

(2005) 08 CAL CK 0059
In the Calcutta High Court
Case No : Writ Petition No. 19226 (W) of 2004

Hasi Mazumdar and Another	Vs	APPELLANT
The West Bengal State Electricity Board and Others		RESPONDENT

Date of Decision : 25-08-2005

Acts Referred:

Contract Act, 1872 — Section 72
Electricity Act, 2003 — Section 126, 126(1), 126(6), 135, 43A

Citation : AIR 2006 Cal 59

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : T.K. Tiwari and P. Ghosh, for the Appellant; B.K. Chatterjee and S. Roychowdhury, for the Respondent

Judgement

Girish Chandra Gupta, J.—Two several provisional assessments both dated 7th August, 2004, purporting to have been made under Clause 22(J) of the terms and conditions of supply of electricity are under challenge in this writ petition. Briefly stated the facts and circumstances of the case are as follows.

2. The writ petitioner No. 1 is the wife of Bidhu Bhusan Mazumdar. The writ petitioner No. 2 is younger brother of the said Shri Bidhu Bhusan Mazumdar. Both the writ petitioners are the recorded consumers of electricity. The service connection provided to the writ petitioner No. 1 is A/3402/1 under consumer No. E300042. The service connection provided to the writ petitioner No. 2 is A/4214/1 under consumer No. E300063. Their case is that they are law abiding citizens. They have regularly been paying the bills raised upon them for electricity consumed. They have two several small businesses (i) wheat grinding machine (ii) Icecream factory. They never indulged in any unfair practice in the matter of consumption of electricity. They have disclosed receipted bills up to July 2004. The last date of reading of the meters is 30th July, 2004 in the case of both the writ petitioners. On 31st July, 2004 which was a Saturday, at about 10 p.m. in the night supply of electricity was disconnected. On 2nd August, 2004 the

respondent No. 4, the Station Manager, at about 21.40 hours filed two several First Information Reports alleging that unauthorised consumption of electricity by hooking was detected. There is an allegation in both the First Information Reports that after de-hooking the supply of electricity was also disconnected. The copies of seizure list go to show that cut out and hooking wire were seized by the respondent No. 4 in the presence of three witnesses. All of them are the employees of the State Electricity Board (hereinafter referred to for brevity as "Board"). Three several letters all dated 5th August, 2004, have been disclosed by the Board purporting to have been written one each by the writ petitioners and the husband of the writ petitioner No. 1. The writ petitioner No. 2 in his letter appears to have contended that although the service connection No. A/4241/1 is recorded in his name, he is no way connected either with the supply of electricity or with the business which he has already relinquished in favour of his elder brother Bidhu Bhusan Mazumdar. Shri Bidhu Bhusan Mazumdar and the writ petitioner No. 1, the husband and wife, appear to have written to the respondent No. 4 that during their absence at the instigation of others their son indulged in unauthorised consumption of electricity although they did never before indulge in any such illegal activity nor did the illegal act of their son have their approval, They appear to have requested by their aforesaid letters that after making assessment for minimum period, electricity should be restored upon payment of 1/4th of the assessed amount and the balance amount may be allowed to be paid in installments. The respondent No. 4 on 7th August, 2004 made the impugned provisional assessment at a sum of Rs. 1,08,296/- for the writ petitioner No. 1 and at a sum of Rs. 1,57,709.02 paise for the writ petitioner No. 2. Both the writ petitioners paid 25% of the aforesaid provisionally assessed amount between 17th and 18th August, 2004 and electricity thereafter was restored but was disconnected once again for non-payment of subsequent instalments. The writ petitioner No. 1 on 19th August, 2004 and the writ petitioner No. 2 on 25th August, 2004 wrote two several identical letters to the respondent No. 4 alleging that the said respondent resorted to arm twisting method for the purpose of extorting money. The relevant part of the letter reads as follows :

With due respect I beg to state that by an overt action on your part my Electric connection was disconnected on 31-7-2004 as I failed to comply your demand for paying Biswakarma Puja subscription. You by accompanying with the police, illegally disconnected my service connection. I did not default in paying the bill. My bills are clear and paid up-to-date. No notice for disconnection was made. You lodged a complaint with the Officer-in-Charge, Nakashipara Police Station against myself illegally alleging that by hooking, I was enjoying Electricity. No hooking material was found, no seizure list was prepared, despite that you disconnected my service connection. Your claim is illegal and I am not bound by the said letter. Repeatedly I told you for restoration of my connection but you did not. However, I was under compulsion of running my business, I deposited a sum of Rs. 27,074.00 on 17-8-2004 and you restored connection. The said sum to be

adjusted with the next bills and you are bound to pay interest over the same. Although you realised a sum of Rs. 27,074.00 against consumer No. E 30004 which is the consumer number of myself but you disconnected my service connection illegally. I have no other consumer number. My meter was checked on 30-7-2004 and bill was raised accordingly.

