(2002) 03 MP CK 0109

In the Madhya Pradesh High Court

Case No : Writ Petition No''s. 4338, 5721 of 2001 and 606 of 2002

Orient Paper Mills — APPELLANT

Vs

State of M.P. and others — RESPONDENT

Date of Decision : 20-03-2002

Acts Referred:

Madhya Pradesh Government Electrical Undertakings (Dues Recovery) Act, 1961 — Section 4, 6
Madhya Pradesh Land Revenue Code, 1959 — Section 147
Madhya Pradesh Upkar Adhiniyam, 1981 — Section 3, 4

Citation : (2002) 3 MPLJ 178

Hon'ble Judges : A.K. Mishra, J

Bench : Single Bench

Advocate : R.K. Gupta, for the Appellant; V.K. Tankha, for the Respondent

Judgement

Arun Mishra, J.—The Petitioners are challenging the action of Respondent/MPEB of mode adopted for recovery of the amount of cess due under M.P. Upkar Adhiniyam, 1981.

2. In W.P. No. 5721/2001 a notice Annexure P/12 was issued on 30th October, 2001 to Petitioner Prism Cement Limited. As per demands raised in the bill dated 3-10-2001; cess was not paid; the Petitioner was informed to make the payment within seven days i.e. up to 6-11-2001; otherwise without any further information the Captive Power DG sets shall be closed/seized which is challenged as an impermissible action and could not be resorted to without following the provisions. It is the further prayer made in the writ petition to quash the demand dated 30th October, 2001 as void and ineffective.

3. In W.P. No. 4338/2001 the relief claimed is to quash the demand and bills Annexure P/2 to P/4 on the ground that Respondents have no authority to demand the cess from the Petitioner.

4. In W.P. No. 606/2002 the relief is claimed to quash the impugned notices dated 18-10-2001 and 26-12-2001 (Annexure P/l and P/2). Further writ of

mandamus is prayed directing Respondents not to take the steps which are not permissible in law and also not to take any prejudicial action of threatening disconnection or closing captive power plants.

5. Petitioners submit that the coercive action of threat of closure or seizure of the DG/diesel generating sets of the Captive Power Plants of the Petitioner is illegal and unauthorized in view of Section 45 of the Electricity Duty Supply Act, 1948. Petitioners further submit that u/s 4 of M.P. Upkar Adhiniyam, 1981, makes M.P. Electricity Duty Act, 1949 and the rules made there under applicable mutatis-mutandis to recovery of cess under the Act of 1981. It is further submitted that u/s 3 M.P. Electricity Duty Act, 1949 makes every person liable to make the payment to deposit it in treasury. u/s 5 of the M.P. Electricity Duty Act, 1949 the amount of duty due and remaining unpaid shall carry interest at such rate as may be prescribed. Sub-section (2) of Section 5 of M.P. Electricity Duty Act, 1949 (hereinafter referred to as "the Electricity Duty Act, 1949) makes the recovery of dues permissible as an arrear of land revenue without prejudice to any other mode of recovery available to the State Government for recovery of dues fallen due for payment and the interest accruing thereon. u/s 9 M.P. Electricity Duty Rules, 1949 have been framed. Rule 3 prescribes the time and manner of the payment; Rule 5 prescribes recovery of duty and interest. Rule 15 of M.P. Electricity Duty Rules, 1949 provides that if a distributor or produce fails to submit, the treasury receipt under Rule 3 and the returns mentioned in Rule 7 within one month the electrical inspector shall to the best of his judgment determine the amount of electricity duty payable by the distributor of electrical energy or producer for the month and shall serve a notice requiring him to pay the amount so determined within one month from the date of receiving of such a notice. Further detail procedure is prescribed in Rule 15 for effecting the recovery. It is the contention that mode of closure or seizure of Captive Power Plants is not provided under the said Act or the Rules. Hence, the notices threatening closure/seizure of Captive Power Plants that too on the lapse of seven days from the date of notice is an illegal act. It is further contended that provisions of Government Electrical Undertakings (Dues Recovery) Act, 1961, are not applicable for the recovery of cess. Alternative submission is in case it is applicable, a notice is required to be issued of three months under Sub-section (1) of Section 6; demand notice is to be served u/s 4. Thereafter recovery can be made as an arrear of land revenue. It is the further submission raised by the Learned Counsel for Petitioners that u/s 50 of M.P. Vidyut Sudhar Adhiniyam the power lies with the State Electricity Regulatory Commission to realize the amount, thus, the action of MPEB is ultra vires of its powers. It is also the submission of the Learned Counsel for the Petitioners that in case the Respondents are to recover the amount as arrears of land revenue, the procedure u/s 4 of M.P. Electricity Duty Act, 1949 and the procedure prescribed in Rule 15 has to be followed. Thus, a notice for seizure containing threat of disconnection of electricity could not be issued for recovery of cess. Learned senior counsel Shri S.L. Saxena submits that since the Petitioners are industries,

