
(2016) 02 PAT CK 0028

In the Patna High Court

Case No : Letters Patent Appeal No. 429 of 2014 in Civil Writ Jurisdiction Case No. 3385 of 2013

Lumbini Beverages Pvt. Ltd.

APPELLANT

Vs

The Bihar State Power Holding Company Ltd. and Others

RESPONDENT

Date of Decision : 18-02-2016

Acts Referred:

Electricity Act, 1910 — Section 26(6), Section 39, Section 44
Penal Code, 1860 (IPC) — Section 379

Citation : (2016) 02 PAT CK 0028

Hon'ble Judges : Navaniti Prasad Singh and Nilu Agrawal, JJ.

Bench : Division Bench

Advocate : Suraj Samdarshi, Advocate, for the Appellant; Anand Kumar Ojha and Ashok Kumar Karu, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—1. Appellant of this intra-court appeal, under Clause 10 of the Letters Patent of the Patna High Court, is a Company incorporated under the Companies Act, 1956 and was the unsuccessful writ petitioner. The appeal has been filed being aggrieved by the judgment and order dated 11.02.2014, passed by the learned Single Judge of this Court dismissing the writ petition being C.W.J.C. No. 3385 of 2013, by which the learned Single Judge refused to interfere with the order dated 29.08.2012, passed by the Chairman (now Chairman-cum-Managing Director) of the Bihar State Power Holding Company Ltd. For the sake of brevity we will be referring to the appellant as the consumer and the Bihar State Power Holding Company as the supplier.

2. By the impugned order dated 29.08.2012 the C.M.D. of the supplier held the consumer liable to be dealt under Clause 16.9 of the 1993 tariff as framed by the erstwhile Bihar State Electricity Board, which inter alia, deals with cases of theft of electricity. Having thus held, he affirmed the assessment as was made as far back as in 2001 of about Rs. 28 lakhs in respect of a period of 39 days, which

the supplier had themselves kept in abeyance.

3. We may now note the facts leading to the controversy. The consumer is a high tension consumer for manufacturing aerated drinks, and has an Electronic Trivector Meter manufactured and supplied by Duke Arnics, Hyderabad. The meter was installed by the supplier themselves. It has several seals including the outer body seal. The meter reading in case of such a high tension consumer is always done in the presence of Executive Engineer of the supply Company apart from other junior engineers. It is done on monthly basis. While it is done, a report is always drawn up as to the condition of various seals which includes plastic seals and paper seals affixed to the meter. On 23rd of January, 2001 meter reading-cum-inspection was done and everything was found in order i.e. neither the paper seal nor the plastic seal was found damaged in any manner. Even in previous months, it is not in dispute, that all things were found in order.

4. On 01.03.2001, a team of two meter readers came and alleged at the time of meter reading, the plastic seal and two numbers paper seals on the meter box were found broken, lying on the floor. They drew up a report and sent a written report to the police station Hajipur reporting that the paper seal and the seal of the meter cover was found broken. On the same day accompanied by Executive Magistrate four constables came and the team of engineers of the supplier disconnected the electric supply to the petitioner Company on the ground of alleged theft. On 03.03.2001, pursuant to orders having been obtained from the Court of Chief Judicial Magistrate, Hajipur, the Investigating Officer along with the engineers of the supply Company came to appellant's premises and after cutting the supply wires and the distribution wires, took away the entire metering unit. Later, on 30.03.2001, a request was made by the Investigating Officer to get the meter tested at the National Physical Laboratory, New Delhi (NPL) which permission was granted by the Court, as it was an alleged case of theft which could only be ascertained by expert testing. In the meantime, by the same letter, dated 30.03.2001, the consumer was served with a bill based on alleged theft of Rs. 28,73,088/-. Petitioner was also informed that the restoration of supply would be based upon the report of the NPL and in case it is found by NPL, that it is a case of theft, then the consumer would be first required to pay the aforesaid amount as determined. The meter, pursuant to the order of the Chief Judicial Magistrate, Vaishali at Hajipur, was taken to NPL by the Investigating Officer, accompanied by three engineers of the supply Company and a representative of the consumer. A detailed test report was then generated by NPL of various parameters as were required by the supply Company. All that was done on 13.04.2001 in presence of the consumer, the supplier and the Investigating Officer. The report having been drawn up, the Investigating Officer, then, concluded the investigation, based upon the report of NPL filing charge-sheet only for obstruction of public servant and charge of Sections 39 and 44 of the Electricity Act, 1910 and Section 379 of the Indian Penal Code in relation to theft of electricity were deleted, as the National Physical Laboratory did not find it to be a case of theft of electricity as no such interference could be drawn. The Chief

