(2015) 04 JH CK 0061

In the Jharkhand High Court

Case No : Writ Petition (C) No. 3420 of 2014 & Writ Petition (C) No. 5168 of 2014

Jharkhand Urja Vikas Nigam Ltd. APPELLANT

Vs

Sheo Shakti Cement Industries and Others RESPONDENT

Date of Decision : 21-04-2015

Acts Referred:

Constitution of India, 1950 — Article 136
Electricity Act, 2003 — Section 126, 126(2), 126(5), 127, 127(4)
Penal Code, 1860 (IPC) — Section 379

Citation : (2015) 04 JH CK 0061

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Ajit Kumar and Saket Upadhyay, for the Appellant; A.R. Choudhary, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

S. Chandrashekhar, J.—Challenging order dated 11.07.2008 and order dated 17.12.2013 in Appeal No. 45/2012-13, the petitioner-Jharkhand Jharkhand Urja Vikas Nigam Ltd. has preferred this writ petition.

2. It is stated that the premises of the respondent No. 1 was inspected on 03.06.2008 when it was found that a number of polycarbonate seals associated with secondary terminals were duplicate and secondary terminal cover of CTPT, CT terminals were found shorted by copper wire. The meter box was opened and observed that the CTPT meter was tampered and energy theft was committed. A written complaint was sent to the Muffasil P.S. Hazaribagh on 03.06.2008 and a case was registered on 04.06.2008. On the same day order of provisional assessment was served by the Electrical Superintending Engineer, Hazaribag whereby, in terms of Section 126 of the Electricity Act, 2003 penalty for unauthorized use of electricity was assessed at 73,92,000/-. The respondent No. 1 challenged the order of provisional assessment dated 04.06.2008 and the final

assessment order was passed on 11.07.2008. Aggrieved, the respondent No. 1 approached this Court in W.P.(C) No. 5226 of 2012. The writ petition was permitted to be withdrawn with liberty to the petitioner/respondent No. 1 to approach the Appellate Authority under Section 127 of the Electricity Act, 2003. The Appellate Authority vide order dated 17.12.2013 in Appeal No. 45/2012-13 quashed the order in so far as, the penal bill raised against the respondent No. 1 is concerned. It was further ordered that the excess amount paid by the respondent No. 1 to the petitioner-Nigam would be refunded to the respondent No. 1.

3. Heard the learned counsel for the parties and perused the documents on record.

4. The learned counsel for the petitioner submits that the final assessment order dated 11.07.2008 itself records that a criminal case was lodged against the Director of the respondent-company for theft of energy at its unit and therefore, the Assessing Authority had no jurisdiction to make provisional assessment and/ or final assessment under Section 126 of the Electricity Act. It is further submitted that a perusal of the appellate order dated 17.12.2013 would disclose that without adverting to the facts of the case, the Appellate Authority has recorded a finding that the allegation of theft of electricity is not proved which cannot sustain scrutiny in law. It is further submitted that in view of the registration of a criminal case against the Director of the company, civil liability would be determined by the Special Court however, in terms of third proviso to Section 135(1A) of the Electricity Act, the petitioner-Nigam is entitled to recover the amount of loss, provisionally.

5. As against the above, Mrs. A.R. Choudhary, the learned counsel for the respondent No. 1 submits that the company is not made an accused and a criminal case was instituted only against the Director of the respondent No. 1-company and therefore, in view of judgment in Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., AIR 2012 SC 2795 : (2012) 2 BC 638 : (2012) 108 CLA 480 : (2012) 172 CompCas 76 : (2012) 2 CompLJ 433 : (2012) CriLJ 2525 : (2012) 5 CTC 101 : (2012) 2 JCC 113 : (2012) 2 RCR(Criminal) 854 : (2012) 4 SCALE 644 : (2012) 5 SCC 661 : (2012) 113 SCL 564 : (2012) AIRSCW 2693 : (2012) 3 Supreme 416 , the entire criminal proceeding should fail. It is submitted that if the contention of the petitioner-Nigam is accepted, the order of provisional assessment as well as the final assessment order would be rendered without jurisdiction and in consequence thereof, the respondent No. 1 is entitled to refund of the amount paid to the petitioner-Nigam. It is further submitted that a complaint was made to the police on 03.06.2008 however, a First Information Report was registered only on 04.06.2008 at 10.30 p.m. in the night whereas, the order of provisional assessment has been made on 04.06.2008 and thus, the Assessing Authority has rightly made order of provisional assessment under Section 126 of the Electricity Act, 2003.