facility of installments ought to have been afforded by the MPEB; the action of making the demand and asking for the payment within seven days was unjustified and not provided under the rules or any of the act and the Respondents have departed from the mode prescribed by threatening disconnection in an illegal manner.

6. Learned Sr. Counsel appearing for the Respondent/MPEB Shri Vivek Tankha submits that the recovery shall be made only in accordance with the Act and the Rules and the Petitioners shall be granted three months'' time period to make the deposit. Thereafter the proceedings shall be taken u/s 6 of the Recovery of Dues Act, 1961. Learned Sr. Counsel submits that recovery of amount as arrears of land revenue is the mode prescribed for the recovery of cess due to the Government and u/s 4 of M.P. Urja Adhiniyam, 2001 the Electricity Board is empowered to collect the cess and further amendment is made in M.P. Upkar Adhiniyam, 1981 and as per second proviso to Sub-section (2) of Section 3 of the amended section the energy cess shall be collected by the MPEB and the amount so collected shall be made available to the State Government. It is further contended by the Learned Counsel for Respondents that the threat to seizure and closure has to be appreciated in pragmatic manner and in no case the MPEB is going to depart from the mode prescribed under the Act and the Rules. He has also fairly offered that Petitioners may be allowed facility of making the payment in the installments; 20% amount may be directed to be paid at once and remaining amount may be directed to be paid in six equal installments.

7. Before the various submissions are discussed, it be noticed that vires of amendment of M.P. Upkar Sanshodhan Adhiniyam, 1981 were challenged before this Court in Madhya Pradesh Cement Manufacturers'' Association Vs. State of Madhya Pradesh and Others, 4 wherein Division Bench of this Court has held that act is not ultra vires; SLPs against the same have been preferred before the Supreme Court which have been admitted but there is no stay of the judgment passed by this Court. Thus, I proceed to deal with these petitions on the basis of the Division Bench decision of this Court holding the recovery of cess to be permissible and also the rates prescribed by the Government. The only question to which the arguments have been confined by Learned Counsel for the parties is with respect to the validity of mode of recovery.

8. Before appreciating the rival submissions, it is necessary to quote the relevant provisions which have been referred to by the Learned Counsel for the parties in their respective submissions. Section 4 of M.P. Upkar Adhiniyam, 1981 which makes applicable the provision of M.P. Electricity Duty Act, 1949 and the Rules made there under is quoted below:-

"4. M.P. Act No. X of 1949 and rules made there under to apply. - The provisions of Sections 4 to 9 (both inclusive) of the M.P. Electricity Duty Act, 1949 (X of 1949) and the rules made there under shall mutatis mutandis apply to cess under this Act as they apply to levy of duty on sale or consumption of electrical energy under that Act and for that purpose reference to "duty" or "electricity duty" in the said Act or the rules made there under, as the case may be shall be construed as reference to "cess".

9. M.P. Electricity Duty Act, 1949 Section 5 provides for recovery of duty and interest which is quoted below:

5. Recovery of duty and interest. - (1) the amount of duty due and remaining unpaid shall carry interest at such rate and in such circumstances as may be prescribed.

