

(2007) 05 DEL CK 0081

In the Delhi High Court

Case No : Writ Petition (C) 1805 of 1988 and CM No. 13272 of 2006

Century Laminating Co. Pvt. Ltd.

APPELLANT

Vs

M.C.D. (DESU) (now North Delhi Power Ltd.)

RESPONDENT

Date of Decision : 22-05-2007

Acts Referred:

Electricity Act, 1910 — Section 26, 39

Citation : (2007) 05 DEL CK 0081

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : S.C. Nigam, for the Appellant; Sudhir Nandrajog, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.

Background facts

1. The Petitioner which is a company running a cold storage and an ice factory was granted a 352 Horse Power (HP) industrial power load connection by the erstwhile Delhi Electric Supply Undertaking("DESU"), under the Municipal Corporation of Delhi(MCD) in the year 1972. In the year 1984 the name and style of the Petitioner, which was H.N. Lohia Agencies (P) Ltd., was changed under the provisions of the Companies Act, 1956 to `Century Laminating Co. (P) Ltd.", which is its present name. The change of name was communicated to the DESU. However, the DESU refused to recognize the changed name of the Petitioner, and began charging an enhanced rate of Rs. 1 per unit on the electricity supply on the basis that the Petitioner had sublet the premises. The Petitioner filed Suit No. 770/1986 in the Civil Court in Delhi seeking a permanent injunction against the DESU from levying the enhanced amount. The suit was contested by the DESU and by a judgment dated 8.5.1987, the suit was decreed in favor of the Petitioner by the learned Sub Judge I Class, Delhi after holding that there is no subletting/misuse and consequently higher tariff cannot be

levied.?

2. Notwithstanding the above judgment, the DESU levied a fresh demand on the basis of misuse charges which resulted in the Petitioner filing a second Suit No. 222/87 against the MCD. This suit was contested and decreed in favor of the Petitioner by a judgment dated 19.1.1988. It was held that "the Co. which was consumer of the electricity has changed its name and there is no subletting or misuser." It was reiterated that since the earlier judgment had become final and binding on the parties "there is no subletting as alleged by the defendant, the rate of Rs. 1 per unit is illegal and cannot be levied by the defendant DESU on the plaintiff."

3. According to the Petitioner, both the aforementioned judgments of the Civil Court were not appealed against and became final.

4. It is stated that the Respondent DESU had been provided a separate room in the factory premises for installation of the Oil Circuit Breakers("OCB"), switching system and the meters for recording consumption. The power cables emerged directly from underground in the said room, which was in the "absolute custody and occupation of the respondent and always remained under their lock and key." It is stated that the Petitioner had no access to the electrical appliances and meters installed in this room and the officials and engineers of DESU used to visit the said room for the purposes of checking and taking of readings recorded by the meters. The Petitioner was provided with meter reading card in which the corresponding entry about the reading taken was made. It is stated that the Petitioner was regular in paying all the bills from time to time. The Petitioner has enclosed detailed charts showing the payment made for the period July 1986 to June 1988, after deducting the misuse charges which were not payable in terms of the two judgments of the Civil Court.

5. It is stated that on 1.8.1988 at about 2.00 p.m. there was a power failure in the area which, after complaints were made, was resumed on 2.8.1988 at about 8.00 p.m. However, the resumption of the power supply was at an abnormally high voltage. It was at 9.00 pm that the refrigeration plant could be resumed. The plant worked from 9.00 pm to 11 p.m. when there was a flash accompanied by a blast somewhere in the area which resulted in a general break-down of the supply. Although a complaint was made, the power supply was not resumed even on 3.8.1988. Since the Petitioner was storing perishable commodities of various customers, it repeatedly requested for restoration of supply of electricity and even issued a telegraphic notice on 4.8.1988. This spurred the officials of the DESU into action. They visited the factory premises on 4.8.1988 and inspected the appliances and instruments installed in the meter room. According to the Petitioner, inspection continued from the morning till late in the evening. However, no supply was resumed and on 5.8.1988 at about 4.00 p.m., a copy of the inspection report was provided to the Manager of the Petitioner. Since the power supply did not resume the Petitioner sent another telegram on 5.8.1988 and 6.8.1988. On 11.8.1988 the Petitioner was served with a supplementary bill

in the sum of Rs. 12,80,704.61 alleging that the Petitioner was guilty of fraudulent abstraction of energy ("FAE") alleged to have been discovered by the Respondent officials during the inspection on 4.8.1988.