6. Before adverting to the rival contentions raised by the parties, relevant

provisions of the Electricity Act, 2003 needs to be noticed. The Electricity Act, 2003 is a special enactment, is an admitted position. Besides being an Act to consolidate the laws relating to generation, transmission, distribution and trading and use of electricity and for taking measures conducive to development of electricity industry, constitution of Central Electricity Authority, Regulatory Commissions and for establishment of Appellate Tribunal and various other matters connected therewith or incidental thereto, there are several special features of the Act which make the Electricity Act, 2003 a very special Act. The Act itself provides for functions, duties and rights of the licensee or generating company as well as the consumers. Section 43 castes a duty on every distribution licensee to supply electricity to the owner or occupier of any premises within one month after receipt of the application, failing which the distribution licensee has been made liable to pay penalty. Section 45 gives power to the distribution licensee to charge prices for supply of electricity in accordance with tariffs from time to time and in terms of conditions of the licence. Section 46 provides that the State Commission by regulation, may authorise a distribution licensee to charge any expense reasonably incurred in providing any electric line or electric plant used for the purpose of supplying electricity. Similarly, Section 47 gives power to a distribution licensee to require a person to furnish reasonable security, as may be determined by regulations. In the Act, vast power has been given to the distribution licensee to refuse to give supply of electricity and to discontinue supply of electricity. A distribution licensee may provide additional terms and conditions for supply of electricity to a consumer. The Electricity Act, 2003 has another special feature engrafted in the Act itself. The Special Court constituted for speedy trial of offences referred to in Sections 135 to 140 and Section 150 of the Act has been conferred power to determine civil liability against a consumer in terms of money for theft of energy besides, power and jurisdiction to try the offences mentioned in Section 153. Section 154 empowers the Special Court, notwithstanding anything contained in the Code of Criminal Procedure, 1973, to try the offence mentioned in Section 153. Generally, the procedure followed is of a summary trial however, if the Special Court finds that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court may recall the witnesses and rehear the case in the manner provided under the Code of Criminal Procedure for the trial of such offences. The Special Court has the power conferred upon it to tender pardon to a person who makes a full and thorough disclosure of the circumstances relating to the offences. Section 154(5) provides that the civil liability shall be recovered as if it were a decree of civil court. The Special Court has been conferred upon powers of the Court of Sessions and it has power to review its own order or judgment passed under Section 154 of the Act. Thus, the case of theft of electricity has to be dealt with in an entirely different manner contrary to the cases of unauthorised use of electricity. This distinction is apparent in as much as, the cases of unauthorised use of electricity as covered under section 126 finds place in Chapter XII which deals "investigation and enforcement" whereas, the theft of electricity under Section 135 is in a different

Chapter, Part XIV of the Act which deals with "offences and penalties". The provision under Section 126 and Section 135 are two different and distinct provisions operating in independent fields and have to be dealt with in different manner, is no longer in dispute.

7. Section 126(2) provides that in cases of unauthorized use of electricity, the order of provisional assessment would be made and after affording a reasonable opportunity of hearing to the consumer/person in occupation or possession or in charge of place of premises, final order of assessment would be made within 30 days from the date of service of provisional assessment order. Section 126(5) provides the manner in which the assessment shall be made. Against the final order under Section 126, the aggrieved person has a remedy of appeal. In contradistinction to Section 126, in Section 135 under Part XIV, there is no provision for appeal in cases of theft. Third proviso to Section 135(1A) provides that the loss suffered by the licensee or supplier would be assessed in accordance with the provisions of this Act and on payment of assessed amount or electricity charges, the supply line of electricity shall be restored.

