(2015) 10 P&H CK 0139

In the Punjab And Haryana At Chandigarh

Case No : SAO No. 11 of 2011 (OandM)

Hement Kumar APPELLANT

Vs

Chief Managing Director, HVPNL and Others RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23-A, Order 41 Rule 25
Electricity Act, 2003 — Section 135

Citation : (2015) 10 P&H CK 0139

Hon'ble Judges : Raj Mohan Singh, J.

Bench : Single Bench

Advocate : Sanjiv Gupta, Advocate, for the Appellant; Sudhir Hooda, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Raj Mohan Singh, J.—This appeal has been filed by the plaintiff against the judgment dated 06.12.2010 whereby the case has been remanded back to the trial Court for reframing of issue No. 1 as per factual position of the case and by directing the parties to lead evidence afresh so that complete documentation of Ex. D-2 and all other relevant things could be brought on record.

2. Additional District Judge, Sirsa also set aside the judgment and decree dated 04.09.2009 passed by the trial Court and directed the trial Court to reframe the issue and retry the case by readmitting the same to its original number. The evidence already recorded shall, subject to all just exception be the evidence during trial after reframing the issues. In a way the lower Appellate Court has directed the trial Court to give findings on an issue likely to be framed by the trial Court on the basis of evidence primarily already on record subject to all just exceptions.

3. Plaintiff filed a suit for declaration and permanent injunction to the effect that plaintiff is a consumer of DHBVNL having account No. SK-316/SP. The plaintiff

has been paying electricity charges regularly and was never a defaulter.

4. On 14.04.2006, the functionaries of defendants came to the premises of the plaintiff and made a false report regarding refixing of meter cover box and seal No. 4 (firm) found to have been tampered with and soldered from latch wires. Memo dated 15.04.2006 was issued on the basis of alleged report and demand of Rs. 1,87,039/- from the plaintiff was made.

5. Plaintiff challenged the report to be illegal, null and void and not binding upon his rights. The alleged checking report dated 15.04.2006 was claimed to be colourable exercise of the powers of the functionaries of the defendants. The checking of the premises was done in the absence of the plaintiff and no independent witness was joined. The report was manipulated. Plaintiff alleged that he was called later on and was made to sign the alleged report by way of coercive method with the help of Police.

6. Plaintiff further alleged that Special Flying Squad checked all the premises of the plaintiff 3-4 times within a period of two months and nothing incriminating could be found. The checking team took all the articles of the meter, disabling the plaintiff to prove his innocence, nor the defendants have got checked the same from independent agency. The defendants have also illegally disconnected the supply of electricity to the premises of the plaintiff and removed the meter from the premises. Mandatory injunction was sought, asking the defendants to restore the energy at the premises of the plaintiff. Hence the suit came to be filed.

7. The suit was contested by the defendants admitting the plaintiff to be the consumer of the Nigam. Checking was done on 14.04.2006 by a team consisting of AEE (Vigilance), JE and other officials in the presence of the plaintiff and it was found to be a case of theft of energy. Checking report is claimed to be legal, valid and binding upon the plaintiff. At the time of checking meter cover box and all 4 number seals (firms) were found to be tampered with the soldered from latch wires. Notice dated 15.04.2006 was issued where demand of Rs. 1,87,039/- was made, but the same later on was withdrawn as the amount was not correctly assessed. Thereafter amended notice was issued on 15.04.2006 whereby plaintiff was asked to pay Rs. 4,36,446/- to the Nigam being the compounding amount in terms of Government notification and plaintiff was asked to pay the amount in view of sale circular No. D-44/2005 of the Nigam. Plaintiff was required to pay Rs. 20,000/- per KW as the connection of the plaintiff was in the nature of industrial service.

8. Trial Court framed the following issues:-

"1. Whether checking report dated 15.4.2006 and notice/memo No. 1652 dated 15.04.2006 in respect of account bearing No. SK-316/SP are wrong, illegal, against law, facts and liable to be set aside as alleged?

2. If issue No. 1 is proved, whether the plaintiff is entitled for permanent

injunction as prayed for? OPP.

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has got no locus-standi and no cause of action to file the suit? OPD

5. Whether the civil court has got no jurisdiction to try the suit? OPD

6. Relief."

9. Both the parties led evidence. Trial Court took up issues No. 1, 2 and 5 jointly and decided the same in favour of the plaintiff. Issues No. 3 and 4 were not pressed by the defendants and, therefore, they were decided against the defendants. In view of findings of issues No. 1, 2 and 5 suit of the plaintiff was decreed, checking report dated 14.04.2006 and memo dated 15.04.2006 were also found to be illegal. Defendants were restrained from recovering any penalty from the plaintiff on the basis of impugned notice, however defendants were held at liberty to proceed in the present case and to decide the matter afresh by following due procedure. The plaintiff was held entitled to get 50% of the amount of penalty already deposited by him by the order the Court.

10. Feeling aggrieved against the judgment and decree of the trial Court, the defendants filed appeal before the lower Appellate Court.

11. Lower Appellate Court by relying upon the stand of the defendants in the written statement took note of the pleadings that checking was done on 14.04.2006, first memo No. 1652 dated 15.04.2006 was issued demanding Rs. 1,87,039/-. The same was withdrawn immediately as the amount was not correctly assessed. Another notice vide memo No. 1653 dated 15.04.2006 was issued asking the plaintiff to pay Rs. 4,36,446/- to the Nigam being the compounding amount. It was clarified that the plaintiff is liable to pay Rs. 20,000/- per KW of his total sanctioned load of 15 KW in view of sale circular D-44/2005. In this way amount came to be Rs. 3,00,000/-. Checking was done as per Rules and the Nigam was entitled to recover the amount as per memo No. 1653 dated 15.04.2008 as the plaintiff was found involved in the activity of theft of energy.

