

(2012) 10 DEL CK 0291

In the Delhi High Court

Case No : Writ Petition (C) No. 2192 of 2010

Standing Conference of Public Enterprises

APPELLANT

Vs

Bses Rajdhani Power Ltd. and Others

RESPONDENT

Date of Decision : 04-10-2012

Acts Referred:

Constitution of India, 1950 — Article 113, 226, 26
Electricity Act, 2003 — Section 142, 42(5), 62(6)
Limitation Act, 1963 — Section 18

Citation : (2012) ELR 1298

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Jayant Nath with Mr. B.C. Pandey, for the Appellant; K. Datta, for R-1 and Mr. Sumeet Pushkarna with Mr. Jitendra Kumar, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—In this writ petition instituted on 17th March, 2010, the petitioner seeks:-

(i). A mandamus directing the respondents to refund the admitted amount of Rs. 1,81,55,924/-.

(ii). A mandamus directing the respondents to refund the aforesaid amount along with Bank rate of interest u/s 62(6) of the Indian Electricity Act, 2003 @ 18% per annum w.e.f. August, 2001 till the date of the filing of the petition i.e. for about 9 1/2 years, amounting to Rs. 3,10,46,630/-.

(iii). A mandamus directing the respondents to pay pendente lite interest.

(iv). A mandamus directing the respondents to pay to the petitioner Rs. 25,00,000/- for hiring services of the Experts and Consultants and towards damages.

(v). Costs of the proceedings.

Though the petitioner, besides the respondent No. 1 BSES Rajdhani Power Ltd. (BRPL) has impleaded Delhi Power Company Ltd. (DPCL), Delhi Electricity Regulatory Commission (DERC) and Government of National Capital Territory of Delhi (GNCTD) as respondents No. 2 to 4 and the reliefs as aforesaid are claimed generally against the respondents but the counsels have proceeded on the premise that the reliefs are directed against BRPL and DPCL only and not against the other respondents.

Notice of the petition was issued. Counter affidavits have been filed by BRPL and DPCL. Rejoinder has been filed by the petitioner to the counter affidavit of BRPL. Written submissions have also been filed by the petitioner, BRPL and DPCL. The counsels have been heard and the written submissions perused.

2. The case of the petitioner is that the erstwhile Delhi Vidyut Board (DVB), during the period from June, 1999 to May, 2001, while raising bills on the petitioner for the electricity connections in the name of the petitioner, recovered the said amount of Rs. 1,81,55,924/- in excess and which was not due from the petitioner to the DVB and which the petitioner was compelled to pay for the fear of disconnection. The petitioner further claims to have made repeated representations to the DVB right from 7th July, 1999 till 26th September, 2001 in this regard, claiming refund of the said amount. It is further the case of the petitioner that the refund remained to be made, owing to the unbundling of the DVB w.e.f. 1st July, 2002. The petitioner further claims to have, w.e.f. 3rd March, 2003 till 24th June, 2004 represented to BRPL as successor in interest of the erstwhile DVB.

3. The petitioner heavily relies on the letter dated 25th September, 2004 of BRPL to Delhi Transco Ltd. and in which letter, according to the petitioner, BRPL admitted the refund being so due to the petitioner. The said letter is as under :-

BSES Rajdhani Power Limited

Regd. & Corp. Office : BSES Bhavan

Nehru Place, New Delhi - 110019

Tel. 399999999 Fax: 39999_____

RAMESH NARAYANAN

Addl. Vice-President

25.09.2004

Ref: AVP/KCC/2004-05/23

To

Mr. A.K. Nagpal

DGM (Finance)

Delhi Transco Limited
Shakti Sadan,
Bahadur Shah Kotla Road
New Delhi - 02

Subject: Refund of excess charges levied by erstwhile DVB against Electric Power Connection Nos. : 20191002093/BS18/3 & 20191002160/BS18/3 installed at Scope Complex, Lodhi Road, New Delhi - 110 003.

Dear Sir,

Please find enclosed herewith the representation of Scope Complex for refund of provisional bills, excess demand charges & load violation levied on their existing connection by erstwhile DVB.

We find the representation alongwith the details provided by Scope justified & necessary Credits for the following to be effected in their ensuing energy bills.

Since, these credits pertain to the period prior to privatization we seek your concurrence to effect the same in ensuing energy bill & debit the amount to your account.

