
(2012) 05 AHC CK 0310

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 64725 of 2011

M/s. Venus Stone Crushing Co. and Another

APPELLANT

Vs

U.P. Power Corporation Ltd. and Others

RESPONDENT

Date of Decision : 15-05-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Electricity Act, 2003 — Section 126, 135

Uttar Pradesh Government Electrical Undertakings (dues Recovery) Act, 1958 —
Section 3

Citation : (2012) 8 ADJ 221 : AIR 2013 All 47 : (2013) 1 AWC 416

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Rakesh Kumar Shukla, for the Appellant; Rajesh Tripathi, H.P. Dubey and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

Hon"ble Sudhir Agarwal, J.—Heard Sri Rakesh Kumar Shukla, learned counsel for the petitioner and Sri H.P. Dube for the respondents. The pleadings having been exchanged, with the consent of learned counsel for the parties, I proceed to decide this writ petition finally at this stage under the Rules of the Court. The writ petition is directed against the order dated 22.9.2011 passed by respondent No. 3 as also consequential recovery proceedings pursuant to the aforesaid order.

2. The petitioner is a Stone Crushing Unit situated at Village Ram Nagar, Post Office Chirgaon, District Jhansi. It had obtained an electric connection bearing No. 1801/037231 with contracted load of 99 HP i.e. 73.85 KW. The petitioner claimed of having made a complaint of non proper functioning of the meter in the month of July 2003. The respondents authorities changed the meter on 21.8.2003 issuing a sealing certificate, (a copy whereof is Annexure 1 to the writ petition).

3. The petitioner was issued a notice dated 16.10.2003 by Executive Engineer,

E.D.D.-II, Jhansi (hereinafter referred to as "Assessing Officer") referring to the sealing certificate dated 21.8.2003 and the check meter report, and it is alleged that company's CT seals and lab seals installed on the meter were found tampered hence an assessment of theft of electrical energy is justified. Applying prescribed formula of $L \times F \times D \times H$ the Assessing Officer proposed provisional assessment of Rs. 21,56,630/-.

4. The petitioner submitted reply stating that in the sealing certificate dated 21.8.2003, concerned Junior Engineer has not mentioned anything or alleged tampering of any of the seal and there is no observation about even a suspicion of theft of electrical energy in the above. The Junior Engineer found meter burnt and therefore changed it by a new one. Copy of sealing certificate was not supplied to petitioner though signature was obtained thereon. Now at this stage without informing anything to the petitioner, proposing a huge assessment alleging theft of electrical energy is nothing but a sheer harassment and mala fide action on the part of the Assessing officer. He also pointed out that mere mention of the word "tampering of the body seal" without specifying the manner etc. of such alleged tampering is not sufficient. Further, even the proposed assessment is wholly illegal and has not cared of the relevant provisions. The supply of electricity in the area is available only for a very short period but in the proposed assessment hours of supply has been taken 17 which is totally fanciful and imaginary.

5. No further order was received by petitioner from Assessing Authority. Instead, straightway, a demand notice dated 1.12.2003 u/s 3 of U.P. Government Electrical Undertaking (Dues Recovery) Act, 1958 (hereinafter referred to as the "1958 Act") was issued for recovery of Rs. 21,56,650/- which included proposed assessment amount and notice expenses. The petitioner's electrical connection was also disconnected on 26.2.2004.

6. The petitioner then challenged demand notice dated 1.12.2003 in writ petition No. 10148 of 2004 whereupon this Court stayed recovery proceedings subject to payment of Rs. 5 lacs. The respondent No. 2 vide letter dated 24.12.2003 (sent by registered post) communicated the petitioner (though petitioner denied its receipt) that his representation/reply to the proposed assessment has been considered. Rejecting all the objections of the petitioner the Assessing Officer advised the petitioner to pay the assessed amount. The aforesaid order was actually produced before this Court in the above mentioned writ petition No. 10148 of 2004 and thereupon the Court vide order dated 3.5.2005 permitted petitioner to avail remedy of appeal observing that since petitioner had already deposited Rs. 5 lacs, he should further deposit a sum of Rs. 1,50,000/- whereupon his appeal shall be entertained and decided on merits and no further amount shall be recovered till the appeal is decided.