Judicial Magistrate on 16.04.2002 accepted this report and it has attained finality, and the case only proceeded for those minor allegations with regard to obstruction of public servant.

5. As noticed earlier in the bill that was raised by letter No. 954 dated 30.03.2001, an amount of Rs. 28,73,088/- was shown as punitive bill for theft with endorsement kept in abeyance because of court case. Virtually nothing happened thereafter. There being no positive finding of theft by the NPL, the electric connection of the consumer was reconnected in the meanwhile. This reconnection was prior to the report by the NPL. There was regular billing thereafter. On 15.11.2011, all of a sudden, the supply Company woke up, even though each and every bill issued from 2001 onwards, contained the amount as kept in abeyance, for deletion of which several representations were filed by the consumer. Now they enforced the payment of this amount of Rs. 28,73,088/- along with a delayed payment surcharge of over Rs. 71 lakhs. It may also be pertinent to note here that how the amount of Rs. 28,73,088/- was arrived was not even disclosed to the consumer for all these 10 years though apparently it was for a period of 39 days only. Being faced with disconnection because of this demand and of payment of Rs. 28,73,088/- along with over Rs. 71 lakhs as delayed payment surcharge the consumer moved this Court in C.W.J.C. No. 3090 of 2012.

6. In C.W.J.C. No. 3090 of 2012, the consumer challenged not only the validity of the punitive bill but also the levy of the enormous delayed payment surcharge. Several contentions were raised to impugn the punitive bill. Apparently, they, inter alia, were; there being positive finding of the NPL with regard to no theft of electricity, there was no occasion to invoke Clause 16.9 of the tariff merely because one of the many seals was found broken. It was urged that in respect of the meter itself the manufacturer had indicated that CT reversal could be reflected because of various reasons like phase imbalances, load imbalances etc. and that could be if they are up to one hour. It was also urged that even if Clause 16.9 had to be invoked the billing period could not be six months, inasmuch as, the CT reversal and its periods were clearly specified and quantified in the report of NPL itself and the total period in the six months for CT reversal came to 167 hours 32 minutes only, and, this period being ascertained and quantified, even if CT reversal as shown in the reading for the sake of argument is taken to be theft, the punitive billing could in view of the provisions of Clause 16.9 of the tariff be only for those many hours and not for either 39 days or the period of six months. It was also apparently urged that if there was no allegation even of meter tampering or interference prior to 01.03.2001, then, how is it that CT reversal on one occasion of over 13 hours continuously is shown for which period there is no allegation of theft or interference with the meter or metering device. This would only go to show that CT reversals are for reasons other than interference with the metering device. It was also urged that though the inspection was conducted on 01.03.2001, the NPL report was dated 13.04.2001. The acceptance of charge-sheet deleting charges of theft by the Court was dated

16.04.2002 and the original punitive bill was of 30.03.2001. It was all along kept in abeyance and in spite of the aforesaid, never sought to be enforced at any time prior to 15.11.2011, which also showed that the authorities were aware that it was not a case of theft but then suddenly after a decade this changed without change in any other fundamental reason. It seems, considering the aforesaid and noticing these arguments C.W.J.C. No. 3090 of 2012 was allowed. Learned Single Judge while allowing the writ petition by order dated 25.06.2012 clearly held that imposition of delayed payment surcharge in the facts was wholly unwarranted, therefore, the delayed payment surcharge of over Rs. 71 lakhs was ordered to be deleted in toto. So far as the punitive demand of Rs. 28,73,088/- is concerned, the bill was set aside and the matter was remanded to the Chairman of erstwhile Bihar State Electricity Board (as it then existed) for a fresh decision.

