum of Rs. Five lacs towards the cost sharing of tapping the electricity.

4. According to the Petitioner, taking of No objection Certificate satisfies the condition of sub-clause B of Clause 5 of the Office Memorandum dated 30-5-2005 and after being satisfied and receiving the money, No Objection Certificate (copyAnnexure No. 3) was issued in favour of the Petitioner. Respondent No. 1 directed the Petitioner to deposit the amount for temporary electric connection, which stood sanctioned in favour of the Petitioner by letter No. 317 EDD(R)/T-5 dated 22-10-2005 thereby demand was raised to deposit a sum of Rs. 3,39,107/- and the said amount was got deposited by the Petitioner. On 25-11-2005 the Deputy General Manager, Electricity Distribution Division had written to Respondent No. 2 intimating for further recourse for granting electric connection to the Petitioner after grant of NOC dated 8-8-2005. After the No Objection Certificate was submitted, the Respondent No. 2 sought an opinion from its Legal Advisor as to whether in the circumstances the Petitioner could be granted the power connection or not. The counsel of the Respondents after considering the office Memorandum dated 30-5-2005 and the NOC dated 8-8-2005 given by the Director of Respondent No. 3 and in view of the fact that deposit of the cost sharing was made by the Petitioner opined to grant connection to the Petitioner. A copy of legal opinion dated 4-1-2006 has been annexed as Annexure No. 4. Consequently, the Petitioner made payment of security amount, service connection charges and meter inspection fees by Cheque dated 7-1 -2006 vide receipt No. 41 and thereafter the Respondents entered into a Memorandum of Understanding/agreement executed with the Petitioner on 7-2-2006. As 8 consequence of the same, electric connection was installed and the Petitioner''s unit became operational.

5. The Respondent No. 3 filed Civil Suit No, 09 of 2006, Shree Bankey Bihari Ispat Pvt. Ltd. v. Uttaranchal Power Corporation Ltd. and others with a prayer to

restrain the Respondents-UPCL to grant electric connection to Respondent No. 5 (Petitioner in the case at hand) from the independent feeder of Respondent No. 3. Along with the suit, an application under Order 39, Rules 1 and 2 CPC was filed, which was rejected by the trial court on 2-2-2006. The Plaintiff-Respondent No. 3 preferred an appeal, which was allowed by the appellate court vide order dated 20-3-2006 and the matter was remanded for being decided afresh.

6. Aggrieved by the order of the appellate court, the Respondent No. 2 went up before the High Court in Writ Petition No. 897 of 2006 (M/S), P.K. Agarwal v. Additional District Judge (1 st) Rudrapur and five others, while the Petitioner filed Writ Petition (M/S) No. 415 of 2006, B.T.C. Industries Pvt. Ltd. v. Additional District Judge and others. The writ petition filed by the Power Corporation was disposed of with the observation that it will be open for the trial Court to decide the application for interim injunction ignoring the observations made by the Appellant Court vide order dated 15-7-2006. The writ petition filed by the Petitioner was dismissed vide order dated 27-4-2006.

7. According to the Petitioner, the stay application moved in the suit is still pending for disposal before the trial court and the entire matter is pending for adjudication. The Uttaranchal Power Corporation filed its written statement in that suit. In its written statement, it has been admitted by the Power Corporation that the No Objection Certificate dated 8-8-2005 issued by the Respondent No. 3- Shree Bankey Bihari Ispat Pvt. Ltd. has legal force and the same has not so far been cancelled. The Petitioner also filed its written statement on 30-1 -2006 denying the contents of plaint and the controversy regarding the cost sharing amount to the tune of Rs. 31 Lakhs is subjudice in the suit.

8. The grievance of the Petitioner is that the Respondent No. 2 issued a notice dated 30-6-2006 to the Petitioner with reference to Office Memorandum No. 106 dated 29-1-2006 and called upon the Petitioner to deposit the amount of proportionate share of B.T.C. Industry to the tune of Rs. 31,15,388.10 otherwise the electricity connection of the Petitioner would be disconnected. A copy of notice has been annexed as Annexure No. 9 to the writ petition. The Respondent No. 2 again issued another notice dated 18-8-2006 directing the Petitioner to deposit the demanded amount as early as possible else the electric connection would be disconnected vide Annexure No. 11, which gave rise to the present writ petition.

