
(2010) 04 MP CK 0089

In the Madhya Pradesh High Court

Case No : Writ Petition No. 8349 of 2009

Manoharlal Sahni

APPELLANT

Vs

M.P. Poorva Kshetra Vidyut Vitran Co. Ltd. and others

RESPONDENT

Date of Decision : 21-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173
Evidence Act, 1872 — Section 94

Citation : (2010) 2 MPLJ 575

Hon'ble Judges : Sanjay Yadav, J

Bench : Single Bench

Advocate : Hemant Shrivastava, for the Appellant; M.L. Jaiswal with Manoj Kushwaha, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Yadav, J.

On 17-7-2008, the Vigilance Team of respondent M. P. Poorva Kshetra Vidyut Vitran.Co. Ltd. (referred as Supply Co.) carried out an inspection of the premises situated at 500/1 Napier Town, at 15.30.

Panchnama, prepared, on the spot, besides recording the sanctioned load of 2.79 K.W found electric gadgets worth 15.724 KW (15724 watt). Mainly the appliance used for the domestic purpose like Tubelight, monoblock pump, CFL, refrigerator, fan, inverter, water purifier, mixi, oven, bulb, Geyser, small tube light, Television, Iron, Computer, A.C 1.5 and a washing machine was found in the premises.

The Panchnama, however, did not record any broken seal of the meter. Column No. 8 of the Panchnama which pertained to the status of the meter at the time of inspection was kept blank, indicating thereby that, the seal on the meter was intact. The meter was sealed for internal testing in the Laboratory and a new meter was installed.

On 18-8-2008, i.e., nearly after a month the petitioner was informed that the

internal testing of the meter would be done on 19-8-2008. Before internal testing the authority conducting the test recorded on external observation in column No. 8 that, meter bodyseal were found broken Pertinent it is at this juncture to note that, when the meter was taken into custody on 17-7-2008 the seals were found intact; whereas, after a period of one month the meter body seals were found broken and there being no explanation by the Company as to the manner in which the meter was handled externally during the period of one month when it remained in their custody. Be it noted that the testing was at the instance of the supply company after one month.

Be that as it may. On internal testing ultrasonic welding in the meter were found broken. The internal visual observation recorded :

On 19-8-2008, a letter addressed to Additional Superintending Engineer by the son of the petitioner indicating therein that in case some tampering is found in the meter the consumer is ready to deposit the entire amount. It was further requested that the supply of electricity may be continued.

Subsequently on 22-8-2008, a provisional assessment was served on the petitioner calling upon the petitioner to pay an amount of Rs. 71,790/- in lieu of unauthorized use of electricity. The petitioner raised the objection against the demand as per provisional assessment. The petitioner was, however, informed vide letter dated 19-9-2009 that if an amount as per assessment dated 22-8-2008 is not deposited within 24 hours, the electricity would be disconnected. It was observed in the letter dated 19-9-2008 that the petitioner has given an undertaking as on 19-8-2008.

Thereafter on 22-9-2008 the petitioner was served with a notice calling upon him to deposit Rs. 49,790/- and a compounding amount of Rs. 22,000/-. Thus, a total sum of Rs. 71,790/- as was asked vide provisional assessment dated 22-8-2008 was required- to be deposited vide notice dated 22-9-2008 failing which it was observed that an action u/s 135/138 of the Act of 2003 would be taken. The petitioner raising the protest deposited the amount of Rs. 71,790 on 23-9-2008. An appeal u/s 127 was preferred on 21-10-2008 by the petitioner; whereby he sought the quashment of provisional assessment order dated 22-8-2008.

The Appellate Authority vide impugned order dated 27-7-2009 declined to hear the appeal as not maintainable. It is this order which is being challenged.

The appellate order in its entirety reads thus:

Assailing the order it is contended by the learned counsel for the petitioner that the authority concerned was not justified in assuming that the entire action taken by the respondents in exercise of their power u/s 126 was speckless and strictly in accordance with the provisions. It is urged that the authority misconstrued the letter dated 19-9-2008 as an acknowledgment of accepting the guilt. It is urged that the Appellate Authority has failed to appreciate the entire circumstances

whereunder the petitioner was just under pressure and the undertaking was not voluntary. It is urged that being statutory Appellate Authority it was incumbent upon the said authority to have taken into consideration the entire facts on record such as that when the meter was seized on the date of inspection the seal of the body was intact and it was only when it had remained in custody of the supply company for about a month that the seal was found tampered. It is urged that since there was no explanation regarding this, the Appellate Authority was not justified in not entering into the merit.

