

(2014) 08 AHC CK 0068
In the Allahabad High Court
Case No : C.M.W.P. No. 23606 of 2014

Om Ice Factory

APPELLANT

Vs

Paschimanchal Vidyut Vitran Nigam Ltd. and Others

RESPONDENT

Date of Decision : 29-08-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Electricity Act, 2003 — Section 126, 126(3), 127
Essential Commodities Act, 1955 — Section 3(3C)

Citation : (2015) 3 ALJ 56 : (2014) 6 AWC 6157

Hon'ble Judges : Vijay Lakshmi, J; Krishna Murari, J

Bench : Division Bench

Advocate : Mayank Agrawal, Advocates for the Appellant; Chandan Agrawal, Advocates for the Respondent

Judgement

Krishna Murari, J.—We have heard Sri Mayank Agrawal, learned counsel for the petitioner and Sri Chandan Agrawal for the respondents.

2. The petitioner has approached this Court seeking a writ of certiorari to quash the order/letter dated 14.5.2012 issued by the respondent No. 2 informing the petitioner that there was no infirmity in the provisional bill and to pay the outstanding arrears as well as the order dated 29.3.2014 rejecting the representation made against the provisional assessment.

3. A preliminary objection has been raised by learned counsel for the respondents regarding maintainability of this petition on the ground of availability of statutory alternative remedy to the petitioner of filing an appeal under Section 127 of the Electricity Act, 2003 (in short the "Act").

4. Learned counsel for the petitioner refuting the argument of the respondents submitted that in the facts and circumstances where the matter has travelled up to this Court and the assessing authority has rejected the claim of the petitioner once again, there is no justification to relegate the petitioner back to the alternative remedy of appeal. He also submitted that alternative remedy is not

an absolute bar and in case the power has been exercised arbitrarily, the Court can interfere in the matter. It is also submitted that judicial review is permissible if the authority exceeded in its power and committed an error of law and order is in the teeth of natural justice or there is an abuse of power, such objections can be entertained bypassing the alternative remedy provided in the Statute. To support the aforesaid contention, learned counsel for the petitioner has placed reliance on the pronouncement of the Hon''ble Apex Court in the case of M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, ; State of Bihar and others Vs. Subhash Singh, ; Employees State Insurance Corporation Vs. All India I.T.D.C. Employees Union and Others, ; V.C., Banaras Hindu University and Others Vs. Shrikant, ; East Coast Railway and Another Vs. Mahadev Appa Rao and Others, and Heinz India v. State of U.P., 2012 (4) AWC 3662 (SC) and the Division Bench judgment in the case of Ashok Kumar and others v. State of U.P. and others, 2008 (6) ADJ 660 (DB).

5. In order to appreciate the rival contention advanced by learned counsel for the parties with respect to the issue whether the petitioner, in the facts and circumstances, is liable to be relegated to avail the statutory alternative remedy, it may be relevant to state the facts in short which are as under:

6. The petitioner M/s. Om Ice Factory is a partnership concern registered under the Partnership Act and is engaged in the manufacture and sale of ice. It has an electricity connection with a sanctioned load of 166 K.V.A. and falls under HV-2 category. The petitioner alleges in the writ petition that on 16.2.2011 a truck collided with pole carrying 11000 volts High Tension Line from the substation to the petitioner's premises on account of which the transformer installed in the premises became defective resulting in unusual increase in energy charges without actual change in the consumption. The petitioner lodged a complaint with the respondent No. 2 requesting for checking of the meter and transformer installed in its premises and also deposited requisite amount of Rs. 1,000. Again on 26.3.2012 the petitioner made an application before the respondent No. 2 intimating that month of February, 2011 was an off season for the petitioner's industry and the unit was not functioning, yet the meter installed in the premises was showing excess demand and was recording consumption above the sanctioned load and upon installation of check meter in its premises, the main meter is recording 8 to 9 units every 10 minutes which was not possible and requested to rectify the bills of February, 2011 to February, 2012. On 12.10.2012 the supply of electrical energy to the petitioner's unit was stopped on account of outstanding arrears amounting to Rs. 47,65,426. The petitioner challenged the bill dated 1.11.2012 by filing writ petition No. 21079 of 2013. The writ petition was disposed of by a Division Bench vide order dated 29.4.2013 by making following observations:

