

(1997) 09 CAL CK 0012
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 12422 (W) of 1997

M/s. Shiva Steel Re-Rolling Mills and Another	APPELLANT
Vs	
West Bengal State Electricity Board and Others	RESPONDENT

Date of Decision : 03-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 46, 49
Electricity Act, 1910 — Section 26(6), 39, 44

Citation : (1998) 1 CALLT 424 : (1998) 4 RCR(Civil) 32

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Mr. Ajit Panja, for the Appellant; Mr. A. Mitra and Mps. P.S. Biswas, for the Respondent

Judgement

S.B. Sinha, J

1. The petitioner in this application has prayed for issuance of a Writ of or in the nature of Mandamus directing the respondent to supply electrical connection in the factory of the petitioner No. 1 at Pakuria, Post Office Lakshanpur, P.S. Domjur, District Howrah.

2. The petitioner is admittedly a consumer of electrical energy. It is also admitted that such supply of electricity is made in terms of the provisions of the Indian Electricity Act, 1910 and the Rules framed thereunder together with the conditions of supply. Such supply is being made to the petitioner by the first respondent in terms of an agreement dated 23.4.87. According to the petitioner various inspections have been carried out wherein defects in the metering system had been found, where the first respondent had been raising bill on average basis. As regard an earlier disconnection, various proceedings were also initiated in between 19.8.92 to 5.11.92 and an order of injunction was granted by the court subject to certain conditions mentioned therein. It is also the case of the petitioner that the meter and the meter reading card were being maintained

by the first respondent. On 4.7.96 a Static Meter was installed when in then existing meter a defect had been found and corrected.

3. On 16.6.97, 17.6.97 and 23.6.97 inspections were held in the factory premises but no complaint was made to the petitioner. On 23.6.97 another meter was installed in addition to the existing one and on 27.6.97 the authorities of the first respondent together with a police force went into the factory and disconnected electrical line on the ground of theft/pilferage of electricity energy. A first information report was also lodged by the Assistant Engineer and two Darwans of first petitioner had been arrested. The petitioner received bills upto May '98, average consumption whereof was Rs. 15,000/-to Rs. 30,000/-.

4. On 3.7.97 the Meter Box, Meter Accessories, C.T. Box etc. Including the Meter Reading Card and other documents were removed from the factory premises. Since 27.6.97 the factory of the petitioner is lying closed. In the mean time a supplementary bill dated 7.7.97 had been served upon the petitioner.

5. Mr. Panja, the learned Senior Counsel appearing on behalf of the petitioner submitted that in view of a Division Bench decision of this court in State of West Bengal and Anr. v. Rupee Ice Factory & Ors. (FMAT No. 3781 of 96) disposed of on 27.6.97 the said supplementary bill must be held to have been raised illegally as the first respondent has no authority to determine the alleged damages suffered by it by way of unmetered consumption on the part of the petitioner. The learned counsel submits that in view of the aforementioned decision it must be held that making payments of such huge amount cannot be a condition precedent for restoration of supply of electrical energy. The learned counsel submits that if the meter was defective, the dispute between the parties could be referred to Chief Electrical inspector in terms of section 26(6) of the Indian Electricity Act in which proceeding also the Chief Electrical inspector could assess the amount payable by a consumer for a period of six months only. The learned counsel submits that despite the fact that various inspections had been made and meter readings had been entered into the yellow card, no allegation of theft/pilferage of electrical energy has ever been made. According to the learned counsel, therefore, in the aforementioned situation the court should direct supply of electrical energy to the petitioner forthwith.

6. An affidavit-in-opposition had been filed on behalf of the first respondent wherein the circumstances under which the First information Report was lodged under sections 39 and 44 of the Indian Electricity Act had been stated in details. It has been stated that the petitioner, prima facie, has been found guilty of tampering with the meter from the beginning and even the Static Meter had been tampered with. Certain photographs which had been taken to show as to how and in what manner pilferage of electrical energy is being made had also been demonstrated.