8. Now adverting to the facts of the case, it is not in dispute that premises of the respondent-company was inspected on 03.06.2008. The inspection report dated 03.06.2008 records that secondary terminals were duplicate and the terminals of CTPT, CT were shortened by copper-wire which amounts to tampering with metering system. A First Information Report for offence under Section 379 I.P.C. read with Sections 126, 135, 138 of the Electricity Act, 2003 was lodged on 04.06.2008 against the Director of the respondent-company namely, Raj Kumar Singhania. The Electric Superintending Inspector, Electric Supply Circle, Hazaribagh served a provisional bill of Rs. 73,92,000/- which was objected by the respondent-company by filing a representation on 30.06.2008. The Electrical Superintending Engineer calculated the punitive bill and directed the respondent-company to pay Rs. 28,58,736/-. The respondent-company approached this Court in W.P.(C) No. 5226 of 2012 challenging assessment order dated 11.07.2008 and for refund of the assessed amount. Vide order dated 21.01.2013, the respondent-company was permitted to withdraw the writ petition with permission to file appeal under Section 127 of the Electricity Act, within thirty days. The Appellate Authority without adverting to the facts of the case and the plea raised by the respondent-company allowed Appeal No. 47/2012-13 holding that the allegation of theft of electricity is not "proved true". Order dated 11.07.2008 of the Electrical Superintending Engineer records registration of the criminal case and also records that, "theft of electricity was going on by tampering CTPT unit". Thus, when the alleged final assessment order was passed on 11.07.2008, registration of the criminal case was within the knowledge of the Assessing Officer. Mere mention of the provision of law that is, Section 126 would not clothe the assessing officer with jurisdiction which otherwise he does not possess. The learned counsel for the respondents has contended that the petitioner-Jharkhand Urja Vikas Nigam Limited has not challenged the final assessment order dated 11.07.2008 and therefore, it is

precluded from challenging the same before this Court. I find no substance in the contention raised on behalf of the respondent-company. The plea of nullity can be raised at any stage. However, in view of inordinate delay in challenging order dated 11.07.2008, I am not inclined to entertain the challenge to the said order. The grievance of the Jharkhand Urja Vikas Nigam Limited is to the reduction of amount of loss to the Nigam. As noticed above, in cases of theft the Special Court has been given power and jurisdiction to assess the civil liability, finally. In the proceeding before the Special Court the consumer would have an opportunity to object to the order of assessment which shall be considered by the Special Court. And, if the amount paid by the consumer is less than the amount determined by the Special Court, the consumer would have to pay the difference in amount paid and amount assessed and thus, the grievance of the petitioner would stand redressed.

9. The appellate order dated 17.12.2013 records that there is an allegation of tampering of seal and that the appellant-company indulged in theft of electricity still, the Appellate Authority has recorded a finding that the allegation of theft of electricity is not proved and it has quashed final bill dated 11.07.2008. A further direction has been issued for refund of the amount deposited by the appellant-company. By order dated 21.01.2013 passed in W.P.(C) No. 5226 of 2012, this Court permitted the company to file appeal under Section 127. The writ petition was withdrawn by the company. The learned counsel for the respondent-company submits that, order dated 21.01.2013 records that if the appeal is filed within thirty days it shall not be dismissed on the ground of limitation or other technical grounds and thus, the petitioner-Jharkhand Urja Vikas Nigam Limited cannot take the plea of jurisdiction. A question of jurisdiction goes to the root of the matter and an order passed by a Court without jurisdiction is a nullity. I find that challenge to order dated 17.12.2013 in Appeal No. 47/2012-2013 by the petitioner-Jharkhand Urja Vikas Nigam Limited is substantial and the issue of jurisdiction should have been addressed to by the Appellate Authority. The contention raised on behalf of the respondents that in view of decision of the Hon''ble Supreme Court in Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd., AIR 2012 SC 2795 : (2012) 2 BC 638 : (2012) 108 CLA 480 : (2012) 172 CompCas 76 : (2012) 2 CompLJ 433 : (2012) CriLJ 2525 : (2012) 5 CTC 101 : (2012) 2 JCC 113 : (2012) 2 RCR(Criminal) 854 : (2012) 4 SCALE 644 : (2012) 5 SCC 661 : (2012) 113 SCL 564 : (2012) AIRSCW 2693 : (2012) 3 Supreme 416 , the prosecution must fail because the company has not been arrayed as an accused, is liable to be rejected. In the present proceeding prosecution of the Director of the respondent-company is not an issue. Whether the prosecution would finally fail or not, is a question which shall be decided by the criminal court or in a proceeding taken by the respondent-company before this Court.