"In view of the aforesaid and on feel of various issues involved in the matter we are not to go into the merits of the matter and we propose to dispose of the writ petition by giving the following directions:

1. Petitioner is to file exhaustive representation stating all the factual and legal aspect annexing the documents on which he wants to place reliance alongwith certified copy of this order within a period of two weeks from today.
2. On receipt of the move, as provided, the competent authority will pass appropriate speaking order taking into account all the aspects in the writ petition as early as possible preferably within a period of three weeks from the date of receipt of certified copy of this order.
3. Petitioner is to deposit an amount of Rs. 5 lakhs with the concerned Executive Engineer alongwith the representation for getting immediate reconnection on completion of other formalities.
4. As and when the regular bill is served on the petitioner he is to pay the same.
5. At the same time it is made clear that as and when final decision is taken in respect to the correct position of the meter parties will take recourse in accordance with law.

With the aforesaid observation writ petition stands disposed of."

7. Pursuant to the order passed by this Court, the petitioner deposited a sum of Rs. 5 lacs on 6th May, 2013 and his electricity connection was restored on 16th May, 2013. A surprise checking was carried out on 4.6.2013 wherein seals of the meter were found to be tampered and he was accused of committing theft of electricity and the supply was again disconnected. A provisional assessment was made and vide order dated 19.6.2013, the petitioner was issued a bill amounting to Rs. 1,09,33,708. The petitioner again approached this Court challenging the provisional assessment by filing writ petition No. 42668 of 2013. The petition was filed on the ground that the provisional assessment has been made in breach of provision of Clauses 6.8 and 6.8 (i) of the U.P. Electricity Code, 2005 as the show cause notice did not precede with a provisional assessment order and no notice or opportunity was given to the petitioner to defend himself. The writ petition was disposed of vide order dated 6.8.2013 in following terms:

"In view of the aforesaid, we are of the view that the petitioner may submit objections within 15 days and raise all his objections to the provisional assessment, which may be considered by the respondent No. 3 before finalizing the assessment.

We make it clear that this Court is not expressing any opinion on the merits of the case at this stage and it is for the Assessing Authority to consider all aspects of the matter and take appropriate decision in accordance with law.

With the aforesaid observations, the writ petition is disposed of."

8. Learned counsel for the petitioner has further pointed out that before making a provisional assessment, no show cause or opportunity was given to the petitioner and it is only after a consumer is given an opportunity to defend and present his case and after the assessing officer applies his mind to the facts the

consumer can be put to show cause on the quantum/amount of assessment. The assessing authority in this case committed a jurisdictional error in issuing the provisional assessment bill without putting the petitioner to a show cause or without affording him to defend himself. He further submits that the allegation that the meter has been tampered was not tested by an independent approved test laboratory of its choice and thus, the entire proceeding are vitiated. He has also submitted that M.R.I. report of the meter cannot form the basis of checking. Learned counsel for the petitioner also submitted that there are following procedural flaws on account of which the provisional assessment dated 29.3.2014 is vitiated and does not carry any sanctity:

"(1) The alleged checking dated 4.6.2013 was not authorized by the Executive Magistrate concern as provided in Clauses 4.30 and 4.31 of the Supply Code, 2005.

(2) There is no certification that the procedure prescribed under Clauses 6.8 and 8.1 of the Supply Code, 2005 has been followed which was necessary in view of Clause 8.0 sub-clause (5) of the Supply Code, 2005."

9. We have considered the rival submissions and perused the record.

10. In the case of Shri Sitaram Sugar Company Limited (supra), the sugar mill challenged the validity of the notification issued by the Central Government in exercise of its power under Section 3(3C). of the Essential Commodities Act and the price of levy sugar on the allegation that the prices have been determined arbitrarily with reference to the average cost profiles of factories grouped together in zones without regard to their individual capacity and cost characteristics. While analyzing the power of judicial review, the Hon''ble Apex Court in paragraph 52 held as under:

"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

11. The proposition is well-settled. But we fail to understand how the same comes to aid of the petitioner to contend that he is not liable to be relegated to the alternative remedy. Reliance is totally misplaced and the case is of no help to the petitioner.