7. The learned counsel appearing on behalf of the respondents further has drawn my attention to sub-clause (c) of Clause 7 of general condition of supply which

reads thus :--

"Every consumer shall compensate the Board for any damage and cost of making good any damage caused to the mains, apparatus or instruments or any other property of the Board in the consumer's premises occasioned by reason of any act, neglect or default of the consumer, his servants or persons employed by him, and in addition shall pay such penalties prescribed or lawfully due to the Board for continued, unauthorised interference with the Board's property or seals."

8. It was further contended that the Division Bench in the aforementioned decision has not considered the distinction between improper use of electrical energy and theft of electrical energy.

9. An affidavit-in-reply has also been filed wherein the aforementioned allegations have been denied.

10. In view of the question involved in this application it is not necessary to enter into the disputed question of fact in great details.

11. Admittedly the terms and conditions of supply of electrical energy are governed by the provisions of the statute as also the condition of supply and the agreement entered into by and between the Parties thereto. The meter has been installed by the first respondent and in terms of the provision of section 26 of the Indian Electricity Act it is the duty of the first respondent to keep the meter in proper condition. As to what would constitute a proper function of the meter is laid down in the rules. It is also admitted that in the event any dispute arises as to whether the meter is defective or not, the same can be resolved only by the Chief Electrical inspector in terms of section 26(6) of the Indian Electricity Act. Reference in this connection may be made to *Madhya Pradesh Electricity Board and Others Vs. Smt. Basantibai*, . The Chief Electrical inspector in terms of the aforementioned provision is also entitled to assess the damages but the period therefore would be confined only to six months. The said provision is also a pointer to the fact that the supplier is expected to keep a strict vigil over its equipments including the meter installed at the consumer's premises.

12. Clause 7 of the general condition of supply, as contained in annexure "B" to the affidavit-in-opposition prohibits the consumer from interfering with the Board's installation. Clause (c) of the said provision puts an obligation upon the consumer to compensate the Board for any damage and cost of making good any damage caused to the mains, apparatus or instruments or any other property of the Board in the consumer's properties occasioned by reason of any act, neglect or default of the consumer, his servants or persons employed by him and in addition shall pay such penalties prescribed or lawfully due to the Board for continued, unauthorised interference with the Board's property or seals.

13. Clause 7 therefore ex facie does not empower the Board to assess the damages for theft of electrical energy unilaterally. Even in terms thereof, the

penalty which is sought to be imposed can be done only upon compliance of the principles of natural justice.

In the instant case no penalty has been imposed in terms of clause 7(c) but the respondent No. 1 has admittedly issued a bill for Rs.3.66,69,515/- for the entire period as would appear from the letter of Superintending Engineer as contained in annexure "G" to the affidavit-in-opposition. In that letter it has been alleged :--

"During inspection, following act of malpractice and/or theft or pilferage of energy was noticed u/s 39/44 of Indian Electricity Act, 1910 (amended 1986).

(i) You have tampered the hinges of meter compartment of metering Kiosk so that the door of that compartment can be slid up and opened the compartment keeping WBSEB seal in the door intact and camouflage during hurry.

(ii) You have tampered a few of the numbered plastic seals of WBSEB & replaced with similar looking, similar numbered duplicate seals.

(iii) You have kept the voltage terminals disconnected for long hours of night for stopping of registration of meter reading, as found from down loading of memory of the static trivector meter & the log sheet of sub-Station."

It was further alleged :

"In your installation the transformer installed appears to be of capacity 750 KVA, 11KV/400 Volt, the big motor appears 500 HP capacity, its connecting cable is probably one inch. dia copper cable, big water resistance and last of all your MOGB panel has ammeter having range 0-800 amp. and MOGB have rated current 800 amp."

The petitioner categorically denies and disputes the said delegations.

The question that arises for consideration is whether in such a situation, the consumer is placed in a helpless situation as a result whereof he must pay whatever amount is demanded of him or face disconnection of electrical energy, which does not absolve him from the said liabilities or there exists a forum where such a dispute can be resolved. Ubi jugs ibi remedium is a well known legal doctrine. If a man has been wronged, he must have a remedy. The next question which arises for consideration is whether there exists such a forum under the Indian Electricity Act, 1910.