3. These letters were duly received by the respondent No. 4 on 19th August, 2004 and 25th August, 2004, but do not appear to have been replied to by the Station Manager, the respondent No. 4 herein. From the affidavit-in-opposition filed by the Station Manager it appears that he was in fact the Chairman of the Biswakarma Puja Committee. He, however, has denied that any demand for a sum of Rs. 20,000/- was made by him from the writ petitioners as alleged by them. He has admitted that on 30th July, 2004, he personally read both the meters" and found the readings are very poor". He has disclosed in his affidavit that Bidhu Bhusan Mazumdar has a domestic connection. His supply was also disconnected and subsequently restored upon payment, of the assessed amount, by him. The writ petitioners in their reply have disowned the letters dated 5th August, 2004. According to them these are fabricated letters. They have reiterated that because they refused to pay the sum of Rs. 20,000 demanded by the respondent No. 4 on account of the Biswakarma Puja, the step of disconnecting supply of electricity was taken and thereafter the disconnection was sought to be justified on the basis of an untrue allegation of hooking and unauthorised consumption. They also have said that payment was made because in illegal exercise of power supply of electricity was disconnected by the respondent No. 4 and the petitioners had no way of surviving. Therefore under compulsion they had to make the payments. It appears that the writ petitioners have already paid altogether a sum of Rs. 1,12,360/- in various instalments.

4. The writ petition was taken up for final hearing on 26th July, 2005, when this Court passed the following order :

The provisional assessment made by the West Bengal State Electricity Board, on the face of it, appears to be in gross violation of Section 126 of the Indian Electricity Act.

The West Bengal State Electricity Board is directed to affirm an affidavit and to disclose all justification in support of the provisional assessment made by them. Let such affidavit be filed within a week from date i.e. next Tuesday and the matter will appear on Wednesday week (2nd August, 2005) marked for orders.

5. Pursuant to the aforesaid order dated 26th July, 2005 the respondent No. 4 filed a supplementary affidavit affirmed on 2nd August, 2005. Another affidavit appearing to have been affirmed on 9th August, 2005 was filed by the respondent No. 4 purporting to be an affidavit of documents although no direction for filing such affidavits had been issued. The respondent No. 4 in his Supplementary Affidavit has disclosed a note-sheet which is annexure "D" thereto which appears to have been signed by the Chief Engineer on 28th

November, 2003 and by the member commercial and other high officials on various dates between 5th December, 2003 and 29th December, 2003. It would be appropriate to notice the said note sheet in extenso.

Section 126 of the Electricity Act, 2003 has stipulated the basis of assessment of bill to be served upon the person if he is found during inspection to have indulged in any unauthorised use of electricity. The basis of assessment and the associated procedure as envisaged in the 2003 Act is different from what has been stipulated in the Board's General Conditions of Supply.

Since the Electricity Act, 2003 has come into effect from 10th June, 2003 assessment bill shall have to be raised now strictly in accordance with the provisions of Section 126 of the said Act.

Payment of assessment bill in suitable instalments by the consumers came up for discussion in various meetings and there has been a general consensus that in the event the consumer is allowed to pay the provisional assessment bill or final assessment bill in suitable instalments, the Board will be in a position to realise substantial revenue.

A comprehensive Office Order covering the mode of assessment, period of assessment and mode of realisation of the claim along with the competent officer who are authorised to allow instalments is placed below for consideration and approval.

6. A detailed procedure for assessment of the quantity of unauthorised consumption of electricity has been disclosed which is Annexure "A" thereto. A chart showing consumption of electricity by the writ petitioners commencing from November, 2000 up to July, 2005 has also been disclosed which is Annexure "E" thereto. The calculations for the provisional assessment made by the respondent No. 4 in respect of both the petitioners No. 1 and 2 have also been disclosed which are collectively Annexure "F" thereto.