(2) Without prejudice to any other mode of recovery available to the State Government, any duty falling due for payment and the interest accruing thereon, if any, may be recovered in the same manner as an arrear of land revenue.

10. It is apparent from the above quoted provision that the amount which falls due under M.P. Upkar Adhiniyam, 1981 can be recovered as arrears of land revenue. M.P. Electricity Duty Rules, 1949 are framed u/s 9 of Electricity Duty Act, 1949. Rules 3, 5 and 15 are pressed into service which are quoted below:

3. Time and manner of the payment. - Every distributor of electrical energy and every producer shall pay the electricity duty in respect of each month before the expiry of the following month into a government treasury to the credit of Government under the head "XII-other Taxes and Duties'' - Receipts from Electricity Duties. Other Receipts, Receipts from electricity Duty, 1949" and send the treasury receipt to the Electricity Inspector within fifteen days from the date of such credit.

5. Recovery of duty and interest. - (1) Where the duty is not paid within the period specified under Rule 3, the same shall be paid thereafter with interest thereon at the rate prevailing in accordance with Sub-rule (2). (for the purpose of calculating the interest, part of a month shall be treated as equal to a month.)

(2) the rate of interest payable under Sub-rule (1) shall be such as may be fixed by the Provincial Government by notification from time to time subject to a maximum of per annum.

15. (1) If a distributor or electrical energy or producer fails to submit the treasury receipt under Rule 3 and the returns mentioned in Clause (i) of Rule 7 in respect of any month before the due date or any extension thereof not exceeding fifteen days at the discretion of the Electric Inspector, the electric Inspector shall, to the best of his judgment, determine the amount of the electricity duty payable on the distributor of electrical energy or producer for the month and shall serve on the distributor of electrical energy or producer a notice requiring him to pay the amount so determined of the difference between the amount of electricity duty, if any, already paid in respect of that month, within one month from the date of receipt of such notice. The amount so determined by the electric Inspector shall be deemed to be the duty payable u/s 3 of the Act.

15(2) Where the distributor or electrical energy or producer has failed to pay the duty in the manner set forth under Rule 3 and the duty is assessed by the Electrical Inspector under Sub-rule (1), the distributor of electrical energy or producer shall pay in addition interest thereon from the date due under Rule 3 at the rate and in the manner set forth under Rule 5:- (Provided that where the distributor of electrical energy or producer has already paid the duty and pays or is called upon to pay the difference and if the Electricity Inspector is satisfied that in the ordinary course of business such difference would not have come to the notice of the distributor of electrical energy or producer at an earlier date, no interest shall be chargeable if the difference is paid before expiry of the notice of one month.

15(3) If the distributor of electrical energy or producer fails to pay the amount mentioned in Sub-rule (1) above together, with interest, if any, within one month from date of receipt of such notice, the Electrical Inspector shall proceed to recover the same u/s 5 of the Act. 15(4) If, within one month from date of receipt of the notice referred to in Sub-rule (i) above the distributor of electrical energy or Producer pays the amount specified in the notice and submits the returns referred to in Clause (i) or Rule 7 for the month concerned, the Electrical Inspector shall order so much amount of out of the amount paid by the distributor of electrical energy or producer as is on the verification of the returns submitted by the distributors of electrical energy or producers found to be in excess of the actual duty payable by him to be adjusted towards the duty payable by him for any subsequent month or months. 15(5) If, on verification of the returns referred to in Sub-rule (4) above, it is found that the amount determined under Sub-rule (1) is less than the actual duty payable by the distributor of electrical energy or producer, the Electrical Inspector shall proceed to recover the difference u/s 5 of the Act.

