

(2012) 07 AHC CK 0021
In the Allahabad High Court
Case No : Misc. Single No. 6088 of 2009

M.D. Pakshimanachal Vidut Vitran Nigam Ltd.	APPELLANT
Vs	
Ombudsman, 3rd Floor, Needa Building, Vibhuti Khand, Gomti Nagar, Lucknow	RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity Act, 2003 — Section 126, 127, 34(1), 42(6)

Citation : (2012) 8 ADJ 262

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Manoj Kumar Dwivedi, for the Appellant; I.B. Singh, A.Z. Siddiqui and Vishal Dixit, for the Respondent

Final Decision : Allowed

Judgement

Hon'ble Sudhir Agarwal, J.—Heard learned counsel for parties and perused the record. Writ petition is directed against the order dated 30.9.2009 passed by Electricity Ombudsman (hereinafter referred to as "Ombudsman") on representation made by Consumer, respondent No. 3, against the order dated 16.12.2008 passed by Consumer Grievance Redressal Forum (hereafter referred to as "CGRF") denying refund of Rs: 14.44 lacs to respondent No. 3. The Ombudsman has set aside the order of CGRF to the extent it denies refund of Rs. 14.44 lacs to petitioner and has held that petitioner is not liable to pay any amount and the amount already paid by petitioner shall be adjusted.

2. The facts in brief giving rise to the present dispute may be narrated as under.

3. Respondent No. 3, M/S United Sprit Ltd., Meerut Cantt. Meerut is an industrial establishment running a distillery business. It had got an electric connection of 1000 KVA. In February 2004 it applied for reduction of load to 400 KVA in the existing factory and also applied for a new connection in a new unit adjacent to existing factory with electrical load of 1000 KVA. The new unit adjacent to the

factory is titled as "Skol Breweries Ltd".

4. Pakshimanchal Vidut Vitran Nigam Ltd. (hereinafter referred to as "PVVNL" or "the licensee") is the supplier of Electricity and is petitioner No. 1 while petitioner No. 2 is local official in-charge where factory of respondent No. 3 is situated.

5. On 26.4.2005 a checking was made by a team of the licensee and found supply and consumption of electricity from premises of respondent No. 3 to Skol Breweries Ltd. also. The aforesaid consumption of electricity in adjacent unit amounts to an "unauthorized use of electricity" assessable u/s 126 of Electricity Act, 2003 (hereinafter referred to as the "Act, 2003"). Thereupon petitioner No. 2 proposed an assessment of Rs. 14.44 lacs vide provisional assessment notice dated 9.5.2005 requiring the petitioner either to pay or to show-cause. Petitioner did not raise any objection and paid the amount of proposed assessment. Thereafter all of a sudden, acting upon an audit objection, another bill of provisional assessment was issued by petitioner No. 2 to respondent No. 3 for Rs. 51,54,749/-. There against the consumer i.e. the respondent No. 3 filed Writ Petition No. 5216 (M/S) of 2007. It was stated in the Writ Petition by respondent No. 3 that against the bill supplied by petitioner alongwith letter dated 3.9.2007, he (the consumer) has approached U.P. Electricity Regulatory Commission (hereinafter referred to as "UPERC") vide Reference No. 1116 of 2007 filed on 25.9.2007 but the same having not been decided, a direction be issued to UPERC to decide the same and in the meantime recovery of the aforesaid assessment be stayed.

6. The writ petition was disposed of vide order dated 5.10.2007 directing UPERC to dispose of representation of respondent No. 3 i.e. the consumer. The Court also recorded undertaking of counsel appearing for licensee i.e. the petitioners that no coercive action shall be taken till the matter is decided by UPERC.

7. Thereafter an application was filed by UPERC before this Court in Writ Petition No. 5216 (MS) of 2007 requesting for modification stating, since UPERC do not possess any power to decide a dispute between licensee and the consumer, therefore, the reference/representation made by consumer i.e. respondent No. 3 was not maintainable in law before UPERC.

8. The Court noticed provisions of U.P. Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2007 (hereinafter referred to as the "Regulations, 2007") and found that it is open to a consumer to raise his grievance before CGRF. Consequently the Court modified its judgment dated 5.10.2007 giving liberty to Consumer to approach CGRF who was directed to decide such representation.

9. It is pursuant to this order, respondent No. 3 filed a complaint before CGRF, Meerut vide its petition dated 30.1.2008. Besides challenging the assessment made by Executive Engineer (petitioner No. 2) for Rs. 51,54,749/-, he (the consumer) also challenged earlier assessment notice dated 9.5.2005 made for Rs. 14.44 lacs and odd and requested CGRF to set aside both-the assessments

and direct licensee to refund the amount already paid by the Consumer.