7. Consequently, complying with this Court's judgment dated 3.5.2005, the petitioner availed the remedy of appeal after depositing Rs. 1.5 lacs.

8. The appeal was considered by a Committee consisting of General Manager (Distribution), Deputy General Manager and Deputy Chief Accounts Officer and relying on some test report of M/s Secure Meters Ltd., a private company, it had rejected petitioner's appeal and confirmed the assessment of Rs. 21,56,630/-.

9. In Writ petition No. 56260 of 2005 the petitioner challenged the aforesaid appellate order, vide judgment dated 23.2.2010 the writ petition was allowed. The Court found that the matter has been dealt with by the respondents appellate authority in a very cryptic, casual manner and without looking to the relevant provisions at all. Section 126 of Electricity Act, 2003 (hereinafter referred to as "Act 2003") permits assessment at one and a half times of the tariff applicable but the respondents authorities have made assessment at thrice of the tariff applicable. The Court found that such assessment was directly in the teeth of the judgment of this Court in Sri Bhagwan Gupta Vs. Kanpur Electricity Supply Company Ltd. and Others, . The Court also found that various grounds raised by petitioner were not adverted to at all except of mere narration of facts of the case. Neither there is any discussion nor any critical analysis of the grounds on which legality of Assessing Authority's orders was challenged by petitioner before Appellate Authority. The Court deprecated the manner in which the Appellate Authority had functioned, and observed:

There cannot be any dispute about the fact that the Appellate Authority having been conferred the appellate powers under a statute performs judicial functions. For arriving at any conclusion it is necessary that after nothing the arguments, reasons may be given for either accepting or rejecting the same as it is only the process of thought which can make the conclusion so arrived to become a subject-matter of scrutiny by a higher forum and thus in the event of arriving at a conclusion there is no process of reasoning, no thought in respect of the matter in issue has been expressed on the arguments so advanced, it cannot be said to be an order in the eye of law.

As the order of the Appellate authority has been found to be faulty for the reasons indicated herein above this Court does not propose to go into the merits of the various submissions advanced by the learned counsel for the petitioner on the basis of which he has tried to demonstrate that the order passed by the Executive Engineer is liable to be set aside as it is the function of the Appellate Authority first to deal with the same and record reasons and finding upon which it is to be judged by this Court.

10. Allowing the writ petition vide judgment dated 23.2.2010, the appellate order was set aside. The matter was remanded for fresh decision on appeal. This Court's judgment dated 23.2.2010 was modified on 20.8.2010 permitting appeal to be decided by the newly constituted Appellate Forum vide State Government's notification dated 14.7.2006. Accordingly, impugned appellate order dated 22.9.2011 has been passed by the new Appellate Forum consisting of Commissioner, Jhansi Division and Superintending Engineer, Head Quarter. The appeal has been partly allowed and amount of assessment is reduced by

confining it to 180 days instead of 451 days and 1.5 times of normal tariff instead of three times, as was done by Assessing Authority. It has further directed to take action against petitioner u/s 135 of the Act 2003.

11. The petitioner, aggrieved by aforesaid appellate order dated 22.9.2011 as also the consequential recovery proceedings, has come to this Court by means of the present writ petition under Article 226 of the Constitution.

12. It is contended that no checking or testing proceeding of the meter, which has been relied on by respondents to saddle him with allegation of theft of electrical energy and consequential assessment, was conducted in his presence. Nothing has been stated by the representative of the Respondents Corporation alleging malpractice, irregularity or illegality or unauthorized use of electricity on the part of the petitioner. The entire exercise and the evidence relied by the respondents is non admissible having been obtained at the back of the petitioner and in flagrant violation of statutory provisions, applicable in this regard. No checking of the meter was made in accordance with procedure prescribed in statute. Reliance on the report of meter manufacturing company, which is a private Company, is thoroughly illegal and unauthorized. The direction issued by Appellate Authority for taking action u/s 135 is nothing but an attempt to further harass and victimize the petitioner for his act of showing resistance with the illegal and unauthorized assessment proceedings of the respondents. The orders impugned are wholly whimsical, unfounded, based on conjuncture and surmises.

