
(2014) 04 AHC CK 0156

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 12545 of 2009

Mayur Sheetgrah Pvt. Ltd.

APPELLANT

Vs

U.P. Power Corporation Ltd.

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 126, 126(3), 135
Income Tax Act, 1961 — Section 34

Citation : (2014) 10 ADJ 465

Hon'ble Judges : Ranjana Pandya, J; Ashok Bhushan, J

Bench : Division Bench

Advocate : Mool Behari Saxena, N.K. Chaturvedi and Pramod Kumar Jain,
Advocate for the Appellant; Rajesh Tripathi, Amrit Lal Yadav and H.P. Dubey,
Advocate for the Respondent

Judgement

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1. Heard Shri Pramod Kumar Jain, learned Senior Counsel appearing for the petitioner and Shri Baleshwar Chaturvedi, Advocate appearing for the respondents.

By this writ petition, the petitioner has prayed for quashing of the order dated 24th February, 2009, which was a theft assessment order. The petitioner has also prayed for a mandamus commanding the respondents to connect the electric supply of the petitioner.

Counter and rejoinder affidavits have been exchanged between the parties and with consent of the counsel for the parties, the writ petition is being finally decided.

The Division Bench while hearing writ petition on 4th March, 2009 has passed the following interim order:

"Heard counsel for the petitioner and Sri H.P. Dube who has put in appearance on

behalf of respondent No. 1 to 4.

Three weeks" time is allowed to file counter affidavit. Rejoinder affidavit, if any, may be filed two weeks thereafter.

List thereafter.

Until further orders of this Court the effect and operation of the order dated 24.2.2009 passed by the respondent regarding the provisional assessment shall remain stayed provided the petitioner deposits a sum of Rs. 50,000/- before the respondent No. 4. The respondents are directed to restore the supply power within 24 hours from the date of deposit of the aforesaid amount."

2. The Corporation filed a Special Leave to Appeal (Civil) No. 11301 of 2009 against the interim order before the Apex Court. The Apex Court has disposed of the aforesaid Special Leave to Appeal vide its order dated 13.5.2009 permitting the petitioner i.e. Dakshinanchal Vidhut Vitaran Nigam limited to file an application for vacation/modification of the (impugned order) interim order. It appears that Corporation filed an application for vacating interim order on 2nd of July, 2009. The case was listed on several occasions thereafter, but on the request made either by counsel for the petitioner or counsel for the Corporation, the case was adjourned from time to time.

Learned counsel for the parties agreed that the petition may be finally decided.

3. The brief facts of the case as emerges from the pleadings of the parties are:

The petitioner, who is a cold storage, has a sanctioned load from respondent No. 2. A checking of the petitioner's premises was held on 23rd November, 2008 and 27th November, 2008. After checking, first information report was lodged under Section 135 of the Electricity Act against the Director. A provisional assessment was made against the petitioner on 1.12.2008 making assessment of Rs. 47,19,834/-. Thereafter a revised assessment was issued on 23rd January, 2009, by which assessment for Rs. 28,19,340/- was made. The petitioner thereafter filed a writ petition before this Court being Writ Petition No. 6130 of 2009, which was disposed of by the Division Bench of this Court on 4th February, 2009 by the following order:

"The petitioner is aggrieved by the provisional assessment order dated 23.1.2009. Sri Mool Behari Saxena, learned counsel for the petitioner has vehemently urged before the Court that the provisions contained in U.P. Electricity Supply Code, 2005 for making provisional assessment has not been followed by the authorities and the impugned assessment is in teeth of clauses 8.1 and 8.2 of the aforesaid code and, therefore, it is unsustainable in law. He has further urged that respondent No. 3 before whom the objection has been filed, is acting in prejudicial manner and he has no hope of justice from respondent No. 3, therefore, the objection filed by him be decided by some other competent authority having same kind of jurisdiction.

Sri H.P. Dube learned counsel appearing for the respondents has submitted that pursuant to assessment order the petitioner has already filed an objection before the authority concerned under Section 126(3) of the Electricity Act, 2003. Hence, this writ petition is not maintainable at this stage.

We have heard learned counsel for the parties.

Considering the facts and circumstances of the case, it is provided that the petitioner's objection which has been filed before respondent No. 3, be decided by any other competent officer except respondent No. 3, for which necessary nomination be made by respondent No. 2 and the entire record be transmitted to the authority nominated by respondent No. 2 and such authority shall decide the same within a period of three weeks from the date of production of a certified copy of this order before him. It is also provided that till the objection of the petitioner is decided, no coercive action shall be taken against the petitioner.

With the aforesaid directions, this writ petition is finally disposed of."

4. After the order of this Court, the petitioner filed a detailed objections as well as additional objections before the Executive Engineer. The petitioner specifically stated in the objection that MRI report was never supplied to the petitioner. After that now the assessment order has been passed on 24th February, 2009 making assessment of Rs. 26,86,316/-. The assessment order is under challenge in this writ petition.

