
(2008) 11 AHC CK 0180
In the Allahabad High Court

J.D. Wires Pvt. Ltd.

APPELLANT

Vs

Dakshinanchal Vidyut Vitran Nigam Ltd.

RESPONDENT

Date of Decision : 04-11-2008

Acts Referred:

Electricity Act, 2003 — Section 135

Citation : (2008) 11 AHC CK 0180

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Shishir Kumar, J.—This writ petition has been filed for quashing the order dated 18.12.2004 (Annexure No. 4 to the writ petition) and appellate order dated 27.9.2005 (Annexure No. 10 to the writ petition), further quashing the order dated 28.8.2005 (Annexure No. 13-A to the writ petition). Further a writ in the nature of mandamus commanding the respondents not to disconnect the electricity of the petitioner and further to refund the amount already deposited by the petitioner to the tune of Rs. 11,45,000.00 along with interest @ 12% per annum.

2. The petitioner is having a electricity connection from erstwhile U.P. State Electricity Board in the year 1992. The sanction load of the petitioner is 175 K.V.A. For the purpose of drawing metallic iron wires. The tariff applicable is of H.V. II category with a trivector meter for M.R.I. Downloading. The petitioner on the basis of bill raised by the respondent was always paying the amount which was being demanded by the respondent on the basis of consumption of the electricity. There was no complaint at any point of time against the petitioner regarding theft of energy. It was on 30.11.2004 that a raid was carried out at the premises of the petitioner and as per the checking report it was alleged that after checking of the C.T. Chamber there was an altercation in paper seal and the lock seal of the C.T. Chamber whereby the petitioner has manipulated the internal device of the C.T. Chamber. This observation was made without opening the C.T.

Chamber. It is further mentioned that metering panel consist of C.T Box, P.T. Box, the electrical meter and the adjoining cables of 11 K.V.A. Electrical supply line. All these things are inside big box made of iron which is known as metering panel or the meter cubical. In the checking report it was specifically observed that paper seal and lock seal were found to be disturbed without opening the meter cubical. It is further corroborated by the observation No. 4 of the checking report. On the basis of the aforesaid, the petitioner was suspected to be concealing electricity and accordingly the electric supply was disconnected. The petitioner disagreed with the finding by filing an application against the checking report disagreeing to the point No. 2 to this effect that without opening C.T. Chamber it is not possible to conclude anything about the internal device, which has been alleged to be manipulated.

3. A provisional assessment for an amount of Rs. 34,31,997/- was raised upon the petitioner which too are based upon fiddling the seals of C.T. Chamber by means of which it was alleged that internal device has been manipulated without opening the C.T. Chamber.

4. An objection was submitted to this effect that without opening C.T. Chamber it is absolutely impossible to make out any manipulation in the internal device of the C.T., as alleged by the respondents. Therefore, there can not be any question of concealing of electricity in view of the aforesaid fact. Mere allegation of theft of electricity is insufficient and the same has to be established beyond doubt on the basis of evidence on record and the same has to be established by the assessing officer. It has further been submitted by the petitioner that on the same day about half our before at 1.00 PM on 30.11.2004 meter reading was carried out and at that time there was no observation in the meter reading slip regarding tampering of the seals, therefore, within half an hour i.e. at about 1.30 PM on the same day this report regarding theft of electricity by the petitioner cannot be believed without opening C.T. Chamber. At point No. 4 it has been admitted that meter reading was carried out and seals were not tampered. At point No. 5 it was admitted that seals were found to be suspicious. At point No. 6 it was admitted that there was no need of opening the C.T. Chamber because seals were found to be tampered. At point No. 7, it was admitted that without opening C.T. Chamber since seals of C.T. Chamber were tampered, the petitioner has manipulated the internal device of the C.T. to his devices which amounts to theft of electricity.

5. While filing the objection, petitioner deposited 1/3rd of the total assessment which was necessary for the purpose of filing the appeal. On the basis of aforesaid deposit the electric supply of petitioner was restored. On 12.1.2005, a new meter was installed and the C.T. ratio (Current Transformer Ratio) and the P.T. ratio (Potential Transformer Ratio) were found to be O.K. The meter and operation were found to be O.K. The petitioner filed an appeal before the Deputy General Manager and a copy to that effect was sent to the Managing Director, which is equivalent to the post of Chief General Manager, with a specific plea that

without opening C.T. Chamber it is impossible to conclude that the internal devices were manipulated by the petitioner to his advantage to steal the electricity. The petitioner has placed reliance upon circular dated 3.5.1998 wherein it was categorically instructed that without there being any clinching evidence regarding tampering of seals, false assessment case should not be booked against the consumers. It was further brought to the notice of the appellate authority that on the same day half an hour before the inspection all the seals were found in perfect condition by the meter reading party then how within half an hour the seals can be tampered which clearly appears to be factually incorrect. An enquiry by the Deputy General Manager (Commercial) was set up and the meter was tested by a test team and it was transpired that at serial No. 5 of the observation that the CT ratio was found in order. The testing was done by the same officials who conducted raid on 30.11.2004. As the C.T. Chamber was now opened there was mention of numbers on the seals. Since the numbers were checked and found OK, as such it can not be presumed that there was any discrepancy with regard to the registration of electrical current by the transformer meter. No device was found inside C.T. Chamber and neither it was concluded that petitioner had manipulated the internal device to his advantage. The seals of C.T. Chamber of front side was found to be correct and the CT ratio were checked and found OK. Further the petitioner submitted a representation before the Deputy General Manager mentioning therein that test team vide its report dated 6.4.2005 did not find any device or manipulation in the meter and CT ratio was found in order. Therefore, it can not be said that there was any theft of electricity and thus the assessment deserves to be withdrawn.