13. The respondents have filed counter-affidavit in which basic facts stated in the writ petition have not been disputed. In fact the averments contained in paras 1 to 15 of the writ petition have admitted by stating that the same are matter of record. Thereafter the respondents have further said that assessment was made since in the Laboratory Testing report, the case of theft of electrical energy was found.

14. Pursuant to the impugned appellate order, the amount of assessment of petitioner has now reduced to Rs. 6,37,264/-. The Assessing officer has issued a revised assessment order on 12.11.2011 requiring the petitioner to pay a further sum of Rs. 4,67,730/-. It is stated that the petitioner had earlier deposited only Rs. 4,54,500/- vide receipt No. 49/006433 dated 29.3.2004 therefore, there is a balance of Rs. 1,82,764/- and thereupon interest is to be added which brings the entire outstanding dues to Rs. 4,67,730/-. In respect to the orders passed by Assessing Authority and Appellate Authority, there are general averments that the same are correct and in accordance with law and no interference is called for. No specific reply about the procedure followed while testing meter and also the competence of Secure Meter Company in regard to Meter Testing Report has been given.

15. The petitioner has filed rejoinder-affidavit reiterating what it has said in the writ petition. It has also objected to the revised assessment order stating that this shows height of perversity and arbitrariness on the part of the respondents,

inasmuch as the petitioner deposited Rs. 5 lacs on 29.3.2004 and Rs. 1,50,000/- vide receipt No. 37/027089 dated 24.5.2005 in compliance of this Court's judgment dated 3rd May, 2005 in Writ Petition No. 10148 of 2004. Both these receipts have been filed as Annexure 3 to the writ petition but ignoring deposit of Rs. 6,50,000/-, respondents have acknowledged only Rs. 4,54,500/- which is wholly illegal.

16. I have heard Sri R.K. Shukla, learned counsel for the petitioner and Sri H.P. Dubey for the respondents. Learned Standing Counsel states that since State is a formal party, therefore he adopts the defence and submissions advanced by Sri H.P. Dubey counsel appearing for respondent Nos. 1, 2 and 3.

17. The record shows that meter in dispute was installed on 20.3.2002. It was replaced on 21.8.2003, which is the date giving birth to the present dispute. The sealing certificate, which contains signature of petitioner (Annexure 1 to the writ petition), show the presence of Junior Engineer (Distribution) who has signed the said report as also that of representative of the petitioner. At item Nos. 11, 12, 13 and 14, seals conditions and position has been noticed. The Court found that numbers of seals of old meter have been mentioned and there is no observation of any infirmity with the seals. The report reads:

Old Seals Meter chamber 01869 AE(M) d2H 1.2 01870 EE 2NIT 10 paper S24 dated 20.3.2002 C.T. Chamber G.A. 01871 AE (M) d2H 1.2 G.A. 01872 EE 2NIT 10 paper I.P.O. 2-06-825287 dated 20.3.2002

18. There is a remark column which contains the following:

New seals Meter Chamber N45484JE(M) 14 CT Chamber H.45485 JE(M) 14 Paper 10920 dated 21.8.2003 T.T.B.H. 45450 JE(M)14 paper 10921 dated 21.8.2003 paper 10919 dated 21.8.2003.

I went to premises of the consumer to change the meter and stayed there till 16.15 p.m.. There being no supply, I could not change the meter.

21.8.2003. At about 10 a.m. I reached the consumer's premises. The electricity supply started at 16.30 p.m. Then I found the meter burnt. There being no time to deposit the money, I changed the meter.

(English Translation by the Court)

19. Thus in the remarks column also there is no averment showing any defect or infirmity or irregularity in the old meter or seals affixed thereon which was replaced on 21st August, 2003.