11. It is apparent from Rule 3 of the M.P. Electricity Duty Rules, 1949 that every producer shall pay the electricity duty under the head "XIII-Other Taxes and Duties-Receipts from Electricity Duties-Other Receipts-Receipts from electricity Duty, 1949" in the treasury before expiry of next month. When it is not so paid, liability arises under Rule 5 to make the payment of interest as may be fixed by the Government by notification. Under Rule 15, in case the amount has not been deposited in treasury, the electrical inspector can determine the amount and issue a notice requiring to make the payment within one month from the date of receipt of such notice. Further fact of recovery of amount as arrears of land revenue is provided under M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961, Dues are defined in Section 2(b). u/s 3 bill is to be raised and has to be paid on the date so fixed. The penal consequences may take place under Sub-section (2) of Section 3; u/s 4 if the dues are not paid notice of demand has to be issued in prescribed form; u/s 6 of the Dues Recovery Act, 1961, it is provided that once a notice is served u/s 4 demanding the amount within three months from the date of such service or such extended period as the prescribed authority may from time to time allow debtor shall be deemed to

be in default and such amount shall be recoverable as arrears of land revenue. Notwithstanding anything contained in any law or instrument or agreement to the contrary. Section 4 and Section 6 of the Dues Recovery Act, 1961 are quoted below:

4. Notice of demand for dues and penalty not paid. - Where the dues are not paid by a debtor by the date specified in the bill therefore, the prescribed authority may at any time serve or cause to be served upon him a notice of demand in the prescribed form, stating the name of the debtor, the amount payable by him on account of the various dues; penalty and costs of recovery and the undertaking to which it is payable. Explanation: The sending of the notice by registered post shall be deemed to be sufficient service on the person concerned. 6. Recovery of dues, etc., if not paid. - (1) If the aggregate amount of the various dues, penalty and costs mentioned in the notice of demand served u/s 4 is not deposited with the prescribed authority within three months of the date of such service of such extended period as the prescribed authority may from time to time allow, the debtor shall be deemed to be in default in respect of such amount and the same shall be recoverable as an arrear of land revenue anything contained in any other law or instrument, or agreement to the contrary notwithstanding. (2) For the purpose of such recovery, the prescribed authority may forward to the Collector a certificate under his signature in the prescribed form stating the amount and details of the demand and the name and description of the debtor in default and the Collector shall on receipt of such certificate, proceed to recover from the debtor the amount of the demand as if it were an arrear of land revenue.

12. Under second proviso to Section 3 of M.P. Upkar Adhiniyam, 1981 MPEB is statutorily empowered to effect the recovery of "development cess" on behalf of the State Government. Section 147 of M.P. Land Revenue Code, 1959 prescribes the process for recovery of arrear of land revenue. The rules have also been framed u/s 147 of the Code which in detail prescribe the procedure for issue of process for recovery of arrears. Warrant of attachment of movable property shall be in Form-B and warrant of attachment of immovable property shall be in form-C.

13. The aforesaid provisions have to be harmonized and followed before taking any action for recovery of amount as arrears of land revenue under M.P. Upkar Adhiniyam, 1981. Electricity Duty Act, 1949 does not provide any procedure for recovery of an arrear of land revenue. It does not provide for drawing the revenue recovery certificate. Section 2(b) of M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961 defines the dues; the "dues" means any sum payable to Government electrical undertaking; cess is imposed on consumption of electrical energy and is payable to M.P.E.B. It is stated by Shri v. Tankha, learned Sr. Counsel that M.P.E.B. officers are authorized to issue revenue recovery certificate to effect the recovery. Learned Counsel submits that the procedure prescribed in M.P. Government Electrical Undertakings (Dues

Recovery) Act, 1961 is applicable in the instant case.