7. Mr. Chatterjee, learned Senior Advocate appearing for the Board made the following submissions :

(a) The provisional assessments dated 7th August, 2004 were made by the respondent No. 4 strictly in accordance with the procedure laid down by the authority, a copy whereof is Annexure "A" to the Supplementary Affidavit dated 2nd August, 2005 affirmed by the respondent No. 4.

(b) Although the petitioners allege to have been running a Wheat Grinding Machine and an Ice Cream Factory, they have suppressed that they are also running an Oil Mill and Husking Machine.

(c) The petitioners have accepted the provisional assessment and have acted thereupon by making part payments.

(d) The supply of electricity was restored upon making payment of 25% of the provisionally assessed amount at the request of the writ petitioner themselves.

(e) The husband of the writ petitioner No. 1 Shri Bidhu Bhusan Mazumdar also indulged in unfair practice. He was also found consuming electricity unauthorisedly. His supply was also disconnected and after making payment he got his supply restored and he has not made any grievance whatsoever.

8. Mr. Tiwari, learned Advocate, on behalf of the writ petitioners submitted that the entire story of unauthorised consumption is untrue to the knowledge of the respondent No. 4. The supply was disconnected in retaliation consequent to refusal of the petitioners to pay a sum of Rs. 20,000/- on account of subscription of Biswakarma Puja of which the respondent No. 4 is admittedly the Chairman. The writ petitioners had no alternative but to concede to the illegal provisional assessment in order to survive and that precisely is the reason why the letters dated 19th August, 2004 and 25th August, 2004 were written by them only after the supply of electricity was restored, to which the respondent No. 4 did not reply. He submitted that the act of entering the premises of the consumer after sunset and in the absence of anyone on behalf of the consumer, the act of disconnecting the supply of electricity is grossly violative of law which goes to show that the Board engaged in a monopoly business does not care for the provisions of law nor do they have any respect for the rights of the citizens guaranteed under the Constitution. They were and are out to extort money and whenever they met with refusal they resorted to illegal disconnection of supply of electricity and thus they keep the citizens in perpetual fear. The citizens have no option but to concede to their illegal demands. The fact that the unauthorised user of electricity is a myth would be evidenced from the fact that (a) the consumption during the month of July 2004 tallies with the average consumption of the writ petitioner; (b). The FIR was filed 48 hours after disconnecting the supply of electricity although police personnel appear to have accompanied the respondent No. 4; (c) the seizure list disclosed by the respondents does not appear to have been signed by any independent witness.

9. He submitted that owing to their refusal to pay a sum of Rs. 20,000/- ostensibly for Biswakarma Puja, the petitioners had to suffer an illegal disconnection; an illegally raised provisional assessment bill; a criminal proceeding for no wrong whatsoever; they had to fork out a sum of Rs. 1,12,000/- to meet the wrongful demand and to undergo the agony which has been continuing for more than a year.

10. After considering the rival submissions made by the learned Advocates, this Court is of the view that points which appropriately fall for determination in this writ petition are (a) "whether the provisionally assessed bills dated 7th August, 2004, copies whereof are annexure P-3 to the writ petition collectively, are legal?" (b) "whether the money paid by the writ petitioners pursuant to those bills is recoverable by them?" The question whether alleged demand for a sum of Rs. 20,000/- was made by the respondent No. 4; whether the supply of electricity was disconnected consequent to refusal on the part of the writ petitioner to pay the said sum; whether the writ petitioners are in fact guilty of

pilferage of electricity are in my view questions which will be decided in the criminal proceedings already initiated pursuant to the FIR dated 2nd August, 2004. It would not be proper for this Court to express any opinion with regard to any of these questions except for expressing a hope that the Board shall take this type of allegations a little seriously and keep a vigil over its own invigilators so that the power entrusted with them is not abused.

11. With regard to the questions formulated above, for a decision by this Court, we already have noted the submissions of the learned advocates. The first submission of Mr. Chatterjee was that the provisional assessment was made strictly in accordance with the guidelines which is annexure "B" to the Supplementary Affidavit dated 2nd August, 2005.

12. As a matter of fact the respondent No. 4 in his said Supplementary Affidavit at Page 4 has stated that:

To keep parity amongst the provisional assessment made by different assessing officers of the Board, a guideline for provisional assessment as per methodology prevailed earlier was proposed by Chief Engineer (Commercial) for circulation. The proposal was agreed by the Chairman and member Secretary and accordingly an office order was issued on 30-12-2003 by the Member Secretary.