7. It may be noted here that in those writ proceedings NPL was made a party, and they did appear, but chose not to file any affidavit and apparently did not take any clear stand, however, as noted above, the matter was remanded for fresh consideration before the Chairman of the erstwhile Bihar State Electricity Board.

8. Now upon remand the Chairman without granting any hearing to the consumer passed an order on 29.08.2012. This time the Chairman merely holding that the CT reversal establishes case of theft, upheld the punitive bill of Rs. 28,73,088/-. Here, it became apparent as to what was the basis of the calculation. Clause 16.9 of the tariff provides that in case of theft how the consumption has to be calculated at the punitive rates. It, inter alia, provides that for the period of theft, if not ascertainable, six months, or, if ascertainable, for the period ascertained, assuming continuous power supplied for 24 hours, at the load factor for the unit consumption, is to be calculated and billed at thrice the normal rate. What was done was that as the last billing was done on 23.01.2001 and the next was done on 1st of March, the period in between being 39 days, was taken to be the period of theft. They had not taken the period of CT reversal as precisely provided by NPL. In the meantime, the consumer was directed to deposit 30% of the punitive bill of about Rs. 8.40 lakhs by an interim order dated 07.03.2012 of this Court in the writ proceedings. The consumer being aggrieved again, on two counts i.e. in such technical matters with so many pleas, it was a fit case in which the Chairman ought to have granted opportunity of personal hearing and that not having been done the order was in violation of the principles of natural justice. Mere consideration of a written representation without any interaction or opportunity to explain, was denial of natural justice. Then, even assuming it to be a case of theft, the period having been specified in regard to CT reversal by NPL itself, the calculations have to be limited to those periods alone within 39 days, and if that was done, the period would be only a few hours and not 39 continuous days. The consumer then filed the present writ petition from which this appeal arises being C.W.J.C. No. 3385 of 2013. In this writ petition the consumer got mixed relief or partial relief. So far as the contention that personal hearing was required to be given, the learned Single

Judge by his judgment dated 11.02.2014 negated the claim. The learned Single Judge took the view that in the earlier writ proceedings the only direction that was issued to the Chairman was to reconsider the matter. There was no direction by this Court to grant opportunity of hearing to the petitioner. Court further held that the petitioner did not also specifically ask for a personal hearing in the matter. What we find more curious is that learned Single Judge held that Clause 16.9 of the tariff where punitive billing has to be done for theft cases does not expressly provide for hearing and as such the Chairman chose not to grant any personal hearing to the consumer. The Chairman could not be faulted on that score. The effect of this finding by the learned Single Judge was that the finding of theft became established and final. The learned Single Judge then noticing that so far as calculation is concerned, it may not have been correctly done in terms of Clause 16.9, remanded the matter back, this time to CMD of the supply Company (which has now come into existence). The consumer being aggrieved by this order as a whole has filed this Letters Patent Appeal and while this Letters Patent Appeal was taken up the matter of assessment was taken up by CMD who was informed that the Letters Patent Appeal being pending he should await the decision of the Court because if the Court is to hold that there is no theft then there could be no assessment. The Court in appeal could clarify the period of theft, if any, hence, the exercise by CMD would be futile. But the CMD being fully aware of the Letters Patent Appeal where the supply Company had already appeared, did not stay. What followed was not only rejection of all pleas of the consumer but enhancement of the punitive bill from mere Rs. 28,73,088/- to Rs. 1,33,62,000/-. The reasoned order for this amount was passed on 15/18.04.2014. Left with no option the consumer-petitioner filed another writ petition being C.W.J.C. No. 9849 of 2014, which is pending, challenging the aforesaid order of punitive bill and the punitive bill wherein by order dated 10.07.2014 the learned Single Judge dealing with that writ petition directed the consumer to deposit a further sum of Rs. 20 lakhs.