The respondents on their turn justify the action and the order passed by the Appellate Authority. It is contended since the meter which was seized on 17-7-2008 on its being tested in laboratory was found attached with variable resistance and there being an undertaking given by the petitioner that if on testing it is found that there is tampering of the meter, the petitioner would be liable to pay the entire dues outstanding. It is contended that keeping in view the admission and the reciprocative acknowledgment by the petitioner, the authorities concerned instead of lodging complaint under sections 135 and 138 of the Act of 2003, called upon the petitioner to deposit the amount of Rs. 71,790/- inclusive of penalty vide assessment order dated 22-8-2008. It is further contended that on inspection excess load was found unauthorizedly being drawn, the respondents were, therefore, well within their right to recover the amount. It is urged that the petition being devoid of substance is sans merit and deserves to be dismissed.

Having extensively heard the learned counsel for the parties, the main issue which crops up for determination is whether the Appellate Authority was within his right to have declined the hearing of appeal u/s 127 treating the same to be arising out of an order passed u/s 135 of the Act of 2003.

There are, however, certain ancillary issues which will have some bearing while determining the main issue. These are (i) as to what would be the effect of undertaking dated 19-8-2008 and (ii) whether in case of non-explanation by the supply company regarding the physical condition of the meter No. 1102253/Elymer seized on 17-7-2008 with its external seal found intact and on 19-8-2008 when the same was presented to the testing laboratory where on external observation the meter body seals were found damaged, any credence can be given to the results of laboratory test.

Taking the issue of admission/acknowledgment first. The admission is said to be on 19-8-2008 which was in the following terms :

15A. The law as to admission is well settled. Section 94 of Indian Evidence Act stipulates:

94. Exclusion of evidence against application of document to existing facts. - When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

In Nagubai Ammal and Others Vs. B. Shama Rao and Others, , their Lordships were pleased to observe :

An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to- be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.

In the present case, there is no question of estoppel, as the title of Dr. Nanjunda Rao arose under a purchase which was long prior to the admissions made in 1932 and in the subsequent years. It is argued for the appellants that these admissions at the least shifted the burden on to the plaintiff of proving that the proceedings were not collusive, and that as he gave no evidence worth the name that these statements were made under a mistake or for a purpose and were, in fact, not true, full effect must be given to them.

Reliance was placed on the well-known observations of Baron Parke in *Slatterie vs. Pooley*, (1840) 6 M and W 664 (669) (C) that "what a party himself admits to be true may reasonably be presumed to be so", and on the decision in 34 Ind App 27 (B), where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained.

It has been already pointed out that the tenor of the statements made by Abdul Huq, his legal representatives and the plaintiff was to suggest that the proceedings in O. S. No. 100 of 1919-20 were fraudulent and not collusive in character. Those statements would not, in our opinion, be sufficient, without more, to sustain a finding that the proceedings were collusive.

In *General Court Martial and Others Vs. Col. Aniltej Singh Dhaliwal*, it was held :

The respondent contended before the High Court that the oral evidence of PWs. 6, 21 and 24 was not admissible in view of the provisions of section 94 of the Evidence Act as the same was contrary to the proceedings of the Board. The High Court has accepted the said contention and held that section 94 of the Evidence Act barred the admissibility of the oral evidence. The High Court has also observed that the Members of the Board who had deposed that they had assigned the Board proceedings because the respondent wanted them to do so should have been proceeded against for their lapses. According to the High Court the non-consideration of the said aspect of the matter was a gross omission on the part of the Court Martial. It was further observed by the High Court that the evidence of PW 20 was omitted to be considered by the Court Martial.