5. Learned counsel for the petitioner, challenging the assessment order, contended that the order has been passed by the Executive Engineer without complying with the directions issued by the Division Bench of this Court on 4th February, 2009. He further submits that as the MRI report had never been supplied to the petitioner, the order is vitiated and has to be treated in violation of Principle of Natural Justice. He submits that the MRI report was submitted alongwith the impugned order as has been averred in the order itself. It is further submitted that without supplying the MRI report, the respondent could not have passed the assessment order. It is lastly contended that the same Executive Engineer has passed the order, whereas this Court directed that decision be taken by another Executive Engineer.

6. Shri Baleshwar Chaturvedi, learned counsel for the respondents submits that the petitioner has a statutory remedy of filing appeal against the order, hence the petition be not entertained.

7. Learned counsel for the petitioner in his rejoinder affidavit, refuting the submission of counsel for the respondents that statutory remedy being available to the petitioner, this writ petition be thrown out on the ground of statutory remedy submitted that this Court had earlier entertained the writ petition and issued directions and if the directions have not been complied with, the petitioner is fully entitled to invoke the writ jurisdiction. He further submitted that admittedly the MRI report having not been served on the petitioner, the order is

in violation of Principle of Natural Justice, hence the respondents cannot insist the petitioner to avail the remedy. He has relied upon the judgment of this Court in Ashok Kumar v. State of U.P., 2008 (3) ESC 1969 (All).

8. We have considered the submissions of learned counsel for the parties and perused the record. One of the submission, which has been pressed by the petitioner is that MRI report was not supplied to the petitioner. He submits that MRI report has been supplied as per the impugned order dated 24th February, 2009 alongwith the impugned order dated 24.2.2009.

9. Shri Baleshwar Chaturvedi, counsel for the respondent has referred to paragraph 6 of the supplementary counter affidavit. In para 6 of the supplementary counter affidavit following averments have been made by the respondents:

"That it is stated that although the Meter Reading Instruction Report was supplied to the petitioner alongwith the assessment order, yet the petitioner disputed this fact and made a statement that MRI report has not been supplied to the petitioner. The matter was considered by the respondent No. 4 under the earlier order of this Hon"ble Court dated 4.2.2009 passed in Civil Misc. Writ Petition No. 6130 of 2009 and vide his order dated 24.2.2009, the respondent No. 4 instructed the deponent to supply the MRI report again. Thus the MRI report down loaded on 27.11.2008 was supplied to the petitioner alongwith the impugned order of assessment dated 24.2.2009."

10. The procedure for theft assessment has been laid down in para 8.1(a) of Electricity Supply Code, 2005. Para 8.1(a)(vii), which is relevant as quoted below:

"In case of prima facie evidence of theft by tampering of meter or metering equipment in case of LT consumers, the meter shall be removed, properly sealed and tested in accordance with procedure laid down in clause 5.6. The supply shall be restored through a new meter of metering equipment of appropriate rating. In case of HT connection, the supply may be disconnected if there is a prima facie evidence of theft as recorded by photographs/MRI reports for TVM meters, or where removal of evidence by consumer is apprehended. The report shall be prepared at site as per sub-clause (iii) above."

11. Thus, there is a statutory requirement that MRI report be supplied, where there is evidence of tampering. From para 6 of the supplementary counter affidavit as noted above, it is clear that MRI report was supplied alongwith impugned order dated 24th February, 2009. The impugned order further states that Executive Engineer may supply the MRI report to the consumer. The order further states that para 8.2(i) of the Electricity Supply Code has not been complied with. Hence, Executive Engineer may now take further proceedings. Although, these two averments were made in the order, but the assessment has already been finalized for amount of Rs. 26,86,316/- and the Executive Engineer directed for supply of MRI report. We failed to see how he proceeded to finalize the assessment by the same order and, thus the order is clearly in violation of

Principles of Natural Justice.

12. Although, Shri Baleshwar Chaturvedi, counsel for the respondents submits that there is a statutory remedy under Section 126 of the Act of filing appeal, but it is well established that in case of violation of principle of natural justice, the petitioner cannot be compelled to avail statutory remedy. The Apex Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , has laid down the following paragraph:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed v. Municipal Board, Kairana, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son v. Income Tax Investigation Commission, which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in State of U.P. v. Mohd. Noon, as under:

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhvani and was affirmed and followed in the following words:

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court."

19. Another Constitution Bench decision in Calcutta Discount Co. Ltd. v. ITO, Companies Distt., laid down:

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act."

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

13. Learned counsel for the petitioner further submitted that this Court has directed on 4th of February, 2009 to finalize the assessment by any Competent Officer except respondent No. 3, who had issued suspension notice. Learned counsel for the respondent submits that the Officer, who was then holding the Office of Executive Engineer, has now changed and new officer has been posted in his place, who will finalize the assessment.

14. It is not necessary to enter into the other issues raised by the petitioner ends of justice be served in setting aside the order dated 24th February, 2009, annexure-1 to the writ petition and remitting the matter to the Executive

Engineer, respondent No. 3 for passing a fresh order. The petitioner may file his objections against the MRI report dated 27th November, 2008 within two weeks and respondent No. 3 after considering the reply already submitted as well as the objections, which are to be filed in pursuance of this order, shall finalise the assessment order. Both the parties have informed that electricity supply has already been stored.

The order dated 24th February, 2009 is thus, set aside. Respondent No. 3 may proceed to pass a fresh order regarding assessment.

With the aforesaid observations/directions, the writ petition is finally disposed of.