6. The appeal filed by the petitioner was rejected on the ground that as the same has been submitted before the General Manager and since the General Manager is having no jurisdiction to hear the appeal u/s 135 of the Electricity Act, therefore, his appeal is being rejected and petitioner was directed to deposit further 2/3rd amount.

7. Learned Counsel for the petitioners submitted that the circular dated 3.5.1998 clearly says that only on the basis that the seal is opened it can not amount or cannot be established on that basis that there is a theft of electricity unless and until sub seals placed in the meter is tested in the laboratory by the Executive Engineer (Meters and Tests) and it has to be certified that it has been tampered. Admittedly no laboratory testing has been done as such it cannot be established by any means that there was any theft of electricity by the petitioner. The petitioner has placed reliance upon Clause 2.2(av) which defines regarding theft of electricity. The same is being quoted below:

(av) "Theft" means abstraction of electricity either through bypassing the meter by some arrangement or tampering with the meter to cause it to record less energy than actually passing through it or through illegal tapping of the supply from the Licensee's network.

Similarly the petitioner has submitted that according to the Electricity Act, in

view of Section 135(1), which provides that whoever dishonestly tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or meter which interferes with accurate or proper registration, calibration for metering of electricity current or otherwise results in a manner whereby electricity is stolen or wasted so as to abstract or consume or [use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

8. Further learned Counsel for the petitioners submits that by mere saying that seals are tampered it cannot be a sufficient proof to punish or to level a responsibility upon the consumer regarding theft of electricity. More so in view of the fact that subsequent testing of the meter dated 6.4.2005 clearly establishes that no device was found and CT ratio was checked and found to be in order. It is impossible to infer without opening C.T. Chamber that any internal device of CT has been manipulated to the advantage of consumer. There is no finding in the test report dated 6.4.2005 that petitioner has manipulated the internal device of CT to his advantage. Further there is no finding recored by any authority in the checking report or in the impugned order that petitioner was found to be dishonestly abstracting energy or by virtue of tampered seals the meter was found recording less or no consumption or something has been manipulated in the meter/CT which restricted the consumption of electricity and due to aforesaid act the petitioner was being benefited in consumption. In absence of any such finding recorded by any of the authorities it cannot be inferred that it is a case of theft of electricity. In view of the aforesaid fact, learned Counsel for the petitioners submits that petitioner is entitled to the refund of the amount deposited by the petitioner with interest.

9. Learned Counsel for the petitioner has also placed reliance upon a judgment reported in 2007 (1) SCC 705 (Srinivasa Rice Mills and Ors. v. ESI Corporation). Reliance has been placed upon para 19 of the judgment. The same is being reproduced below:

19. What would be a jurisdictional fact has recently been stated by this Court in Arun Kumar v. Union of India in the following terms: (SCC para 74)

...A "jurisdictional fact" is a fact which must exist before a court, tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or nonexistence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses.

It is further stated: (SCC para 84)

...it is clear that existence of "jurisdictional fact" is sine qua non for the exercise

of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of "jurisdictional fact", it can decide the "fact in issue" or "adjudicatory fact". A wrong decision on "fact in issue" or on "adjudicatory fact" would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present.

10. Taking support of the aforesaid judgment learned Counsel for the petitioner submits that in the present case it was implicit upon the authorities to confer jurisdiction upon themselves regarding the jurisdiction or fact that petitioner's meter was recording less consumption and once the authorities would have concluded that meter was recording less consumption that would have been a jurisdictional fact. In that circumstances the assessment could have jurisdictional fact. In that circumstances the assessment could have been proceeded against him.

11. Further reliance has been placed upon a judgment reported in Raghbir Singh and Others Vs. State of Haryana, . Reliance has been placed upon paragraphs 8 and 10 of the judgment. The same is being reproduced below:

8. The question as to whether jurisdictional fact existed for issuance of the said notice, the order passed by the respondent was in question in the said writ petition.

10. The said principle has been followed by this Court in V.C., Banaras Hindu University v. Shrikant, stating:(SCC p.60, paras 48-49)

48. The Vice-Chancellor appears to have made up his mind to impose the punishment of dismissal on the respondent herein. A post-decisional hearing given by the High Court was illusory in this case.

49. In K.I. Shephard v. Union of India this Court held: (SCC p. 449, para 16)

It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose.

(See also Shekhar Ghosh v. Union of India and Rajesh Kumar v. D.C.I.T.)