9. The Respondent Nos. 1 and 2 filed its counter affidavit. It has been stated by the Power Corporation that the Office Memorandum dated 30-5-2005 has been superseded by the Office Memorandum No. 106 dated 29-1 -2006 (Annexure No. 8 to the writ petition) and the electric connection from the independent feeder of the Respondent No. 3 was released to the Petitioner after coming into force the Office Memorandum dated 29-1 -2006, i.e. on 11 -2-2006 hence the Petitioner is liable to pay charges of the independent feeder in accordance with the Office Memorandum dated 29-1-2006. It has also been stated that the electric connection was released to the Petitioner after execution of agreement dated

7-2-2006, i.e. on 11 -2-2006. It has further been stated that the written statement was filed by the Power Corporation in the suit filed by Respondent No. 3 before issuing of the Office Memorandum dated 29-1-2006 and in view of the subsequent Office Memorandum dated 29-1-2006 the Petitioner is liable to pay the proportionate cost of the independent feeder and the Power Corporation has power to release the electric connection to an intended consumer from the independent feeder of a consumer and such consumer is entitled for the proportionate cost for which the Respondent No. 2 issued a notice to the Petitioner.

10. Regarding the notice for deposiiof the amount of Rs. 31,15,388.10, it was stated in para No. 15 of the counter affidavit that the notice issued by the Respondent No. 2 requiring the Petitioner to deposit a sum of Rs. 31,15,388.10 is perfectly correct and in accordance with law. Since the Petitioner is availing electricity through the independent feeder of the Respondent No. 3, hence as per order of the Corporation, the Petitioner is liable to pay the proportionate cost which is payable to Respondent No. 3. It was stated that in the suit the Respondent No. 3 has claimed that unless the proportionate cost is paid to it, no electricity connection be released from his independent feeder to any other person including the Petitioner.

11. It has further been stated that the agreement for electric connection was executed by the Petitioner with the Power Corporation on 7-2-2006 while the Office Memorandum had been issued on 29-1-2006, hence the Petitioner is liable to pay all the dues pending against him. It was also submitted that the Petitioner has an alternate statutory remedy to approach the Consumers'' Grievances Redressal Forum constituted u/s 42(5) of the Electrictity Act 2003, hence the writ petition is not maintainable before this Court.

12. The Respondent No. 3 filed its Counter Affidavit. It has been stated that the Petitioner has remedy for redressal of his grievance before the Consumers Grievances Redressal Forum as provided u/s 42(5) of the Electricity Act, 2003. It has been stated that the Respondent No. 3 made objection for tapping of the connection from his independent personal feeder line and the Respondent No. 3 has not given any No Objection Certificate. A copy of the objection dated 27-12-2005 has been annexed asAnnexureCA-2 to the counter affidavit. It has also been stated that the Petitioner is liable to pay the proportionate cost as per Office Memorandum dated 29-1-2006. In paragraph No. 8 it has been stated that the certificate dated 8-8-2005 is a forged one and prepared by the Petitioner for his own benefit. It has been further stated that the Petitioner has come before this Court against the notice issued by the Power Corporation and there is no order against the Petitioner, hence the writ petition is misconceived and premature.

13. The Petitioner has filed rejoinder affidavit and therein the averments made in the writ petition have been reiterated. It has further been stated that as per Clause 5-B of the Memorandum dated 30-5-2005 the dispute of cost sharing is

between two consumers and the same cannot be referred u/s 42(5) of the Electricity Act 2003. It has also been stated that the Corporation has got no lien for the payment of amount of cost sharing.

14. I have heard learned Counsel for the parties and perused the averments made in the memo of writ petition, counter affidavits filed by the Respondents and the rejoinder affidavit filed by the Petitioner along with its annexures.

15. The undisputed facts are that the Office Memorandum dated 30-5-2005 was issued by the Respondents-Power Corporation for grant of electric supply from the independent/industrial feeders to certain consumers including prospective consumers with certain conditions as laid down in Clause 5 of the Office Memorandum. It is also not disputed that the Office Memorandum dated 30-5-2005 had been superseded by Office Memorandum dated 29-1-2006 issued by the Chairman-cum- Managing Director of Respondent-Corporation. In Clause 5-B of the said Office Memorandum, it is provided that the Corporation shall recover the proportionate cost amount of common portion from the prospective consumer and shall refund the same to the original consumer. It is also not disputed that the agreement between the Petitioner and the Power Corporation regarding electric connection was executed on 7-2-2006 and the electric connection was installed as a consequence of agreement between the parties.