20. However, there is a separate mention of two things namely, "B phase CT Error and R Phase PT Error".

21. Thereafter a check meter report was supplied to petitioner alongwith proposed assessment bill/notice dated 16.10.2003 (Annexure 2 to the writ petition). This check meter test report has been placed on record at page 11 of

rejoinder-affidavit. Sri H.P. Dube has also supplied a photocopy of the said report for perusal of this Court which is taken on record. The comments in the said report which are said to be jointly signed by Assistant Engineer (Meter/Test) and Junior Engineer (Meter/Test) read as under:

Meter is Burnt.

Cost of meter is to be got deposited by the consumer.

Meter Body seals-(1) Company's sticker seals as well as lab seal No. B02678 found TEMPERRED.

EE. EDD-II Jhansi is required to raise an assessment and follow other departmental actions against the above fact.

22. The aforesaid test report does not show the date of testing. Both these officers have taken care of not putting any date under their signatures.

23. The petitioner contended that the alleged lab testing has been done behind his back and therefore, is of no legal consequence for the reason that a detailed procedure is prescribed in Clauses 5.17, 5.18 and 5.20 of Electricity Supply Code, 2002 (hereinafter referred to as "Code 2002") which was applicable at the relevant time when the checking and testing alleged to have been made but the same has not been observed at all and has been flouted with impunity.

24. The relevant provisions i.e. paras 5.17, 5.18 and 5.20 applicable for testing of meter at the relevant time contained in Supply Code read as under:

5.17. Testing of Meters

(a) It shall be the responsibility of the Licensee to satisfy himself regarding the accuracy of the meter before it is installed and may test them for this purpose.

(Rule 46 of 1956)

(b) Licensee shall conduct periodical inspection/testing of the meters as per the following schedule:

(i) Single phase meters Once every five years

(ii) LT 3 phase meters Once every 3 years

(iii) HT meters including MDI Yearly.

Wherever applicable, CT and PT shall also be tested alongwith meters

(c) The test results shall be maintained in accordance with Rule 57 of Indian Electricity Rules, 1956.

5.18 The Licensee shall have the right to test any meter and related apparatus if there is a reasonable doubt about the accuracy of the meter and the consumer shall provide the Licensee necessary assistance in conduct of test. However, the consumer shall be allowed to be present during the testing.

5.20 In all cases of testing of a meter in the laboratory, consumer shall be informed of the proposed date of testing at least 7 days in advance so that he may be present at the time of testing, personally or through an authorized representative. The signature of the consumer or his authorized representative, if any present, be obtained on the Test Result Sheet.

(Emphasis added)

25. A perusal of these provisions show, when the licensee shall test the meter, he is obliged to allow the consumer present during testing. For this purpose he has to inform the consumer seven days in advance about the proposed date of testing so that the consumer may present himself at the time of testing or through authorized representative. No such procedure admittedly has been followed in this case.

26. Considering *pari materia* provision introduced subsequently in para 5.6 of U.P. Electricity Supply Code, 2005 a Division Bench of this Court in *Amrawati Devi v. Purvanchal Vidyut Vitran Nigam Ltd.* and another, 2009 (1) ADJ 430, has held that procedure prescribed for testing of meter so as to enable a consumer to remain present at the time of alleged testing is mandatory and if such procedure is not followed, the test report cannot be relied on to take any action against the consumer. The aforesaid judgment has become final after dismissal of SLP vide order dated 3.8.2009 before the Apex Court in SLP (Civil)....2009, (CC 10260/2009).

27. Sri H.P. Dubey, learned counsel appearing for respondents during the course of argument could not dispute that procedure prescribed in paras 5.17, 5.18 and 5.20 of Code 2002 admittedly has not been followed. This is also evident from Executive Engineer's letter dated 24.12.2003 whereby he rejected petitioner's objections/representation against proposed assessment stating, if the petitioner wanted testing of meter in his presence, he should have informed the representative of the respondents corporation at the time when meter was removed but since no such information was given by petitioner, hence there was no reason for inviting him to remain present at the time of testing of the meter. He says that error in B Phase CT Error and R. Phase P.T. Error was already noticed in the sealing certificate that itself was sufficient. Since the consumer did not inform about his anxiety to remain present at the time of checking of the meter in lab, his absence in such test would not make any difference.