14. It is clear from the reading of the provision of Section 4 of M.P. Upkar Adhiniyam that the procedure prescribed in Sub-section (2) of Section 5 of M.P. Electricity Duty Act, 1949 is applicable for recovery of amount as arrears of land revenue. Payment has to be made regularly under Rule 3 of Electricity Duty Rules, 1949; otherwise liability arises under Rule 5 to pay the interest. One month notice has to be given in case there is failure to make the payment. Sub-rule (3) of Rule 15 of Duty Rules provides that in case the payment is not made, the amount becomes recoverable as per Section 5 of the Electricity Duty Act, 1949 as an arrear of land revenue. For recovery of the amount as an arrear of land revenue, the M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961 and the Rules framed under Dues Recovery Act assume significance. The mode of recovery in part is prescribed under Dues Recovery Act, 1961. Section 4 and Section 6 quoted above makes it clear that demand notice has to be sent in the prescribed form. Sub-section (1) of Section 6 prescribes three months time after the notice of demand is served u/s 4 to deposit the amount or such extended period as the prescribed authority may from time to time allow. Thereafter on lapse of such period of three months or the extended period, as the case may be, the debtor shall be deemed to be in default in respect of such amount and the same shall be recoverable as an arrear of land revenue notwithstanding anything contained in any other law, instrument or agreement. Under Sub-section (2) of Section 6 the prescribed authority may forward to Collector a certificate under his signature in the prescribed form stating the amount, details of the demand and the names and description of the debtor in default and the Collector shall on receipt of such certificate proceed to recover from the debtor the amount of the demand as if it was an arrears of land revenue. The Dues Recovery Rules, 1961 framed u/s 7 of the Dues Recovery Act, 1961 prescribes the form of the bill u/s 3 scale of penalty, form of notice of demand. The form of certificate to be sent to the Collector under Sub-section (2) of Section 6 shall be in form-C. Rule 1 to 7 of M.P. Government Electrical Undertakings (Dues Recovery) Rules, 1961 are quoted below in extenso:

1. Short title and commencement. - (a) These rules may be called the M.P. Government Electrical Undertaking (Dues Recovery) Rules, 1961. (b) They shall come into force at once.

2. Definitions. - In these Rules, unless the context otherwise requires:

(a) "Act" means the M.P. Government Electrical Undertakings (Dues Recovery) Act, 1961 (No. 36 of 1961);

(b) "Form" means a Form appended to these rules.

3. Form of the Bill. - The bill under Sub-section (1) of Section 3 of the Act shall be in Form A-I or A-2, or A-3 as the case may be.

4. Scale of Penalty. - If the dues are not paid by the date specified in the bill the

debtor shall be liable to pay in addition thereto a penalty at the scale specified in the Schedule appended to these rules from the said date.

5. Form of notice of demand. - The notice of demand u/s 4 of the Act shall be in Form B.

6. Costs of notice of demand and recovery. - The costs of a notice of demand shall be two rupee and the costs of recovery shall be ten rupees.

7. Form of certificate. - A certificate under Sub-section (2) of Section 6 of the Act shall be in Form C.

15. Once the period prescribed in Section 6 of Dues Recovery Act, 1961 is over and revenue recovery certificate is drawn, the provision of M.P. Land Revenue Code comes in the interaction and applies. Once a certificate is finalized, recovery of an amount as an arrear of land revenue has to commence after three months period is over as prescribed in Section 6 or the time extended by prescribed authority. It cannot take place before that; no seizure or attachment of Captive Power Plants can be effected without following the procedure prescribed u/s 6 of the Dues Recovery Act, 1961 and the rules framed there under before lapse of three months period or extended one as the case may be.

16. An action can be taken by the Electricity Board of the amount of the recovery as an arrear of land revenue under second proviso to Sub-section (2) of Section 3 of M.P. Upkar Adhiniyam, 1981. However, they are bound to have recourse to the provisions of M.P. Land Revenue Code. Section 147 of the rules framed thereunder. As per Section 6(2) of the Dues Recovery Act, 1961 certificate has to be sent to the Collector; now that power has been given under the amended provision of Section 3(2) of M.P. Upkar Adhiniyam, 1981 to the MPEB but the procedure remains that of M.P. Land Revenue Code of the recovery of amount as arrears of land revenue. I find force in the submissions raised by the Learned Counsel for Petitioners that the procedure prescribed has not been followed and the Petitioners were threatened with the seizure/closure of captive power plants. DG sets etc. in case the amount of "cess" which is recoverable as an amount of arrears of land revenue was not paid within seven days. Demand was required to be raised u/s 4 of Dues Recovery Act, 1961 when the dues were not paid within three months as per Section 6 of Dues Recovery Act, 1961, then the procedure prescribed under M.P. Land Revenue Code Section 147 and the rules framed there under was required to be followed which has not been done in the instant case.