13. At page 5 he stated that "accordingly provisional assessment was done on the basis of the office order dated 30-12-2003."

14. It would appear from the Annexure "F" to the affidavit dated 2nd August, 2005 affirmed by the respondent No. 4 that based on the guideline dated 30th December, 2003 the respondent No. 4 came to a conclusion that the writ petitioner's unauthorised monthly consumption was 3072 units whereas that of the writ petitioner No. 2 was 4370 units per month. The respondent No. 4 himself has disclosed the monthly consumption of both the writ petitioners commencing from November 2000 up to July 2005 which is annexure "E". It would appear from the Annexure "E" to his affidavit dated 2nd August, 2005 that the average consumption of the writ petitioner No. 1 during the year 2001 was 170.41 units per month, during the year 2002 average consumption was 271.41 units per month, during the year 2003 average consumption was 351.6 units per month, during the year 2004 up to the month of July average consumption was 399 units per month, whereas during August 2004 to July 2005 average consumption was 566 units per month.

15. Electricity after all is energy. Except for energizing electrical apparatus it cannot be put to any other use. When the monthly consumption of the writ petitioner No. 1 both before and after the alleged act of pilferage did not exceed 566 units per month, how did the respondent No. 4 come to a conclusion that the quantity of electricity unauthorisedly consumed could be 3072 units per month which is nearly 6 times of her highest average consumption. In the case of writ petitioner No. 2 the average consumption during the year 2001 was 75.25 units per month, during the year 2002 it was 305.16 units per month, during the

year 2003 it was 224 units per month, during the year 2004 up to the month of July it was 332.14 units per month, during August 2004 to July 2005 it was 32.12 units per month. In his case unauthorised consumption per month has been assessed at 4320 units per month. Would it be too much to say that the assessment is absurd and fanciful? The assessor could be said to have demonstrated his partisan attitude in making the assessment. That however may not be true for reasons I shall discuss hereafter.

16. Admittedly the provisional assessment in this case was made under Clause 22(J) of the Terms and Conditions of Supply as would appear from copies of the assessment collectively marked as Annexure "P-3" to the writ petition. The respondent No. 4 in his Supplementary Affidavit dated 2nd August, 2005 has disclosed the note sheet which we already have noticed above. There is an admission contained in the said note sheet that with effect from 10th June, 2003 the provisional assessment has to be made strictly in accordance with Section 126 of the Electricity Act 2003. The assessment goes to show that it was made under Clause 22(J) of the Terms and Conditions of Supply. Therefore admittedly it was not in accordance with Section 126 of the Electricity Act 2003.

17. Mr. Chatterjee submitted that there is nothing wrong in the assessment because it was made following the guidelines dated 30th December, 2004 a copy whereof is annexure "A" to the Supplementary Affidavit dated 2nd August, 2003. The respondent No. 4 who made the assessment has also stated in his Supplementary Affidavit which we have already noticed above that it was made by him in accordance with the aforesaid guidelines. Now the question is "does the Section 126 of the Electricity Act 2003 contain any scope for issuance of any such guideline?"

Section 126 contains the mode of making the provisional assessment. Sub-section (1) of Section 126 provides as follows :

If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.

18. The provisional assessment of the charges payable by the offender has been left by Sub-section (1) to the best judgment of the person who on inspection of any place or premises after inspection has come to the conclusion that the offender is indulging in unauthorised use of electricity. The object is very clear. The assessment can be made only by the person who has seen the extent of unauthorised use. Based on his personal observation he has been authorised to assess the quantity of unauthorised consumption and to assess the amount payable for that at the penal rate provided under Sub-section (6) of Section 126. In this case it is an admitted fact that the respondent No. 4 who is alleged to

have found upon inspection that there has been an unauthorised use of electricity did not assess the amount payable by either of the petitioners on the basis of his own judgment. He has in fact assessed the amount as per the desire of his masters and that precisely is the reason why such an absurd demand was made.

19. In this case has there been an impartial assessment? The answer obviously is "No". Because it was not the judgment of the respondent No. 4. It was the judgment of the persons who issued the guideline dated 30th December, 2003 being annex-tire "A" to the supplementary affidavit dated 2nd August, 2005. Is such a judgment legal? The answer again is "No".