6. The Petitioner on 19.8.1988 filed the present petition seeking the quashing of the supplementary bill dated 11.8.1988, and seeking resumption of electricity supply. By an Order dated 5.9.1988 this Court, while directing rule to issue passed an interim order that upon deposit of Rs. 75,000/- by the Petitioner, the Respondent would restore electricity supply.

Pleadings

7. The Petitioner's contention is that the inference drawn by DESU of FAE was not borne out by the inspection report. At that stage the Petitioner had not been provided with the details on the basis of which the inference was drawn. The Petitioner contended that it had no access to the electricity supply system since the entire installation and equipment was in the room secured under the lock and key of the respondent. Moreover, if the meter had been slowed down as was alleged it should have been reflected in the meter readings recorded every month by the officials of the respondent. It was submitted that the basis of the calculation of the enhanced amount was not disclosed particularly since u/s 26 of the Indian Electricity Act, 1910("IE Act") the meter index was the sole basis for measuring the consumption and charging for the same. The demand to pay the enhanced amount on the basis of the consumption during the years 1978-79 to 1981-82 was erroneous since the meters were in order throughout this period. The basic ingredients for FAE in terms of Section 39 of the IE Act were not fulfilled.

8. In reply to this petition, the DESU on 5.9.1988 filed a counter affidavit enclosing the notes of the inspection conducted on 4.8.1988. According to the DESU the inspection revealed that one seal was found broken and a sticker seal was also found torn out. On visual inspection, a flash was found over the front panel cover of the meter. The back plate was also found open and a flash was noticed on the cable end on the back of the outgoing cable from the meter cubicle to the consumer premises. It was stated that the inspection team found that "the metering cubical bottom plate near the meter from where the connections are passing to the meter was open and these connections to the meter were accessible." Upon opening of the top plate one secondary current transformer was found open. The report concluded that due to the broken seal as well as the fact that the three plates of the cubicle metering could be opened easily "the possibility of any malpractice with the metering cubical could not be ruled out."

9. In regard to Suit Nos. 770/86 and 222/87 it was stated that "the same being the matter of record needs no reply from the answering respondent." The respondent did not deny that the room where the electrical apparatus was installed was under the lock and key of the respondents. It was stated that "

however, the fact of tampering with the meters referred to in para 2 of the reply to the petition indicates that persons other than the respondent seem to have an access to the said room.? As regards the consumption pattern, it was stated that the recorded consumption of the energy by the Petitioner after the meter was replaced in the month of June 1986 happened to be on the lower side than the preceding years particularly from 1978-79 to 1981-82. It was on this basis that the assessment of FAE was made and the supplementary bill has been raised.

10. After the Respondent MCD(DESU) was substituted by the present Respondent North Delhi Power Limited (`NDPL"), a further counter affidavit was filed on 13.10.2006. In this counter affidavit it was stated that ?the petitioner was found tampering with the meter and committing fraudulent abstraction of energy for which the electricity bill was raised which is payable by the petitioner.? It was then stated that the consumption pattern for the years 1978-79 till 1988-89 indicated that ?consumption has fallen sharply from 1981-82 onwards (connected load being approximately the same), which was against the normal trend of business.? Although it was not denied that the electricity cables and apparatus were in a separate room, it was asserted that the custody and possession was with the Petitioner. It is further stated that ?the petitioner was found to have broken the seals of the electricity meter and having access to the internal metering mechanism, tampering the same as a result of which the electricity meter did not record the entire consumption of electricity by the petitioner.?

11. The Petitioner and the Respondents have filed their respective written submissions.

Submissions of counsel

12. Mr. S.C. Nigam, the learned Counsel appearing for the Petitioner makes the following submissions:

(a) the inspection report does not indicate that the Petitioner was indulging in FAE. The room where the apparatus was installed was entirely in the custody of the Respondents and the Petitioner had no access whatsoever to the equipment. The question of Petitioner tampering with the internal mechanism of the meter simply did not arise.

(b) the petitioner had regularly paying the bills and was not entitled to pay misuse charges on account of the two judgments of the Civil Court referred to which had attained finality.

(c) the only basis for calculating the electricity charges was the meter. Section 26 of the Indian Electricity Act did not provide for any other basis. The Respondents have failed to indicate how they have calculated the impugned bill.

(d) the reliance on the past consumption pattern is misplaced particularly because on the face of it no sharp drop in the supply could be discerned when observing the consumption patterns from 1978-79 till 1981-82. Moreover, the

industry was a seasonal one and there is likely to be fluctuation in the consumption pattern.