12. In the case of State of Bihar (supra) relied upon by the learned counsel for the petitioner, the Hon''ble Apex Court has held that all actions of the State or its authorities and officials must be carried out in accordance with the Constitution and within the limits set by the law. The Court can determine not only the constitutionality of the law or the procedural part of administrative action as part of the judicial review. This Court, in the earlier Writ Petition No. 42688 of 2013, found that authorities have not acted in accordance with the established

procedure gave liberty to the petitioner to file objections and directed consideration thereof before finalizing the assessment. The assessing authority considered the objections of the petitioner and has taken a decision. It is not the case of the petitioner that decision is de hors the law or established procedure. Even if, as alleged by the petitioner, there is some flaw or factual error the same cannot constitute a ground to by-pass the statutory remedy available. It is not a case that decision is de hors the procedure of law. In the circumstances, this case is also of no help to the petitioner.

13. For the same reasons the case of E.S.I. (supra) relied upon by learned counsel for the petitioner, wherein it has been held that an action or order of the State or an authority is found to be illegal, or in contravention of the prescribed procedure, or in breach of the rules of natural justice, or arbitrary or mala fides or abuse of power, such action is open to judicial review, is also no avail to the petitioner.

14. In the case of V.C., Banaras Hindu University (supra), the Hon'ble Apex Court while considering the issue of abandonment of service by a reader of the university observed in paragraphs 41 and 42 as under:

"41. Although, laying down a provision providing for deemed abandonment from service may be permissible in law, it is not disputed that an action taken thereunder must be fair and reasonable so as to satisfy the requirements of Article 14 of the Constitution, the same cannot be sustained. Statutory authority may pass an order which may otherwise be bona fide, but the same cannot be exercised in an unfair or unreasonable manner. The respondent has shown before us that his leave had been sanctioned by the Director being the Head of the Department in terms of the Leave Rules. It was the Director/Head of the Department who could sanction the leave. Even the matter relating to grant of permission for his going abroad had been recommended by the Director. The respondent states, and it had not been controverted, that some other doctor was given the charge of his duties. We have indicated sufficiently that the Vice-Chancellor posed unto himself a wrong question. A wrong question leads to a wrong answer. When the statutory authority exercises its statutory powers either in ignorance of the procedure prescribed in law or while deciding the matter takes into consideration irrelevant or extraneous matters not germane therefore, he misdirects himself in law. In such an event, an order of the statutory authority must be held to be vitiated in law. It suffers from an error of law.

42. Such an error of law is capable of being rectified by judicial review. Reasonableness in the order and/or fairness in the procedure indisputably can also be gone into by the writ court."

15. As already noticed above in the case in hand, the petitioner has not come up alleging violation or lack of fairness in the procedure, which may have necessitated this Court to have gone into the issue by overlooking the statutory remedy of appeal available to the petitioner. The ratio of the decision of this case

is also of no help to the petitioner.

16. The decision in the case of East Coast Railway (supra), relied upon by the learned counsel for the petitioner was in respect of cancellation of selection process for appointment on the vacant post of "Chief Typist" in the East Coast Railway, in that context it was observed by the Hon"ble Apex Court in paragraph 31 as under:

"31. So also whether the competent authority ought to have conducted an enquiry into or verification of the allegations before passing an order of cancellation is a matter that would depend upon the facts and circumstances of each case. It may often depend upon the nature, source and credibility of the material placed before the authority. It may also depend upon whether any such exercise is feasible having regard to the nature of the controversy, the constraints of time, effort and expense. But what is absolutely essential is that the authority making the order is alive to the material on the basis of which it purports to take a decision. It cannot act mechanically or under an impulse, for a writ court judicially reviewing any such order cannot countenance the exercise of power vested in a public authority except after due and proper application of mind. Any other view would amount to condoning a fraud upon such power which the authority exercising the same holds in trust only to be exercised for a legitimate purpose and along settled principles of administrative law."

17. There is not even a specific ground taken in the writ petition in this regard nor the learned counsel for the petitioner could demonstrate before us during the course of argument that the impugned provisional assessment order has been passed without taking into consideration the material available on record and the same has been passed mechanically or "under an impulse". Reliance on the ratio of this decision by the learned counsel for the petitioner is also totally misfounded.