14. The question as to whether such a power exists in the supplier or not was considered by me in Sri Hanuman Steel Rolling Mill and another Vs. C.E.S.C. Ltd., . In that decision in absence of any provision to the contrary in the condition of supply it was held that normally the principles of natural justice have to be followed. In that aforementioned case this court noticed various other decisions of this court and the Supreme Court of India including Municipal Corporation of Delhi Vs. M/s. Ajanta Iron and Steel Company (Pvt.) Ltd., .

Auckland international Ltd. v. The CESC Ltd. reported in 1992(2) Cal. LT 176, Gautam Roy v. CESC Ltd. reported in 1994(1) Cal. LT 444 and M/s. Ganges Manufacturing Co. Ltd. v West Bengal State Electricity Board reported in 1993(2) Cal. LJ 210.

15. In that case it was held that by disconnecting the electrical energy on the ground of pilferage or otherwise, the relationship between the parties does not come to an end. This court further noticed the decision of the Supreme Court in Isha Marbles Vs. Bihar State Electricity Board and Another, wherein it was observed :

"No. doubt, dishonest consumers cannot be allowed to play tyrant with the public property but inadequacy of the law can hardly be a substitute for over zealousness."

16. As regard the right of the supplier to assess unilaterally the alleged damaged suffered by it. It was held :

"The question which now arises is as to in case of such disconnection and in case any pilferage is alleged whether the respondent can unilaterally assess the alleged damages suffered by it. In my opinion it cannot do so in absence of any regulation. The quantum of damages suffered depends on facts of each case. A licensee in absence of any statute cannot make a unilateral demand purported to be on the basis of a formula which is not within its authority to adopt. It is, therefore, necessary that even in such a case principles of natural Justice are required to be complied with. However, as indicated hereinbefore the word "improper use of electrical energy" find place not only in sub-paragraph 3 of paragraph VI of the schedule appended to the Indian Electricity Act but also in section 44 thereof. According to Mr. Pal the words "improper use of electrical energy" cannot amount to a matter which comes within the purview of sections 39 and 44 Indian Electricity Act. The said submission cannot be accepted in view of the fact that Clause (d) of section 44 makes improper use of energy of a licensee a punishable offence. Thus, where the damages suffered by a licensee is required to be quantified by such improper uses of energy, evidently the Chief Electrical inspector is entitled to consider as to whether there has been an improper use of electrical energy or not in terms of sub-paragraph 3 of Paragraph-VI of the schedule appended to the Act and in all such circumstances, where charge is made that the consumer has improperly used the electrical energy, the Chief Electrical inspector will have the jurisdiction adjudicate upon the said issue. As a necessary corollary he will also have the jurisdiction to decide the quantum of losses suffered by the licensees as otherwise a finding on such improper use of electrical energy may become academic. Paragraph VI(3) of the schedule providing for an adjudicator forum should be construed liberally.

A distinction has got to be made between the power of the Chief Electrical inspector u/s 26(6) of the Indian Electricity Act and Paragraph VI(3) of the Schedule. Of course in a given case both the powers can be exercised

simultaneously.

In *Hamidullah Khan, Jabalpur Vs. The Chairman, Madhya Pradesh Electricity Board, Rampur, Jabalpur and Others*, the learned Chief Justice speaking for the Division Bench observed that clause 6[3] of the schedule is a general provision."

17. However, in the mean time the apex court in *M.P. Electricity Board, Jabalpur and others Vs. Harsh Wood Products* and another, held that where there exists a provision empowering such disconnection, the same can be taken recourse to without complying with the principles of natural justice. In that case such a provision existed in the tariff framed under sections 46 and 49 of the Electricity (supply) Act. A similar matter came up for a decision before R. Pal, J. In *Nishikanta Banik v. CESC Ltd. & Ors.* reported in 1996(2) CHN 534, but in view of the aforementioned decision of the apex court, the learned Judge did not decide the question as to whether the CESC Ltd. has the power to disconnect the electricity without notice although therein "*Shree Hanuman Steel*" (supra) was noticed. The learned Judge, however, observed :

As the act or default itself is disputed it would not be appropriate to withhold the supply of electricity to the petitioner merely on the calculations as made by CESC. Besides there is no provision in law or in the Conditions of Supply which enables CESC to withhold the connection unless payment is made as demanded by CESC, The most important distinction between this case and the *Harsh Wood Product's* case (supra) is the absence of any provision in the case before me entitling CESC to withhold the supply of electricity after disconnection on the ground of pilferage without the payment of the alleged claim on account of improper dues. In the case before the Supreme Court the power was expressly provided for."