16. First of all it has to be seen as to when the Petitioner became a consumer of the Power Corporation and whether the provisions of Office Memorandum dated 30-5-2005 were applicable to its case or the Office Memorandum dated 29-1-2006 has been enforce at the relevant time.

17. At the outset, it may be mentioned that the Petitioner itself has made averment in the writ petition in paragraph No. 13 as under:

13. That after the formalities for installation of electric connection was completed the Respondents entered into a memorandum of understanding/agreement executed with the Petitioner on 7.2.2006. As a consequence of the agreement the electric connection was installed and the Petitioner''s unit became operational and is in production.

18. In reply to the above averment, the Power Corporation in paragraph 9 of the counter affidavit has stated as under:

9. That in reply to the contents of para 13 of the writ petition it is submitted that after the execution of agreement dated 7-2-2006 the electric connection was released to the Petitioner on 11-2-2006.

19. The Petitioner has filed rejoinder affidavit in reply to the counter affidavit filed on behalf of the Power Corporation and in paragraph 10, which is in reply of paragraph 9 of the counter affidavit, the following averments have been made by the Petitioner:

10) That the contents of para 9 of the counter affidavit are based on records and

need no reply however the contents of para 13 of the writ petition may be reiterated. Even from the chorological dates and events which has chanced goes to show that as matter of fact admittedly after the deposits made on 7.1.2006 and after execution of agreement on 7.2.2006 the relationship of consumer with Respondent Nos. 1 & 2 stood settled as per the agreement dated 7.2.2006, hence also any subsequent policy decision which has taken place by the office memorandum dated 29.1.2006 will be applicable to the subsequent prospective consumers who may apply for grant of electricity, it will not be applicable on the consumers whose application has already been processed under the existing policy decision of 30.5.2005, hence the policy decision dated 29.1.2006 will not have a retrospective effect being administrative in nature, hence also the stipulations of the office memorandum No. 106 dated 29.1.2006 will not govern the terms of providing electricity to the Petitioner.

20. Thus, from the averments made in the writ petition, the counter affidavit and the rejoinder affidavit, it clearly comes out that the Petitioner became a consumer of the Power Corporation only as a consequence of execution of agreement dated 7-2-2006. Since it is admitted to the Petitioner itself that the Petitioner has got an electric connection on the strength of agreement dated 7-2-2006, there can be no hesitation to hold that the provisions of Office Memorandum dated 29-1-2006 have been in force on the date of execution of agreement, because it has been mentioned in the Office Memorandum dated 29-1-2006 (Copy Annexure No. 8 to the writ petition) that the OM dated 30-5-2005 stands superseded with immediate effect. In my view, the provisions of Office Memorandum dated 29-1-2006 are applicable to the electricity connection of the Petitioner as a consequence of agreement dated 7-2-2006.

21. It has been contended by the learned Counsel for the Petitioner that the Petitioner had obtained No Objection Certificate from the Director of the Respondent No. 3 by letter dated 8th August 2005 (copy Annexure No. 3). Therefore, it shall be presumed that the provisions of Office Memorandum dated 30-5-2005 were applicable to the case at hand.

22. The letter dated 8th August 2005,which has been prepared on the writing pad of Shree Bankey Bihari Ispat Pvt. Ltd. reads as under:

I Jagdish Chawla S/o Shri Jaman Das Chawla, R/o B4/76, Sector-11, Rohini, New Delhi the Director of M/s Shree Bankey Bihari Ispat Pvt. Ltd has received Rs. 5,00,000/-(Five lacs only) as cost sharing from BTC Industries Pvt. Ltd. for providing N.O.C. of tapping from our company''s independent feeder & power line of 33 KV. BTC Industries Pvt. Ltd. will give first priority to our company while purchasing the ingots. Our best wishes to BTC Industries Pvt. Ltd.

For Shree Bankey Bihari Ispat Pvt. Ltd.