17. Faced with the aforesaid situation, learned senior counsel Shri Vivek Tankha appearing for the Respondents has submitted that the threat meted out was not to be acted upon immediately and procedure as prescribed under Dues Recovery Act, 1961 and M.P. Land Revenue Code would have been followed by the Respondents. These provisions shall be adhered to while making the recovery effecting the attachment of movable/immovable property in case it becomes necessary and the dues are not paid. For payment of dues also the Respondents

shall be given three months period as required u/s 6 of Dues Recovery Act, 1961.

18. Learned Counsel for Petitioners have raised submission that u/s 50 of M.P. Vidyut Sudhar Adhiniyam, 2000, the commission shall be entitled to recover all sums due to it under this Act, whether by way of license, fees or fines and charges, in accordance with the provision of M.P. Public Money (Recovery of Dues) Act, 1987 as if any such sum were a public demand as defined in that Act and handover the amount due to the person or authority concerned. The amount in the instant case of "Upkar" is payable to the Government and by virtue of amendment made in Upkar Adhiniyam, 1981 in Section 3(2) it is the Board which is empowered to effect the recovery on behalf of the State. It is not the commission which is empowered under Upkar Adhiniyam to effect the recovery. Thus, the provision of Section 50 of M.P. Vidyut Sudhar Adhiniyam which applies only to the such sums which are payable to the commission are required to be paid to it not each and every sum. Commission means M.P. Electricity Regulatory Commission established u/s 3.

19. M.P. Urja Adhiniyam, 2001 is an Act to provide for prohibition of unauthorized use of electrical energy and assessment on the cases of unauthorized use of electrical energy in the State of M.P. and for matters connected therewith or incidental thereto. Section 3 carves out prohibition of unauthorized use of energy. Section 4 provides the power of entry, search and seizure to any officer of the revenue department not below the rank of Naib-Tahsildar, the police department not below the rank of Assistant Sub-Inspector; the energy department not below the rank of an Electrical Inspector; and to the electricity utility not below the rank of a Junior Engineer, if electrical energy has been, is being or is likely to be used unauthorisedly. Section 5 provides for assessment; Section 6 provides for payment of interest if default is committed; Section 8 prescribed for mode of recovery. Urja Adhiniyam, 2001 deals with the assessment u/s 5 with respect to unauthorised use of energy. The provisions are applicable in that fact situation which is not existing in the instant case. It is not the case of unauthorized use of energy in the instant cases. Thus, the method prescribed in M.P. Urja Adhiniyam is not of relevance to the mode of recovery in the instant case.

20. Resultantly the writ petitions are partly allowed. It is held that an amount of cess payable under Upkar Adhiniyam, 1981 is recoverable as an arrear of land revenue. The notices issued to the Petitioners shall be treated as demand notice issued u/s 4 of Recovery of Dues Act, 1961.

21. The directions of the M.P. Electricity Board requiring for the payment within seven days and on failure to close/seize captive power plants and DG sets etc. and to disconnect electricity are illegal and, thus, liable to be set aside. They can make attachment only as per the procedure prescribed.

22. Recovery was stayed by the interim orders passed in W.P. No 5721/2001 while in WP 4338/2001 there was partial stay of the demand. The counsel for the

Electricity Board Shri Tankha has fairly submitted that normal policy of the Board is not to throttle the industries, in such cases, normally they allow 20% down payment and rest of the amount in six equal installments. Hence, it is directed that Petitioners shall make the deposit in the following manner:

(a) They shall make the payment of 20% amount within one month from today;

(b) remaining amount shall be paid in equal monthly installments in six months thereafter;

(c) the total amount is to be paid in seven months;

(d) In case there is default in making the payment as ordered above, the Respondents shall be free to take the steps u/s 6 of Recovery of Dues Act, 1961 and the rules framed there under to draw the recovery certificate and to recover it in accordance with Section 147 of M.P. Land Revenue Code and the rules framed there under as an arrear of land revenue; for that due procedure has to be followed. Cost on parties.