13. Mr. Sudhir Nandrajog, the learned Counsel appearing for the Respondent submitted as under:

(a) the break-up of the amounts that constituted the total sum of Rs. 12,80,704.61 showed that the misuse charges was around Rs. 3,14,720/- and the component of FAE was around Rs. 3,32,041/-. There were arrears in the sum of Rs. 6,33,951.46. Therefore, in any event since the Petitioner had not questioned the misuse and arrear charges, those had nevertheless have to be paid together with interest.

(b) the inspection report showed that three users were mentioned therein and none of them through the petitioner itself. The first user was M/s Century Cold Storage and Ice Plants and the second was Ashok Kumar and the third M/s Bhagwat and Company. On the face of it Therefore, there was subletting and misuser.

No case of FAE made out

14. The fact that there was a separate room in which electricity apparatus and cables including the meters were erected and that such room was under the lock and key of the respondent is not denied. In fact in the first counter affidavit filed by DESU this fact is expressly admitted. It is also not denied that there was a power failure on 1.8.1988 which led to the complaint by the Petitioner following which the inspection took place. In the circumstances, unless the Respondents are able to show that the Petitioner had a access to the metering room independent of the Respondents and that there were signs to show that the Petitioner had tampered with the internal mechanism of the meters, it would not be possible to straightway infer FAE.

15. In the context of Section 39 of the IE Act, the Hon''ble Supreme Court had the occasion in two decisions to underscore the importance of positively proving that the consumer of electricity had indulged in FAE. [See Jagarnath Singh Vs. B.S. Ramaswamy, ; Ram Chander Prasad Sharma Vs. State of Bihar and Another, followed in Col. R.K.Nayar v. BSES Rajdhani Power Ltd. 140 (2007) DLT 257. The inspection report at the highest leads the Respondents only to suspect FAE. In terms of the language used in the counter affidavit filed by DESU ?the possibility of a malpractice with the metering cubicle could not be ruled out?, suspicion cannot itself constitute conducive proof. The mere fact that one seal was found broken and a sticker seal was found torn out cannot by itself lead to an inference of FAE. In fact the inspection report notes that there was no visible evidence of access by the Petitioner to the metering equipment. The inspection report records that the secondary terminal being open ?could have been as a result of blast of cable end.? Further the ?flash in the box could be as a result of fault in the consumer''s installation which could be a transient fault or otherwise, in the case of fault in consumer wiring, clearance be taken from COI.? The entire

report, far from lending an assurance of conclusive evidence of FAE, raises more questions than it answers.

16. The learned Counsel for the Respondent was unable to show how, on the basis of the above inspection report, a case of FAE could be said to have been made out. The Court is also unable to appreciate the basis on which the bill has been calculated on the FAE component. Mr. Nigam is right that Section 26 of the IE Act stipulates that the meter is the sole basis for calculating the bill to be paid. Counsel for the Respondent was also unable to indicate on what basis the FAE charges in the excess of Rs. 3 lakhs have been levied. In the circumstances, this Court comes to the conclusion that the charge of FAE is unjustified and the impugned bill to that extent is unsustainable in law.

No misuser

17. Turning to the question of misuse charges, it requires to be noticed that in ground (k) of the petition, the petitioner had expressly averred that there was no question of subletting in view of the judgments of the Civil Court, and Therefore, there was no misuser. The reply to ground (k) of the petition, as contained in the first counter affidavit is not a specific denial at all but a general one. In the further counter affidavit filed in October 2006 it is stated that ?contents of this ground are matter of record.? The Respondent clearly has not based its calculation of misuse charges on the three names, appearing in the inspection report but only on account of the fact that the Petitioner has a changed name. As already noticed, the two judgments of the Civil Court have conclusively held that mere change of name by the Petitioner after following the procedure outlined in the Companies Act, cannot constitute subletting. The Respondents not having challenged these judgments, could not possibly levy misuse charges on that basis. This Court unhesitatingly holds that the levy of misuse charges in the instant case is bad in law.

18. On the last point concerning the arrears payable, the calculation shows that the arrears were as a result of the Petitioner not paying the misuse charges. Once the misuse charges is held not to be leviable, the question of arrears does not arise at all.

Directions

19. For all of the above reasons, this Court finds that the impugned bill is unsustainable in law and it is hereby quashed. The writ petition deserves to succeed. The Respondents are directed to refund to the Petitioner the sum of Rs. 75,000/- paid by it pursuant to the interim order dated 5.9.1988 together with interest at 12 per cent per annum from the date of payment till the date of refund which in any event should be made not later than 4 weeks from today, i.e., not later than June 23, 2007. Respondent will also be pay to the Petitioner costs of Rs. 5,000/- within the same period.

20. With the above directions, the writ petition is allowed. Pending application

stands disposed of accordingly.