18. In the case of Heinz India (P.) Limited (supra), the Hon"ble Apex Court laid criteria and parameters for judicial review by an administrative action. In paragraph 43, it has been held as under:

"The duty of the court is to confine itself to the question of legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers ?
- (2) Committed an error of law.
- (3) Committed a breach of the rules of natural justice.
- (4) Reached a decision which no reasonable Tribunal would have reached or,
- (5) Abused its powers."

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only

concerned with manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

"(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

At this stage it may also be relevant to note the observation made by the Hon"ble Apex Court in paragraph 45 of the said judgment which reads as under:

"45. There is almost complete unanimity on the principle that judicial review is not so much concerned with the decision itself as much with the decision-making process. (See *Chief Constable of North Wales Police v. Evans*, (1982) 3 All ER 141). As a matter of fact, the juristic basis for such limitation on the exercise of the power of judicial review is that unless the restrictions on the power of the court are observed, the Courts may themselves under the guise of preventing abuse of power, be guilty of usurping that power. Justice Frankfurter's note of caution in *Trop v. Dulles*, 356 US 86 (1958), is in this regard apposite when he said:

"All power is, in Madison's phrase, 'of an encroaching nature' Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."

Neither from the perusal of the record nor the learned counsel for the petitioner, during the course of argument, has been able to point out that any of the five criteria laid down by the Hon"ble Apex Court in the case of *Heinz India* (supra) has been violated in the facts and circumstances of the present case so as to make the ratio of the decision applicable. Again the case is distinguishable on facts and the reliance is totally misfounded.

19. Similar is the position with respect to the Division Bench decision of this Court in the case of *Ashok Kumar* (supra). In the said case, no doubt, the assessment order passed under Section 126 of the Act was under challenge but the issue raised was that respondent No. 2 therein was not a licensee under the U.P. Electricity Reforms Act, 1999 or 2003 Act and, therefore, the respondent No. 3 could not be nominated or notified to be an assessing officer under Section 126 of Act, 2003. Challenge was also made to the Government notification dated 27.6.2006. The Division Bench finding that the issues involved were purely legal and jurisdictional and therefore, did not relegate the petitioners to avail alternative remedy. It may be relevant to quote following from the said Division Bench's judgment:

"7. The petitioners assailing the impugned orders/notices briefly submitted as under:

(1) The respondent No. 2 is not a "licensee" either under U.P. Electricity Reforms Act, 1999 (hereinafter referred to as the "1999 Act") or the Act, 2003 and, therefore, the respondent No. 3 neither can be nominated or notified to be an assessing officer" under Section 126 of Act, 2003 nor the State Government's notification dated 27.6.2006 can confer such power upon him. The notification dated 27.6.2006 is thus illegal and ultra vires of the Act, 2003 rendering various assessment orders issued by respondent No. 3 also without jurisdiction.

(2) Though the impugned provisional assessment notice apparently pretend to give opportunity to the petitioners of showing cause against the proposed assessments but in fact there is flagrant violation of the procedure prescribed under Clause 6.8 of the U.P. Electricity Supply Code, 2005 (hereinafter referred to as Code, 2005) and in effect virtually no opportunity has been given to the petitioners. The entire proceedings are in flagrant violation of principles of natural justice.

(3) Neither D.V.V.N.L. has been notified to be a "Government Electrical Undertaking" under Section 2(c) of 1958 Act nor the respondent No. 3 has been notified as "prescribed authority" under Section 2(b) of 1958 Act, therefore, the demand notice issued under Section 3 of 1958 Act is wholly without jurisdiction.

(4) The very allegation of theft of electrical energy levelled against the petitioners is not substantiated by any material whatsoever and, therefore, unless the relevant material is disclosed to the petitioners, and charge of theft is proved they are not in a position to submit any effective defence to the allegations made against the petitioners. The entire action of the respondents is based on conjectures and surmises and is in flagrant violation of the procedure prescribed in law."