20. In the case of B. Rajagopala Naidu Vs. State Transport Appellate Tribunal and Others, , their Lordship held that only administrative direction could be issued but the quasi judicial function has to be left to the authority. It would be appropriate to notice the following law laid down by Their Lordships (Para 19) :

... In interpreting Section 43A, we think, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi judicial function the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State.

21. In Orient Paper Mills Ltd. Vs. Union of India (UOI), following the judgment in the case of Raja Gopal Naidu (supra) Their Lordship held as follows (Para 8):

... if their judgment is controlled by the directions given by others. Then it is a misnomer to call their order as their judgments; they would essentially be the judgments of the authority that gave the directions.

22. The aforesaid judgment in the case of B. Rajagopala Naidu Vs. State Transport Appellate Tribunal and Others, was followed in the case of Collector of Central Excise v. Krishna Carbon Paper Co. reported in, 1988 (37) ELT 480 (SC) where Their Lordships held that a quasi judicial body exercising quasi-judicial power is not bound by the direction of the Board and the tariff issued by them was irrelevant.

23. In the case of Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. and Others Vs. Secretary (Food and Agriculture) Government of Andhra Pradesh and Others, a direction issued under the provisions of law was called into question. Their Lordship held as follows (Para 24) :--

It was submitted, however, that there was no direction in the order which was only by way of "request" and suggestion. We are, however, unable to accept this submission as correct. Any "request" of the Government to a subordinate authority is tantamount to a positive direction or order and it will be difficult for

the subordinate authority to disregard the same.

24. For the aforesaid reasons I am firmly of the view that the directions with regard to the mode of assessment contained in the office order dated 30th December, 2003 a copy whereof is Annexure "A" to the Supplementary Affidavit affirmed by the respondent No. 4 on 2nd August, 2005 is without authority and is wholly irrelevant for the purpose of making assessment. It is, in this case, an admitted fact that the assessment was made on the basis of that direction dated 30th December, 2003.

25. For the aforesaid reasons the first question formulated above is answered in the negative.

26. Answer to the second question formulated above automatically follows in the affirmative based on the answer to the first question. I shall however consider rest of the submissions made by Mr. Chatterjee, learned Senior Advocate before I finally answer this question.

27. The alleged admission of guilt contained in the letters dated 5th August, 2004, has been disputed by the writ petitioners. In any event there can be no denial of the fact that the alleged letters dated 5th August, 2004 were written in order to secure resumption of the supply of electricity. Even assuming that the petitioners were found to have been extracting electricity by hooking, the Board could have removed the hooking, could also have proceeded to realise value of the unauthorisedly consumed electricity at a penal rate and could also possibly have proceeded u/s 135 of the Electricity Act 2003 but no provision was shown which might have authorised the Board to disconnect the supply of electricity. Moreover the request contained in the alleged letter dated 5th August, 2004 to restore supply of electricity after assessing the charges for illegally consumed electricity could not clothe the Board with any authority to make an illegal assessment. Since I already have held that the agreement was illegal, money paid pursuant therefore is recoverable regard being had to the fact that there was an element of threat that until payment, supply of electricity would not be restored. If the Board is allowed to retain the money paid in such circumstances it would amount to unjust enrichment which is not permissible under the Indian Contract Act. The second statutory illustration to Section 72 of the Contract Act would further make the legal position clear.

A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge was illegally excessive.

28. The letters dated 19th and 25th August 2004 being part of Annexure P-4 to the writ petition do not appear to have been replied to nor is there any allegation in the opposition disputing receipt or contents of these two letters. Therefore the fact that the money was paid under compulsion has amply been proved. I answer the second question in the affirmative for the aforesaid reasons.

29. The provisionally assessed bills dated 7th August, 2004 copies whereof are Annexure P-3 collectively to the writ petition are therefore set aside. It would however, be open to the respondent No. 4 to make his best judgment under Sub-section (1) of Section 126, if he so desires, for reasons to be assigned by him. The money already paid by the writ petitioners pursuant to the provisionally assessed bills being Annexure P-3 to the writ petition shall be set apart by the respondents in a separate account to the credit of the writ petitioners which may be adjusted against the future bills lawfully raised. Electricity be restored forthwith. Supply of electricity should not be disconnected for the alleged detection of unauthorised use on 30th July, 2004 until and unless a fresh provisional assessment is made in accordance with law, for appropriate reasons, and an opportunity is given to the writ petitioner to make their representation if any and the issue is decided finally. The respondents shall pay costs of this application assessed at 300 G.Ms.