- 1) Provisional Units of 22,13,316 for the months June & July 1999 & July 2000.
- 2) Demand Violation levied & paid by wrongly merging the load of two meters which could operate energy on alternate basis depending upon supply availability amounting to Rs. 42,55,407.41.
- 3) Reversal of demand violation charges in arrears amounting to Rs. 17,85,143.45 alongwith the accrued LPSC reflecting in the bills.
- 4) Refund of excess demand payment charges amounting to Rs. 78,93,600/- paid by Scope during the period October 1999 to August 2001.

Thanking You,

Yours Sincerely

Ramesh Narayanan

Copy to: Mr. U.K. Gupta, General Manager, SCOPE.

4. However not meeting with any success, the petitioner on 7th July 2008 filed a complaint u/s 142 of the Electricity Act, 2003 with the DERC. A reply dated 10th September, 2008 was filed by the BRPL to the said complaint and in which reply also, according to the petitioner, BRPL yet again admitted to its liability in the said amount of Rs. 1,81,55,924.01. BRPL however took a stand that the said liability pertained entirely to the DVB period and prayed that "DPCL may be directed to pay the balance amount of the crystallized liability to the applicant as it (erstwhile DVB) has already discharged part liability in this regard".

5. The petitioner further claims that BRPL in the bills raised by it on 17th April, 2009 reversed the arrears and the late payment surcharge being shown in the earlier bills, thereby partly implementing the accounts filed before the DERC. It is the contention of the petitioner that the said action of BRPL is also in acknowledgement of the accounts as produced by the petitioner and of the liability.

6. DERC however vide its order dated 30th January, 2009 disposed of the complaint aforesaid of the petitioner observing that the liability towards the petitioner was required to be met by DPCL and DPCL being not a regulated entity, DERC was not in a position to issue any direction thereto.

7. The petitioner thereafter approached the Public Grievances Cell (PGC). BRPL in its reply dated 1st October, 2009 before the PGC again took a stand that it was the DPCL which was liable to refund the sum of Rs. 1,81,55,924.01 to the petitioner. The PGC also however vide order dated 28th January, 2010, though observed that prima facie the liability for refund was of the BRPL and BRPL could recover the amount from DPCL, closed the matter as unresolved leaving the petitioner to avail remedy in accordance with law.

8. It is thereafter that the present petition was filed, as aforesaid, on 17th March, 2010.

9. BRPL has contested the writ petition pleading/contending:-

(a). That the writ remedy is not available to the petitioner since the agreement between the petitioner and DVB contained an arbitration clause - reliance in this regard is placed on *The Empire Jute Co. Ltd. and Others Vs. The Jute Corporation of India Ltd. and Another, & State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.,* .

(b). That the writ petition is not maintainable since the disputes raised are pure billing disputes, which should first go to the Consumer Grievances Redressal Forum (CGRF) and thereafter to the Ombudsman established u/s 42(5) & (6) respectively of The Electricity Act, 2003 - reliance in this regard is placed on *Ram Kishan Vs. N.D.P.L. 130 (2006) DLT 549 (DB) & The Maharashtra State Electricity Distribution Co. Ltd. Vs. Lloyds Steel Industries Ltd.,* .

(c). That the writ petition is not maintainable since no question involving public law character arises for consideration and the dispute raised is contractual, in the realm of private law - reliance in this regard is placed on *State of Jammu and Kashmir Vs. Ghulam Mohd. Dar and Another, , Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., & State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.,* .

(d). That the writ petition does not lie for recovery of an amount under a contract - reliance in this regard is placed on *Suganmal Vs. State of Madhya Pradesh and Others, , Improvement Trust, Ropar through its Chairman vs. S. Tejinder Singh and Ors., (1995) Suppl. (4) SCC 577 & Neeraj Kumar Vs. Commissioner of*

Central Excise W.P. (C) No. 2812/2007 decided on 20th September, 2010.

(e). That the petitioner has in the garb of writ petition indeed filed a suit for recovery of money/damages.

(f). That the money claims of the petitioner are barred by time.

(g). Limitation is a mixed question of law and fact which cannot be adjudicated in writ jurisdiction - reliance in this regard is placed on Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust (2006) 5 SCC 658.

(h). Damages cannot be ascertained in writ jurisdiction.

(i). That the cause of action for refund of the amounts claimed to have been paid in excess accrued to the petitioner as and when each of the individual bills during the period June, 1999 to May, 2001 were raised and the limitation for initiating proceedings for refund/recovery of the amount paid in excess for the bill for the month of May, 2001 lapsed in May, 2004.