None of the reasons given by the High Court is sustainable. A perusal of section 94 of the Evidence Act shows that it has no applicability whatever. The section reads thus :

Exclusion of evidence against application of document to existing facts :- When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

The section will come into play only when there is a document and the language of it has to be considered with reference to a particular factual situation. That section will apply only when the execution of the document is admitted and no vitiating circumstance has been put forward against the same. In the present case, the document in question is a proceeding of the Board. If at all, it can only be said that the said document contains an admission made by the signatories thereto that they had checked the materials and the serviceability thereof. It is well settled that an admission can be explained by the makers thereof. In *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, the Court held that an admission is not conclusive as to the truth of the matter stated therein and it is only a piece of evidence, the weight to be attached to which must depend upon the circumstances under which it is made. The Court said that it may be shown to be erroneous or untrue so long as the person to whom it was made has not acted upon it at the time when it might become conclusive by way of estoppel. The same principle has been reiterated in *K.S. Srinivasan Vs. Union of India (UOI)*, *Basant Singh Vs. Janki Singh and Others*, and *Prem Ex-servicemen Co-op. Tenant Farming Society Ltd. and Others Vs. State of Haryana and Others*,

In the case at hand the petitioner contends that the letter dated 19-8-2008 were obtained by the respondents by creating circumstances wherefrom the petitioner could not have redeemed unless the alleged undertaking was given. The respondents, however, countenances the allegation by saying the same was a voluntary act and was not under any duress on irredeemable circumstances as alleged.

Thus aforesaid aspect has to be examined on the touchstone of the given facts of present case.

Section 126 of the Act of 2003 stipulates :

Assessment. - (1) 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.

(2) The order of provisional assessment shall be served upon the person in occupation or possession or in-charge of the place or premises in such manner as may be prescribed.

(3) The person, on whom a notice has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before

the assessing officer, who may, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.

(4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount with the licensee within seven days of service of such provisional assessment order upon him:

(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).

Explanation : For the purposes of this section, -

(a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity-

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorized; or

(v) for the premises or areas other than those for which the supply of electricity was authorized.

Sub-section (1) of section 126 obligates the assessing officer to provisionally assess to the best of his judgment the electricity charges by such person or any other person benefited by such use. Thus assessment to the best of his judgment has to be after inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used. The assessing officer as per sub-section (2) of section 126 is obliged to serve the order of provisional assessment, who has a right to raise objection and if still aggrieved a right to appeal u/s 127.

In the case at hand after the inspection on 17-7-2008, admittedly the provisional assessment order is passed on 22-8-2008, as is evident from Annexure P/7. The last paragraph of this order clearly indicates it to be a provisional assessment

order. Whereas, the so-called admission is dated 19-8-2008. If the admission was treated to be an admission then where was the necessity to have a provisional assessment order? There is no explanation forthcoming from the respondents, though a detail return is filed by them. This aspect thus lend support to the contention of the petitioner that he was put to an irredeemable circumstances and unless the letter dated 19-8-2008 was given the electricity supply could not have been restored. Thus, the letter dated 19-8-2008 cannot be treated as an admission in unequivocal term and the respondents were not justified in treating the same as an admission without considering the explanation tendered.

The next issue is as to whether in absence of explanation regarding the physical status of the meter seized by the respondents on 17-7-2008 and kept in their custody for about month till it was sent on 19-8-2008 for testing in the laboratory whereon external observation the meter body was found tampered; which was contrary to the fact as they existed on 17-7-2008, can be taken to be just and proper.

The respondents have not denied the facts as they exist in the Panchnama, Annexure P/2, prepared on spot on 17-7-2008 in presence of the petitioner and the member of the inspection team. The said Panchnama nowhere records the tampering of meter body seal, meter/test terminal block/meter terminal seal or the seal on metering equipment/CT-PT unit. The meter was admittedly in the custody of the respondent Supply company for a period of about a month. On 19-8-2008 when the Supply company placed the meter for its testing in laboratory on 19-8-2008, on external observation, the meter body seals were found broken. Since the meter was in the custody of the Supply Company they owe an explanation as to the manner in which the said meter was handled; however, no such explanation has been tendered in the return, nor during the course of hearing. This leads to a reasonable suspicion about the fairness of the supply company in dealing with the matter. Since the cloud of suspicion hovers over the entire procedure, the Appellate Authority who has been conferred with the salutary duty u/s 127 of the Act of 2003 to discharge itself as a quasi-judicial authority was not justified in dealing with the matter in the manner which it did vide impugned order. Being empowered with quasi-judicial powers, the Appellate Authority is to remind himself that it is disposing itself as an adjudicator and not a prosecutor while dealing with appeal, because his verdict has a far reaching consequences. It has to see that the justice is not only done, but seems to have been done, a principia which is sine-qua-non of a fair trial.