9. When this Letters Patent Appeal was taken up and this fact was brought to the notice of this Court, we have summoned the records of those writ proceedings pending before the learned Single Judge for the reason that if we set aside the order of the learned Single Judge, as passed in C.W.J.C. No. 3385 of 2013 those writ proceedings which are challenging the order passed consequent to the remand order passed in the said writ petition would also become infructuous. In our view, in this Letters Patent Appeal both the questions are open to the consumer : (i) with regard to theft and (ii) with regard to computation, because that was the controversy before the learned Single Judge at the first instance as also the second instance.

10. Having considered the matter, in our view the matter requires reconsideration at the level of the supply Company on both the aspects i.e. whether is it a case of theft or not, for mere broken seal which was found lying on the ground there itself, could lead to the inference of theft, or, whether mere CT reversal as recorded from time to time for duration of one minute to a

singular case of 13 hours could by itself establish theft and that too in absence of any positive finding by the NPL, requires to be considered. The authorities all along were themselves in doubt. Knowing fully well, they have not chosen for the last one and a half decades to challenge the order of the Chief Judicial Magistrate or the charge-sheet that was submitted excluding the charge of theft. These are important issues which are to be decided. Then, even if it is held to be a case of theft, Clause 16.9 of the tariff itself does not give a right to assess punitive charges for six months period. It is only when the period of theft is unascertainable that six months period is to be taken. The charges as has been noticed earlier themselves took the period only 39 days because in January, 2001 there had been an inspection and no theft was detected. Everything was in order. Therefore, they had themselves taken the period from 23rd of January to the date of inspection on 1st March. That itself is a question to be considered because even in that period NPL has quantified to the minute, when CT reversals were there. What the CMD has now done is, ignoring the period as ascertained by NPL, merely observing that CT reversal being there, theft was established. He has calculated the liability for the entire period of six months. This clearly is not permissible under Clause 16.9 of the tariff. The period, even if it is taken to be theft, having assessed the liability, can only be for that period, as it is a punitive liability.

11. We are of the considered opinion that when we are dealing with a case under Clause 16.9 which deals with punitive liability in case of theft, it is elementary that it has serious civil consequences on the part of the consumer. It is too late in the day to suggest that in such matters, and more so in such technical matters, no hearing is to be provided, The learned Single Judge was clearly in error in holding that as Clause 16.9 does not provide for any hearing, no hearing is required to be given. We are also surprised that the learned Single Judge has gone to the extent that Clause 16.9 does not provide for a notice, and, therefore, no notice was required to be given and before punitive bills are raised no hearing is also required. We cannot subscribe to such a view especially in view of the judgment of the Apex Court in the case of Transmission Corporation of A.P. Ltd. and others v. M/s. Sri Krishna Rice Mill, since reported in , (2006) 3 SCC 74 wherein the Apex Court dealing with such situation has clearly held that grant of reasonable opportunity of hearing has to be there. We may also refer to the judgment of the Apex Court in the case of S.L. Kapoor v. Jagmohan, since reported in , AIR 1981 SC 136 wherein, it has been clearly noted that whenever a person is to be visited by civil consequences, he has to be heard.

12. We may notice one additional fact before we close. Having received the report of the National Physical Laboratory the consumer moved the Electrical Inspector under Section 26(6) of the Electricity Act, 1910, in respect of the correctness or otherwise of the meter. He sought an opinion from the Electrical Inspector, which has been brought on record in the present appeal by way of supplementary affidavit, whether the report of NPL discloses any case of theft or inaccuracy in the meter. The Electrical Inspector is a statutory authority, and, he

clearly opined that the report of NPL does not disclose any theft and as such he could not quantify the energy consumed as a consequence of theft.

13. In view of the aforesaid, we are of the view that the order of the learned Single Judge cannot be sustained. It is set aside. The writ petition being C.W.J.C. No. 3385 of 2013 has to be allowed and the matter has to be remanded to the CMD for a fresh decision in the matter, both in regard to the allegation of theft, period of theft and the quantification of punitive bill, pursuant to any such finding. All bills in relation to this incident would stand quashed, accordingly. Consequently, C.W.J.C. No. 9849 of 2014 would be rendered infructuous. We would expect the parties to cooperate in hearing before the Chairman-cum-Managing Director of the Supply Company, who would decide the same within a period of two months.