10. In the meantime, it appears that consumer also lay his hand to a letter dated 3.5.2009 sent by Executive Engineer to Superintending Engineer and Member/ CGRF, Meerut informing that assessment applying the provision relating to theft, of electrical energy are not applicable in the present case and it is only to create an extra pressure upon consumer and to earn certain revenue for the licensee, assessment of 14.44 lacs was made and thereafter further assessment was made for 51 lacs and odd, though it was not justified. A copy of this letter has been placed on record as Annexure 8 to writ petition.

11. CGRF, however, decided the matter by order dated 7.12.2008 setting aside assessment of 51,54,749/- but rejected the claim of consumer against assessment of Rs. 14,44,251/- which amount had already been paid by it. Aggrieved by this order, petitioner filed representation under Clause 8 of Regulations, 2007 read with Section 42(6) of Act, 2003. Respondent No. 3 also filed a representation assailing CGRF's order insofar as it had non suited the consumer against assessment made for Rs. 14.44 and odd but the said document has not been placed on record. Respondent No. 3 also filed a Misc. application registered as 28-C/09 requesting Ombudsman to direct licensee to act according to CGRF's order dated 16.12.2002 in respect to assessment of Rs. 51.54 lacs and odd and not to raise any demand in this regard.

12. The representations have been decided by Ombudsman vide order dated 30.9.2009 impugned in this writ petition, making an observation that there was no unauthorized use of electricity. It has held assessment orders illegal and has set aside the same. It has also directed the licensee to refund the amount already paid by consumer with compound interest of 16 per cent per annum.

13. Sri Manoj Kumar Dwivedi, learned counsel for petitioner submitted that assessment of unauthorized use of electricity is assessable u/s 126 of Act, 2003 read with Clause 6.8 of U.P. Electricity Supply Code, 2005 (hereinafter referred to as Code, 2005) and in this regard order of Assessing Officer who is a statutory authority notified u/s 126 of Act, 2003 is not assailable before any of the authorities constituted vide Regulation 2007. He submitted that the entire proceeding before CGRF and Ombudsman are illegal and without jurisdiction.

14. Learned counsel for respondent No. 3, on the contrary, submitted that against the orders passed by CGRF, licensee has no authority to make any representation before Ombudsman since Clause 8 of Regulation 2007 has been struck down by this Court vide judgment dated 6.1.2012 in Writ Petition No. 4237 (MS) of 2008 (Dakschinanchal Vidut Vitran Nigam Ltd. v. Vidut Lokpal Lucknow and others). He further submitted that the assessment made against consumer were apparently illegal and unjustified as is evident from letter dated 3.5.2009 written by Executive Engineer to the Superintending Engineer (copy whereof has been filed as Annexure 8 to writ petition) still the petitioners with an intention only to harass him have proceeded with the matter by challenging

order of CGRF before Ombudsman. Therefore the action of petitioners is wholly mala fide and illegal. He contended that a person who seeks equity must do equity and must come before this Court with clean hands. The petitioners have not come to this Court with clean hands, therefore, this Court may not exercise extraordinary equitable jurisdiction under Article 226 of the Constitution in this matter.

15. I have carefully considered rival submissions and perused the record as well as the relevant provisions and the judicial precedents.

16. It is evident from record that assessment proposed by Executive Engineer i.e. petitioner No. 2, whether vide provisional assessment notice dated 9.5.2005 or the later one communicated by letter dated 3.9.2007, are the assessments on the ground of "unauthorized use of electricity" and therefore are referable to Section 126 of Act, 2003. The "Assessing Officer" competent to make assessment u/s 126 of Act, 2003 is a statutory authority. His order is appealable before an authority u/s 127 of Act, 2003.

17. When the statute itself creates an adjudicatory forum as well as the appellate forum, a parallel forum by means of a subordinate legislation is not permissible. Therefore CGRF and Ombudsman constituted under Regulation, 2007 by UPERC cannot have jurisdiction to have a review of orders passed by Assessing Officer u/s 126 or the appellate order(s) u/s 127 of Act, 2003. In my view CGRF in such matters has no jurisdiction at all.

18. It is however, pointed out by learned counsel for respondent No. 3 that Consumer approached CGRF under the judgment of this Court and therefore it cannot be said that CGRF has no jurisdiction in the matter. A perusal of judgment dated 5.10.2007 as modified on 11.1.2008 shows that there was no issue raised before this Court regarding applicability of Regulations, 2007 in respect to assessment orders made by "Assessing Officer" which are referable to Section 126 of Act, 2003. The Court proceeded assuming jurisdiction with CGRF since it was not disputed or contested by the parties before it.