10. The learned counsel for the petitioner contends that order dated 17.12.2013 in Appeal No. 47 of 2012-13 is a cryptic order which discloses non-application of mind by the Appellate Authority. In my opinion, the Appellate Authority while dealing with a statutory appeal under Section 127 of the Act is under a duty to

advert to the facts of the case and after noticing the materials brought on record, to record its own findings. Section 127(4) provides that the order of the Appellate Authority shall be final. The provisions of the Electricity Act, 2003 have overriding effect is noticed from Section 174. It is further provided under Section 175 that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. Section 127(4) indicates that a finality has been attached to the order passed by the Appellate Authority and therefore, the Appellate Authority is under a duty to examine every aspect of the matter including, the question of jurisdiction, even though it is not raised specifically by the opposite party. Recording of reason is a facet of the principles of natural justice. In Woolcombers of India Ltd. Vs. Woolcombers Workers Union and Another, AIR 1973 SC 2758 : (1973) LabIC 1613 : (1974) 1 LLJ 138 : (1974) 3 SCC 318 : (1974) 1 SCR 504 , the Hon''ble Supreme Court has observed as under:

5. "...........The giving of reasons in support of their conclusions by judicial and quasi-judicial authorities when exercising initial jurisdiction is essential for various reasons. First, it is calculated to prevent unconscious unfairness or arbitrariness in reaching the conclusions. The very search for reasons will put the authority on the alert and minimise the chances of unconscious infiltration of personal bias or unfairness in the conclusion. The authority will adduce reasons which will be regarded as fair and legitimate by a reasonable man and will discard irrelevant or extraneous considerations. Second, it is a well-known principle that justice should not only be done but should also appear to be done. Unreasoned conclusions may be just but they may not appear to be just to those who read them. Reasoned conclusions, on the other hand, will have also the appearance of justice. Third, it should be remembered that an appeal generally lies from the decisions of judicial and quasi-judicial authorities to this Court by special leave granted under Article 136. A judgment which does not disclose the reasons, will be of little assistance to the Court. The Court will have to wade through the entire record and find for itself whether the decision in appeal is right or wrong. In many cases this investment of time and industry will be saved if reasons are given in support of the conclusions. So it is necessary to emphasise that judicial and quasi-judicial authorities should always give the reasons in support of their conclusions".

11. The learned counsel for the respondent-company has pleaded that no criminal case was pending when the respondent-company approached this Court in W.P.(C) No. 5226 of 2012 or at the time when the appeal was filed under Section 127 of the Act. Per contra, it has been submitted on behalf of the petitioner that Final Form was submitted on 26.11.2009 in the criminal case and it was accepted by the Court on 05.07.2010. Thereafter, a protest petition was filed on 05.10.2013 which was registered as Complaint Case No. 2108 of 2013 on 28.10.2013, in which the criminal court has issued summons to the accused. In order dated 17.12.2013 the Appellate Authority has recorded a finding that the allegation of theft of electricity is "not proved". What was the material

brought before the Appellate Authority on the basis of which the above finding has been recorded, does not appear from the impugned order dated 17.12.2013 except that a report was produced by the appellant. The appellate order is a non-speaking order which requires interference by this Court. The reliance placed by the learned counsel for the respondent No. 1 in W.P.(C) No. 3986 of 2009 is misconceived in as much as, in the said case this Court had directed refund of excess amount whereas, in the present case there is no such direction by this Court. Moreover, in W.P.(C) No. 3986 of 2009 it is recorded that Section 154 of the Electricity Act, 2003 gives power to the Special Court to assess the civil liability. Since the appeal was preferred by the company in pursuance of liberty granted by this Court, I am of the opinion that the Appellate Authority is required to pass an order which shall reflect every aspect of the matter including, the question of jurisdiction. In the result, the writ petition is allowed to the extent that appellate order dated 17.12.2013 is set-aside. Appeal No. 47 of 2012-13 is restored to its original file. The appellate Authority is directed to decide the appeal, in accordance with law.