28. These observation of the respondents, unfortunately, are not only mischievous but show shallow understanding of Assessing officer who has been conferred with such a huge responsibility of power to make assessment to the tune of lacs and crores of rupees against a consumer of electricity. The stand that rule of information is applicable only when there is any doubt on the correctness of meter and then the meter is tested and not otherwise is nothing but a gross misreading and misapplication of the relevant provisions.

29. Here is a case where at the time of replacement of meter, respondent's

representative did not suspect anything wrong on the part of the petitioner. Sri Dube, during course of argument, also could not dispute that when a meter is burnt, error in CT/PT phase may also occur since there are dozens of reason for such error which may cause such error which includes technical reasons also.

30. An error by itself does not mean that there is some unauthorized act or omission on the part of consumer. It may occur for technical reasons also. No seal or metering equipment at the time of removal of meter was found tampered or otherwise defective. To suggest at a subsequent stage that meter body seals etc. are tampered is something which is wholly an ex parte observation/finding. Assuming what is being said to be correct, even this would be doubtful since possibility cannot be ruled out that it was done after removal of meter when the meter was in possession of the representative(s) of the respondents. The Court need not make any further observations in this regard and suffice it to say that in order to saddle responsibility upon petitioner, respondents are required to prove with a cogent reason and evidence that it is only he, who could and actually did the kind of irregularity which has been noticed during lab testing and it could not have been possible to be done subsequently when the meter was taken by representative(s) of the respondents.

31. The test report also does not show that Assistant Engineer of respondent Corporation himself made any checking or testing but from the impugned appellate order it is evident that all these findings etc. are founded on some report which the respondents have obtained from the Test Lab. of Meter Manufacturing Company, a private company, which obviously has a vested interest to maintain accuracy of its meter, otherwise; it may reflect upon his business. The respondents could not show to this Court any legal authority on the part of meter manufacturing company to test the meter in its lab ex parte so as to cause some legal consequences and that too in absence of the consumer or his representative. There is no provision authorising private meter manufacturing Company to submit report with a status which would be binding on the authorities of the Corporation and the consumer for the purpose of assessment.

32. Similar issue has been considered by this Court in M/s. Modern Rice Mill Vs. Madhyanchal Vidyut Vitran Nigam Limited and Another, and the Court has observed:

48....The practice of getting secure meter tested by its manufacturer has been deprecated as it amounts to making a person judge in his own cause. Secure Meters Ltd., the manufacturer of Secure Meter, is a pure and simple commercial undertaking. Its interest is to prove efficacy of its meters for augmenting its sale. This would be possible only by canvassing a system of metering which is tamper proof, pilfer proof etc. and generate confidence as much as possible. It cannot admit easily or at least cannot be expected to admit easily defect(s) in its meters, if any. Even if it finds something wrong, there is every possibility that being a private party, not accountable to any one, it may try to dispel charge on its own and make responsible someone else. It may be a good commercial

undertaking but being solely private not accountable to the consumer or the licensee, testing of a meter by such a company and that too wholly ex parte and in a self-contented manner cannot be imposed on a consumer by the Licensee. The action following the conclusion that a meter has been tampered etc. so as to record incorrect reading results in civil consequences to the consumer. The exercise, therefore, if not judicial is also not pure administrative. The procedure consistent with the principles of natural justice, therefore, would be attracted in such a case. No person can be made an Arbiter of a dispute when such person has its own interest in the matter. When there is a dispute regarding the meter whether it is correct or not, whether tampered or not, Meter Manufacturing company having its own interest in the meter, if allowed to adjudicate and that too conclusively on the question of tampering or tamper etc. that would amount to inviting a decision from a person having large commercial interest in the matter. It would hit the principle that no one shall be judge in his own cause. Even otherwise when the statute talks of an "independent testing laboratory" it does not mean that it should be a test lab of the person holding large commercial interest in the matter. Moreover, a private company's opinion cannot be given statutory status in absence of any provision to do so.