19. It is well-settled that a judgment cannot be read to lay down a ratio decidendi unless an issue is raised, argued and decided. When an issue is raised, addressed and considered, only then it will constitute a binding precedent. Here applicability of Regulation, 2007 in respect to assessment order referable to Section 126 of Act, 2003 has not at all been considered by this Court in its judgment dated 5.10.2007. Therefore it cannot be said that question of jurisdiction has been decided by this Court conferring jurisdiction on CGRF. It is also not disputed that the parties or the Court cannot confer jurisdiction. It cannot be conferred even by consent of parties.

20. As early as in 1951 the Apex Court in *The United Commercial Bank Ltd. Vs. Their Workmen*, held:

No acquiescence or consent can give a jurisdiction to a Court of limited

jurisdiction which it does not possess.

21. In *Kiran Singh and Others Vs. Chaman Paswan and Others*, , the Court said:

A defect of jurisdiction... strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.

22. In *BENARSI SILK PALACE Vs. COMMISSIONER OF Income Tax, U.P.*, , this Court held:

Jurisdiction could be conferred only by statute and not by consent and acquiescence. Since jurisdiction is conferred upon Income Tax Officer to proceed u/s 34(1) only if he issues a notice an assessee cannot confer jurisdiction upon him by waiving the requirement of a notice because jurisdiction cannot be conferred by consent or acquiescence.

23. In *Kali Das Wadhwani and another v. Jagjiwan Das and another*, 1985 (2) ARC 533, this Court observed as under:

It is well-settled that a jurisdiction cannot be conferred on a Court by consent, acquiescence or waiver where there is none, nor can it be ousted where it is. Acquiescence, waiver or consent of the parties may be relevant in objections relating to pecuniary or territorial jurisdiction of the Court, but these factors have no relevance where the Court lacks inherent jurisdiction which strikes at the very root or authority of the Court to pass any decree and renders the decree, if passed a nullity.

24. In *Sardar Hasan Siddiqui and Others Vs. State Transport Appellate Tribunal, U.P., Lucknow and Others*, , the Division Bench of this Court observed:

A Tribunal of limited jurisdiction cannot derive jurisdiction apart from the statute. No approval or consent can confer jurisdiction upon such a tribunal. No amount of acquiescence waiver or the like can confer jurisdiction of a Tribunal is lacking, the doctrine of nullity will come into operation and any decision taken or given by such a Tribunal will be a nullity.

25. In *Karnal Improvement Trust, Karnal Vs. Parkash Wanti (Smt) (Dead) and Another*, , the Hon"ble Supreme Court observed that acquiescence does not confer jurisdiction and an erroneous interpretation equally should not be perpetuated and perpetrated defeating of legislative animation. A similar view has been taken in *U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. and others*, .

26. In *S. Sethuraman Vs. R. Venkataraman and Others*, , the Apex Court observed that if jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner. The above authority has been referred to and relied on by Apex Court recently in *Collector, Distt. Gwalior and Another Vs. Cine Exhibitors P. Ltd. and Another*, .

27. Therefore, the entire proceedings commencing from the application made by

respondent No. 3 before CGRF and subsequent orders passed by it as well as proceedings before Ombudsman culminating in impugned order all are without jurisdiction and a nullity in the eyes of law.

28. Moreover, it is also evident that petitioners have no remedy to file a representation under Clause 8 of Regulation, 2007 read with Section 42(6) of Act, 2003 before Ombudsman against the order of CGRF. This issue is squarely covered by judgment in Dakschinanchal Vidut Vitran Nigam Ltd. v. Vidut Lokpal Lucknow and others (supra).

29. In view of the above, the entire proceedings before Electricity Ombudsman and CGRF being without jurisdiction and nullity in the eyes of law are hereby quashed and set aside. It is also clarified that entire proceedings initiated by respondent No. 3 before CGRF against assessment notices dated 9.5.2005 and 3.9.2007 are wholly illegal and without jurisdiction and hence would have no legal consequences between the parties for any purpose whatsoever. The same are also hereby quashed.

30. However, this order shall not preclude respondent No. 3 to take such legal remedy as permissible in law i.e. either by filing its objection before the "Assessing Officer" as provided u/s 126 of Act, 2003 read with Electricity Supply Code 2003 or 2005, as the case may be, or if the assessment is treated to be final, an appeal u/s 127 of Act, 2003.

31. It is also provided that in case the aforesaid remedy is availed by respondent No. 3 within one month from today, the competent authority shall decide the matter on merits and shall not reject the same only on the ground of limitation.

32. Writ petition stands allowed in the manner as above. No order as to costs.