"10. Dealing first with the preliminary objection regarding availability of alternative remedy we are of the view that the issues which have been raised in all these petitions are purely legal and involves jurisdictional issues, therefore, these are not the cases where the writ petitions can be thrown on the ground of non-exhaustion of alternative remedy. We need not to multiply various authorities on the subject but apt it would be to refer a recent one of the Apex Court in Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, wherein the court has reiterated three exceptions for entertaining writ petition without relegating parties to avail alternative remedy and has said that if the action of the authorities is illegal and without jurisdiction; if the principles of natural justice have been violated and if the fundamental rights of the other side is violated, the writ petition would be maintainable, as is evident from paras 15 to 19 and 44 of the judgment."

"11. All the three exceptions are applicable in these cases, if the contention of petitioners are upheld. Since, the issues raised involve not only jurisdiction issue

but also the constitutional rights of petitioners, i.e., non-deprivation of their property except in accordance with the procedure prescribed in law, we are of the view that the said issues should be settled by this Court so as to avoid multiplicity of litigation on the same issues before various authorities. Moreover, vires of notification dated 27.6.2006 of the State Government issued under Section 126 of the Act, 2003 is also involved. It is well-settled principle that an authority constituted under a provision cannot judge the validity of the order in the nature of delegated legislation, therefore, the question as to whether the said notification is valid or not cannot be decided either by the assessing officer or even by appellate authority under Section 127 of the Act, 2003. Hence, it is appropriate that these issues should be decided in these writ petitions without relegating the parties to avail alternative remedy. We accordingly negative preliminary objection and proceed to decide the issues on merits."

20. Thus, it was on account of the fact that legal issue with regard to the validity of the notification and jurisdiction was involved which could not have been decided either by the assessing officer or even by the appellate authority hence, the petitioners therein were not relegated to avail alternative remedy, same is not so in the case in hand. In the present case, pure and simple challenge has been made to the provisional assessment order passed under Section 126 of the Act, 2003. Neither legality of any provision nor notification is under challenge nor any question of jurisdiction has been raised. Thus, the ratio of the judgment in the case of Ashok Kumar and others (supra) relied upon by the learned counsel for the petitioner has no application, in the facts and circumstances of the present case."

21. Reference at this stage may be made in the case of The Executive Engineer and Another Vs. Sri Seetaram Rice Mill, . One of the issue for consideration before the Apex Court in the said case was that whether a writ petition in the High Court under Article 226 of the Constitution of India is maintainable where there is statutory alternative remedy available under Section 127 of the Electricity Act, 2003. While holding that there is no dearth of power in the High Court to entertain writ petition challenging the notice/provisional assessment order but the same is to be exercised keeping in view of the prescribed limitation of law in exercise of such jurisdiction. But the petition should be entertained only against an order of jurisdiction of notice/provisional assessment order and after following with the jurisdictional issue, the appropriate course of action is to remand the matter to the assessing authority. The Apex Court further held that High Court should normally decline to interfere in a final order of assessment. It may be relevant to quote the summarization made by the Hon"ble Apex Court in paragraph 87 of the decision which is as under:

"87 (4) Thus, the High Court should normally decline to interfere in a final order of assessment passed by the assessing officer in terms of Section 126(3) of the 2003 Act in exercise of its jurisdiction under Article 226 of the Constitution of India.

87 (5) The High Court did not commit any error of jurisdiction in entertaining the writ petition against the order raising a jurisdictional challenge to the notice/provisional assessment order dated 25.7.2009. However, the High Court transgressed its jurisdictional limitations while traveling into the exclusive domain of the assessing officer relating to passing of an order of assessment and determining the factual controversy of the case."

22. The issue being raised by the petitioner in the present writ petition is squarely covered by the aforesaid decision of the Hon"ble Apex Court in the case of Southern Electricity Supply Company of Orissa Limited (supra).

23. The case in hand is not a case where any question of jurisdiction of any such kind, which may go to the very root of the matter, is involved nor there is any allegation or averment with respect to the authorities having acted beyond provision of the Act or the prescribed procedure and thus, in view of the settled law on the subject, writ petition is not liable to be entertained against an order of provisional assessment, which is appealable under Section 127 of the Electricity Act, 2003 and appropriately the matter should be examined by the appellate authority.

24. In view of above facts and the settled legal position, since the petitioner has an alternative remedy of filing an appeal under Section 127 of the Electricity Act, 2003, writ petition is not liable to be entertained and accordingly stands dismissed on the ground of existence of alternative remedy.