12. Further reliance has been placed upon a judgment of this Court in writ petition No. 15498 of 2008 Abdul Gani and Anr. v. State of U.P. and Ors. In the said case it has been held that if it has not been established beyond doubt on the basis of relevant record that seal was tampered and only mentioning in the report that seals are tampered will not be a sufficient cause to impose assessment upon the petitioner. This Court has directed refund of the amount. Further reliance has been placed upon a Division Bench judgment of this Court in writ petition No. 21073 of 2008 Ashok Kumar and Ors. v. State of U.P. and Ors. Reliance has been placed in para 58 of the Judgment. Relying upon the aforesaid

judgment learned Counsel for the petitioner submits that there are two stages of the opportunity which is given to a consumer. The first one is a stage of finding a person guilty and later one is the stage of determining the extent of monetary liability for compensating the electricity department for loss on account of theft of electricity. This Court has laid down a law that a jurisdictional fact is a sign qua non for assessing a consumer. In the present case this jurisdictional fact that petitioner was dishonestly abstracting energy by using of alleged tampered seal is missing. Further report dated 6.4.2005 also does not find the petitioner to be guilty. In such a situation learned Counsel for the petitioner submits that mandamus may be issued to the respondents to refund the amount assessed against the petitioner and the proceedings against the petitioner be dropped.

13. On the other hand, Sri H.P. Dubey learned Counsel for the respondent corporation, has filed a counter affidavit and has submitted that on 30.11.2004 a checking was conducted in the premises of the petitioner and it was found that seals of CT chamber were tampered on which the meter No. SECURE UPE59649 has been printed. The said meter was installed on 20.7.2004 and sealing certificate was issued to this effect in presence of the representative of the petitioner and an endorsement to that effect was done but subsequently it was found upon checking that seals of CT chamber had been tampered by which the meter was being operated by some device. On the basis of the checking report dated 30.11.2004 the Executive Engineer Testing Agra has submitted a comment in his report dated 25.6.2005 by which the consumption of electrical energy in an unauthorised manner has been described. As such assessment against the petitioner was raised and as there is a requirement that before filing an appeal 1/3rd amount of the total assessment has to be deposited, the petitioner has "deposited the said amount and appeal filed by the petitioner has been | considered and decided. The appeal filed by the petitioner has been rejected on the ground that appeal u/s 135 of the Electricity Act has to be filed before the competent court of law.

14. I have heard learned Counsel for the petitioners and learned Counsel for the respondents and have perused the record. From the perusal of various checking report and other documents it appears that admittedly CT chamber was not opened and a report to that effect has been submitted regarding theft of electricity against the petitioner. It is also to be noted from the record that on the same day about half an hour before the officers of the corporation has taken the reading and there is no report to this effect regarding tampering of seal or anything then immediately within half an hour, tampering of seal has been done, is not clear from the record, neither from the report submitted by the respondents. It is also to be noted from the record that the report dated 6.4.2005 does not give any advice that there was any manipulation in the meter and a report to that effect has been given that CT ratio was found to be in order. In such situation, the contention of the learned Counsel for the petitioners to this effect that in view of circular dated 3.5.1998 that unless and until seals are tested in a laboratory by the Executive Engineer and a certificate to that effect is

not issued regarding tampering of meter by mentioning the same it cannot be inferred that any consumer is involved in theft of electricity. This Court in the judgment in writ petition of Ashok Kumar (supra) in para 58 has recorded a clear finding regarding two stages to this effect that before arriving at the conclusion of unauthorised use of electricity and before making final assessment are distinct. Unless and until the first stage is determined regarding finding consumer guilty the second stage will never come. Further it is to be noted from the order passed by the respondent that order has been passed in a very cryptic manner without assigning any reason. Initially the petitioners challenged the order dated 27.9.2005 by which [the appeal filed by the petitioner has been rejected on the ground that appeal u/s 135 of the Electricity Act was not maintainable before the General Manager, Agra Region, Agra. Subsequently by order dated 28.8.2005 petitioner was directed to pay the said amount and the General Manager has directed the authority to take steps accordingly. The same has been challenged by the petitioner by means of an amendment application which has been allowed and the amendment has been incorporated by the petitioner.

15. After perusal of both the orders it appears that appeal of the petitioner has not been decided on merits. It has been decided on the ground that it is not maintainable. Therefore, in my opinion it will be appropriate that the petitioner should be given an opportunity before the appellate court and the respondent corporation is directed to decide the appeal of the petitioner on merits.

16. In view of aforesaid facts, considering the facts and circumstances of the present case, the present writ petition is allowed and the orders dated 27.9.2005 (Annexure No. 10 to the writ petition) and order dated 28.8.2005 (Annexure 13-A to the writ petition) are quashed and matter is remanded back to the appellate authority to decide the appeal filed by the petitioner in accordance with law taking into consideration the finding recorded above as well as in the judgment relied upon by the petitioner and the same will be decided on merits after affording full opportunity to petitioners according to law by a reasoned order, if possible, within a period of six months from the date of presentation of certified copy of this order.

No order as to costs.