12. Lower Appellate Court has emphasised that issue No. 1 framed by the trial Court is not correctly framed. Court observed that there was no checking report dated 15.04.2006 as actual checking report was prepared on 14.04.2006. Memo No. 1652 dated 15.04.2006 was withdrawn by the Nigam and, therefore, notice memo No. 1653 dated 15.04.2006 was issued. Due to material irregularity issue No. 1 as framed does not cover issuance of memo No. 1653.

13. Plaintiff was examined as PW-1 and has also tendered affidavit of his neighbour Satpal as PW-2/A. The defendants put all the relevant facts to the plaintiff in his cross-examination including passing of notice memo No. 1653 dated 15.04.2006 and also gave suggestion that the Nigam is entitled to recover

fine of Rs. 20,000/-per KW from the plaintiff. Checking report dated 14.04.2006 was also tendered as Ex. D-1, besides as tendering notice memo No. 1653 dated 15.04.2006 as Ex. D-2 and sale circular as Mark A.

14. As per sale circular No. D-44/2005 clause 7(2)(d) in case of theft of energy compounding fee shall be deposited within three days failing which FIR shall be registered against the person under Section 135 of the Indian Electricity Act of 2003. No such communication was recorded in the memo No. 1653 dated 15.04.2006 Ex. D-2. Lower Appellate Court has observed that in fact entire document has not been tendered in evidence and only its first page has been put on record by the defendants.

15. The defendants were supposed to bring on record photographs or the CD which was required to be prepared at the time of checking the spot, but no such production has been made on record. The defendants have failed to bring on record the incriminating material. The lower Appellate Court classified the case to be an exceptional one as the trial Court has not discharged its duty properly while framing issue No. 1 and while receiving Ex. D-2 in evidence.

16. Supply of electricity is a sovereign duty and it was held that Nigam was discharging the sovereign function and, therefore, it cannot be equated with ordinary litigant. Lapse on the part of the Nigam by not exhibiting full context of Ex. D-2 was sought to be condoned and plaintiff was not held entitled to seek redressal on the basis of anomalies which could be removed by the Nigam by providing appropriate opportunity.

17. The lower Appellate Court without setting aside the findings under issues No. 1, 2 and 5 opined on the sovereign function of the Nigam and the lapse on the part of the defendants was not equated with a lapse on behalf of ordinary litigant and on that premise it was ordered that it is a fit case for remanding the matter back to the trial Court for reframing of issue No. 1 as per factual position of the case and by asking the parties to lead evidence afresh so that complete documentation viz. Ex. D-2 and other relevant factors could be brought on record. The appeal was allowed, impugned order of the trial Court was set aside and it was ordered that the evidence already on record shall subject to all just exception be the evidence during trial of the case after reframing of issues.

18. The aforesaid observation runs contrary to the earlier part of remand wherein it was observed after reframing of issue as per factual position of the case parties were held entitled to led evidence afresh so that complete documentation of Ex. D-2 could be brought on record. De hors the aforesaid conflicting findings recorded, it is necessary to see whether the remand order/judgment falls under any of the category of remand in terms of order 41 Rules 23, 23-A and 25 CPC.

19. Remand of case by Appellate Court under Order 41 Rule 23 CPC deals with a situation where the Court from whose decree an appeal is preferred, has disposed of the suit upon a preliminary point and the decree is reversed in appeal by the Appellate Court. The Appellate Court, if thinks fit by order of

remand may further direct the trial Court to try the issue/issues and remand the case to the Court from whose decree the appeal is preferred with directions to re-admit the suit at its original number and proceed to determine the suit on the basis of material.

20. Order 41 Rule 23-A CPC deals with remand in other cases where the Court from whose decree, an appeal is preferred has decided the case otherwise than on a preliminary point and the decree is reversed in appeal and retrial is considered necessary. The Appellate Court has the same powers as under Order 41 Rule 23 CPC.

21. Order 41 Rule 25 CPC deals with the situation where Appellate Court frames issues and refer them to the trial Court whose decree is appealed from and in such case Appellate Court may direct the trial Court to take additional evidence and return the evidence to the Appellate Court together with findings thereon within such time as may be prescribed by the Appellate Court.

22. In the present case the remand has been ordered on the basis of reframing of issues and this assignment was left to the wisdom of the trial Court. Apparently, the lower Appellate Court has not set aside the findings of the issues recorded by the trial Court and, therefore, remand does not satisfy the ingredients of any of the category enshrined under Order 41 Rules 23, 23-A and 25 CPC.

23. At the most lower Appellate Court could have reframed the issue of its own and have asked for report from the trial Court on the said issue. Since the exercise has not been done by the lower Appellate Court an illegality has crept in by not setting aside the findings recorded under different issues by the trial Court, therefore, this Court feels it appropriate to allow the present appeal by setting aside the impugned judgment dated 06.12.2010 passed by the lower Appellate Court and remand this case back to the Additional District Judge, Sirsa to pass appropriate order on merits in the light of Order 41 Rules 23, 23-A and 25 CPC.

24. Nothing expressed hereinabove would be construed to be an expression of any opinion on merits of the case.