18. Thus, for the aforementioned proposition the ratio laid down in *Shree Hanuman Steel Mill* was followed.

19. It was further observed that prior to seizure of the Meter Box or any other materials, the authority should take such precautions as has been laid down in that regard under the Code of Criminal Procedure. Distinguishing the decision of the Supreme Court in *Election Commission v. Dr. Subhramaniam Swamy* reported in 1996(3) Scale 734 the learned Judge observed :

This decision certainly does not suggest that the ipse dixit CESC is final. At the highest it is presumption which may be drawn. Is there no alternative to CESC deciding the matter unilaterally?

The supply of electricity to an industry is vital to its survival. The power of disconnection of such supply is a drastic one entailing very serious consequences. The power may be exercised only under the strictest controls with a rigid adherence to the provisions of law whereby such power is sought to be exercised"

20. In *State of West Bengal & Anr. v. Rupa ice Factory & Ors.* (FMAT No. 3781 of

1996) disposed of on 27.6.97. R. Pal. J. speaking for a Division Bench upon taking into consideration the relevant provision of condition of supply framed by the West Bengal State Electricity Board held that the Board has neither any power to assess unmetered consumption either in a case, where the meter is defective or where a theft/pilferage of electricity has taken place.

21. As regard tampering, the learned Judge although did not refer to Hanuman Steel Rolling Mill, but accepted the principles laid down therein and held "the criminal liability of a dishonest consumer is distinct from his civil liability to pay for the amount abstracted." The Division Bench clearly held that in such an event clause VI(3) of 1910 Act must be taken recourse to.

22. It will not be out of place mention that recently Chief Justice, Mahapatra speaking for the Division Bench of Allahabad High Court in Afzal Husain Vs. Uttar Pradesh State Electricity Board and others, has held that before disconnecting the electrical energy the principles of natural justice should be compiled with. It may further be noticed that yet recently in Bihar State Electricity Board, v. Parameshwar Agarwalla reported in 1997(2) PLJR 32 (SC), the apex court dismissed a special leave application questioning an order of the Division Bench of the Patna High Court wherein by reason of a notification charges were sought to be levied on the basis of 30 per cent load factor in a case where the meter has stopped functioning. The apex court also observed :--

"For the reasons aforesaid, we are constrained to dismiss the appeals, much though we would like to lend our support to the Board in its efforts to effectively deal with theft of electricity caused by manipulation of meter, which is a known devil. Despite the laudable object which the Board sought to achieve in issuing the notification, we are of the view that the same has not been done in accordance with law."

23. In this view of the matter there cannot be any doubt that the Division Bench decision being binding upon this court, the respondent cannot refuse to supply electricity again for non-payment of the supplementary bill subject of course to the condition that it has paid all the arrears of the bills but as i have noticed in Hanuman Steel Rolling Mill and Anr. (supra) and various other subsequent cases that it would not be proper for this court to exercise Us discretion without putting the consumer to certain terms.

24. Keeping in view the fact that the first respondent has assessed the damages for the last 10 years which, prima fade, appears to be unjust, this writ application is disposed of with the following directions :--

1. The respondent company shall restore the electrical energy of the petitioner on payment of a sum of Rs. 30 lacs together with the restoration charges without prejudice to the rights and contentions of the parties and subject to the result of the writ application. Such electrical connection should be made within 72 hours from the time of deposit.

2. A new meter shall be installed and the cost thereof shall be borne by the petitioner.

3. The old meter shall be kept in a sealed cover in presence of both the parties and shall be sent by the Board to the Chief Electrical inspector and the said authority is hereby requested to make an award at an early date and preferably within two months from the date of entering into reference.

4. It goes without saying that in this case the consumer shall go on paying the current charges on the basis of the consumption of the electrical energy recorded in the new meter.

5. It will be open to the respondents to take all precautionary steps for prevention of theft of electrical energy and for that purpose it would be entitled to make surprise inspection(s).

This writ application is disposed of with the aforementioned directions but in the facts and circumstances of this case there will be no order as to costs.

25. Application disposed of with directions.