Now coming to the main issue as to whether the Appellate Authority was justified in its approach in rejecting the appeal u/s 127 of the Act 2003, treating it to be against an order u/s 135.

Section 135 of the Act 2003 stipulates :

Theft of electricity. - (1) Whoever, dishonestly, -

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or supplier, as the case may be; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or, allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or

(d) uses electricity through a tampered meter; or

(e) uses electricity for the purpose other than for which the usage of electricity was authorized,

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:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use -

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that in the event of second and subsequent conviction of a person where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use exceeds 10 kilowatt, such person shall also be debarred from getting any supply of electricity for a period which shall not be less than three months but may extend to two years and shall also be debarred from getting supply of electricity for that period from any other source or generating station;

Provided also that if it is provided that any artificial means or means not authorized by the Board or licensee or supplier, as the case may be, exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(1A) Without prejudice to the provisions of this Act, the licensee or supplier, as the case may be, may, upon detection of such theft of electricity, immediately disconnect the supply of electricity:

Provided that only such officer of the licensee or supplier, as authorized for the purpose by the Appropriate Commission or any other officer of the licensee or supplier, as the case may be, of the rank higher than the rank so authorized shall disconnect the supply line of electricity:

Provided further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hours from the time of such disconnect:

Provided also that the licensee or supplier, as the case may be, on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, shall, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to this clause restore the supply line of electricity within forty-eight hours of such deposit or payment;

(2) Any officer of the licensee or supplier as the case may be, authorized in this behalf by the State Government may -

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity has been, or is being, used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which has been or is being, used for unauthorized use of electricity;

(c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4) The provisions of the Code of Criminal Procedure, 1973, (2 of 1974) relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act.

In the case at hand admittedly there is no proceedings u/s 135, because section

151 of the Act of 2003 provides for :

Cognizance of offences. - No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate government or Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose:

Provided that the Court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed u/s 173 of the Code of Criminal Procedure, 1973;

Provided further that a special Court constituted u/s 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial.

In the case at hand no such action as contemplated u/s 151 shown to have been resorted for. Therefore, the Appellate Authority who rejected the appeal on the ground that the same is against the order u/s 135 is apparently addressing to wrong facts.

Indisputably, the appeal which is brought on record vide memo dated 29-3-2010 is against the provisional assessment order dated 22-8-2008 as the relief therein sought for was

(i) to declare by appropriate order or direction entire proceedings culminating in issuance of the impugned order of provisional assessment Annexure A/4, dated 22-8-2008 to be void and illegal.

(ii) to quash the impugned order of provisional Assessment Annexure A/4, on account of the same being contrary to law and based upon concocted allegations,

(iii) to direct the Respondents to refund the sum of Rs. 71,790=00, which has been extracted from the appellant by exercising coercive means and by taking recourse to arm twisting tactics.

(iv) to award suitable compensation to the appellant for the humiliation and loss of face suffered by the appellant on account of illegal highhanded and arbitrary conduct of the respondents.

(v) Any other relief's that this Hon'ble Appellate Authority deems fit and proper in the facts and circumstances of the case to the appellant.

The Appellate Authority was thus not justified in rejecting the appeal as not maintainable.

The upshot of above analysis is that the impugned order dated 27-7-2009 being not tenable in the eyes of law is hereby quashed. The Appellate Authority is hereby directed to decide the appeal on merit within a period of three months from the date of communication of this order and shall take into consideration observations made hereabove.

Since the matter is remitted for rehearing on merit and the total amount of Rs. 71,790 has already been deposited the Appellate Authority shall not insist upon depositing half of the assessed amount. Neither the petitioner would presently be entitled for refund; however, in case the petitioner succeeds he will be entitled for the refund along with interest @ 6% per annum from the date of such entitlement till its realization.

In the result the petition is allowed to the extent above. However, no costs.