Sd/ Director

23. Learned Counsel for the Respondent No. 3 has urged that for the purposes of

the present writ petition, much weight cannot be given to this letter because in the writ petition no positive assertion has been made by the Petitioner that the sum of Rs. Five lacs had been actually paid by M/s B.T.C. Industries Pvt. Ltd. Kishanpur Kichcha through any responsible officer of the Petitioner and the location of the Petitioner unit has not been disclosed. Even the mode of payment has not been disclosed whether such a huge amount was paid in cash or by cheque or demand draft. Even the Respondent No. 3 in para No. 8 of its counter affidavit has stated that the Petitioner has not paid any amount to the answering Respondent and the certificate dated 8-8-2008 is a forged one and has been prepared by the Petitioner for his own benefit. According to the learned Counsel for the Respondent No. 3, in such circumstances the veracity/authenticity of Annexure No. 3 is disputed. Be that as it may, it would suffice to mention that it is disputed question of fact whether the amount of Rs. 5,00,000/- (Rs. Five lacs) had been paid to the Respondent No. 3 or not, which needs appraisal of evidence and the same cannot be adjudicated upon in exercise of writ jurisdiction by this Court.

24. Learned Counsel for the Respondent No. 3 has vehemently argued that only a show-cause notice has been challenged in the present writ petition, which was issued by the Power Corporation against the Petitioner and the Petitioner has every opportunity to file its reply against the notice and since the Petitioner has not at all pleaded that the authority had no jurisdiction to issue the impugned notice, therefore, the writ petition is not maintainable. In support of his contention, learned Counsel for the Respondent No. 3 has relied upon the case of The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, wherein the Apex Court has observed in paragraph 5 that "unless the High Court is satisfied that the show-cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ Petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition."

25. To sum up, the controversies- what is the amount of cost sharing can only be determ ined by the Power Corporation and whether the amount of cost sharing had been paid by the Petitioner to Respondent No. 3, are disputed questions of fact and this Court in exercise of writ jurisdiction cannot adjudicate upon the disputed questions of fact, for which appraisal of evidence is necessary.

26. In the peculiar facts and circumstances of the case coupled with the fact that only notice has been issued against the Petitioner vide Annexure No. 11 and also considering the fact that statutory remedy is available to the Petitioner for redressal of his grievance before the Consumer''s Grievances Redressal Forum constituted u/s 42(5) of the Electricity Act, 2003, therefore, it would not be proper to enter into the merits and to decide the case by this Court.

27. While parting with the judgment, it may mentioned that the Apex Court in the cases of Maharashtra Electricity Regulatory Commission Vs. Reliance Energy

Ltd. and Others, , wherein the Apex Court while dealing with the provision of Section 42(5) and 42(6) of the Electricity Act, 2003, has observed in paragraph No. 33 as under:

33. As per the aforesaid provision, if any grievance is made by a consumer, then they have a remedy u/s 42(5) of the Act and according to Sub-section (5) every distribution licensee has to appoint a forum for redressal of grievances of the consumers. In exercise of this power the State has already framed the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2003 (hereinafter referred to as "the 2003 Regulations") and created Consumer Grievance Redressal Forum and Ombudsman. Under these 2003 Regulations a proper forum for redressal of the grievances of individual consumers has been created by the Commission. Therefore, now by virtue of Sub-section (5) of Section 42 of the Act, all the individual grievances of consumers have to be raised before this forum only. In the face of this statutory provision we fail to understand how could the Commission acquire jurisdiction to decide the matter when a forum has been created under the Act for this purpose. The matter should have been left to the said forum. This question has already been considered and decided by a Division Bench of the Delhi High Court in Suresh Jindal v. BSES Rajdhani Power Ltd. and Dheeraj Singh v. BSES Yamuna Power Ltd. and we approve of these decisions. It has been held in these decisions that the forum and ombudsman have power to grant interim orders. Thus a complete machinery has been provided in Sections 42(5) and 42(6) for redressal of grievances of individual consumers. Hence wherever a forum/ombudsman have been created the consumers can only resort to these bodies for redressal of their grievances. Therefore, not much is required to be discussed on this issue. As the aforesaid two decisions correctly lay down the law when an individual consumer has a grievance he can approach the forum created under Sub-section (5) of Section 42 of the Act.

28. The ratio of the Apex Court judgment is fully applicable to the facts of the case at hand. It is undisputed that a complete machinery as provided in Section 42(5) and 42(6) of the Electricity Act 2003 has been in existence in the State of Uttarakhand, therefore, the Petitioner has statutory remedy to approach the Consumer Grievance Redressal Forum for redressal of his grievance. Accordingly, on the ground of alternate remedy, the writ petition deserves to be dismissed and is hereby dismissed. Costs easy.

29. Interim order dated 24-8-2006 passed by this Court is vacated.