49. The Patna High Court time and again, confronted with similar situation, has deprecated test of meter by its manufacturer M/s Secure Meters Ltd. It had observed that it is likely to create a strong bias on the part of supplier/manufacturer. In para 13 of the judgment in M/s JMD Alloys Limited (supra), a Single Judge of Patna High Court observed:

13. It has also been held by this Court that sending the meter for testing to the accredited laboratory of M/ s. Secure Meters Ltd. which is the manufacturer and supplier of the said meters under guarantee to replace the defective meter to the Electricity Board, is likely to create a strong bias on the part of the supplier/manufacturer in testing the meter, even though its laboratory may be an accredited laboratory.

50. I, therefore, finds no justification in relying on the report of M/s Secure Meters Ltd. I have no hesitation in holding that in the light of discussion as above, the laboratory of M/s Secure Meters Ltd. cannot be said to be an "Independent Laboratory" under para 5.6(b)(iii) of Code 2005.

33. The respondents have founded their findings regarding allegations of theft of electricity, upon the petitioner, solely on the report of Meter Manufacturing Company which has been signed by the Assistant Engineer (Meter). Admittedly there is nothing to show that any checking was conducted by official of respondents or by any official Test Laboratory.

34. There is another technical snag. The authorities have failed to consider that alleged CT found short in MRI report on 28.5.2002 at 21.57 but on its own become normal on 17.6.2002 on 23.57, which is evident to show a technical operational error in the system. Then on 17.6.2002, there is error in R-Phase P.T.

which could not be reversed till 21.8.2003. Had there been any external operation, both the things could not have happened simultaneously. In this regard the respondents have not scrutinized the matter in appropriate detail as to how it has happened and whether happened on its own or could have happened only after some external manual reasons. Further with respect to the allegation of metering company that "Rating plate was found tampered in the meter and extra resistance of circuit soldered across CT secondary, the document show that CT itself become normal on 17.6.2002 at 23.57. How this could happen is not discussed or even explained to this Court. Meaning thereby, the findings are self contradictory, sketchy and vague.

35. The system of functioning of Secure Meter, which is a computerised electrical meter has also been considered and commented in M/s Modern Rice Mill (supra) where this Court has said:

38. The Secure Meter is admittedly a digital computerized meter functioning with the support of a Base Computer Software, specially designed by the manufacturing company for the same. Such a software cannot be controlled by an external device unless such external device is fully compatible with the specially designed software and is loaded with the supporting software for external device. Unless specially designed software is known to a stranger, no one can place anything so as to make the computerized meter to function on the command of a stranger device. Such possibility can exist with collusion of Meter Manufacturing company or any of its official knowing details of the specially designed software namely Base Computer Software.

36. Now coming to the procedure for assessment also, this Court found that procedure laid down for assessment has also not been followed in words and spirit. This Court need not to detain itself on this aspect since procedure has been discussed in detail by Division Bench in Ashok Kumar and others v. Stage of U.P. and others, 2008(6) ADJ 660 and from bare perusal of the facts stated above, it is evident that such procedure has not been followed. Sri H.P. Dubey, learned counsel for the respondent during the course of argument could not dispute that procedure as provided in the statute and has been discussed by this Court in Ashok Kumar and others (supra) has not been followed in the case in hand.

37. Since the very basis of assessment i.e. test report stands vitiated in law in view of the discussions made above, the entire assessment automatically would fall to the ground and has to disappear.

38. The writ petition is accordingly allowed. The impugned order dated 22.9.2011 (Annexure 11 to the writ petition) passed by respondent No. 3 is hereby quashed. The petitioner shall be entitled for refund of amount already paid to the respondents (pursuant to impugned assessment proceedings) alongwith interest @ 6% p.a. The petitioner shall also be entitled to cost which is quantified to Rs. 10,000.