(j). The petitioner claims to have first represented to the DVB on 7th July, 1999 and it is thus not as if it was unaware of the excess claim and payment.

(k). That repeated notices and correspondence do not extend the period of limitation.

(l). That the earliest "admission" relied upon by the petitioner is of 25th September, 2004 and which is beyond the period of three years from the last bill, which lapsed in May, 2004.

(m). That in fact there was never any admission.

(n). Admission does not create any fresh cause of action and merely renews an existing right - reliance in this regard placed on Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and Others, .

(o). That even in a writ petition, limitation is a guiding factor - reliance in this regard is placed on The Municipal Council, Ahmednagar and Another Vs. Shah Hyder Beig and Others, and on Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, .

(p). That the disputed questions of fact arising from the pleadings of the parties cannot be adjudicated in writ jurisdiction.

(q). That the claim in the writ petition, in so far as against BRPL, is barred by res judicata; DERC which was earlier approached by the petitioner held the liability to be not of the BRPL but of DPCL and which is the correct position in accordance with the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001.

10. DPCL has pleaded that it is only a Holding Company of GNCTD and is not the successor of the liabilities on account of the distribution business of the erstwhile DVB; that the liability to contest consumer claims and to bear the liability is that

of the distribution company which in this case is BRPL; reliance in this regard is placed on Govt. of NCT of Delhi and Others Vs. K.R. Jain and Others, ; DERC in its order dated 30th January, 2009 supra has rightly held that DPCL is not within the jurisdiction of DERC.

11. The senior counsel for the petitioner has contended that BRPL having as aforesaid categorically admitted to the liability in the sum of Rs. 1,81,55,924.01, there is no disputed question for adjudication and the writ remedy is available since BRPL is wrongfully withholding the dues of the petitioner. It is further argued that though DERC had not issued any direction to BRPL to make the payment but in view of the subsequent judgment of the Supreme Court in North Delhi Power Limited Vs. Govt. of National Capital Territory of Delhi and Others, it now stands established that the liability is of BRPL and not of DPCL. With respect to the defence of BRPL of limitation, it is argued that the claim of the petitioner is based on Statement of Account duly accepted and signed with an affidavit filed by BRPL before DERC on 10th September, 2008; the parties have accepted the said Statement of Account and BRPL as per the said Statement of Account, apart from refunding the aforesaid sum of Rs. 1,81,55,924.01, was to waive the DVB period arrears on account of load violation and LPSC for the period of BRPL itself, as these were not payable by the petitioner - this part of the Statement of Account was implemented by BRPL by withdrawing the arrears and LPSC, as reflected in the bill on 17th April, 2009. Reliance is also placed on Article 26 of the Schedule to the Limitation Act, 1963 which prescribes a period of three years from the period when the accounts are stated in writing and signed by the defendant. It is urged that the present writ petition is based on accounts and it is not based on original claim in as much as the original claim of the petitioner is based on bills and the excess payment made is in the sum of Rs. 6.06 crores out of which the petitioner is claiming only Rs. 1.81 crores as per accounts signed by the BRPL and accepted by the petitioner. Reliance in this regard is placed on Gordon Woodroffe and Co. Vs. Sheikh M.A. Majid and Co., , order dated 23rd March, 2010 in WP(C) No. 7225/2007 titled New Variety Tent House Vs. GNCTD and Bishun Chand Vs. Girdhari Lal Vol. LVI, ILR Privy Council 376. It is alternatively argued that the Limitation Act does not have any application to writ proceedings and it is only to be seen whether there is a reasonable explanation for the alleged delay and laches. Reliance in this regard is placed on Jaipur Golden Gas Victims Association Vs. Union of India (UOI) and Others, and on State of U.P. and Others Vs. Raj Bahadur Singh and Another, . It is contended that in the present case there is sufficient explanation in the face of unbundling of the DVB and the issue as to liability came to be settled only in the aforesaid judgment in North Delhi Power Ltd supra. Reliance in this regard is placed on Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, and on Indo Rama Synthetics (India) Limited Vs. Union of India and Others, . Reference is further made to Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, to contend that the Court has discretion to allow a writ petition even if under the Limitation Act the debt is barred and a suit would not

lie. Relying on *Abbas Ahmad Choudhary Vs. State of Assam*, , *Smt. Sanita Arora Vs. Union of India and others*, & *U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another*, . It is contended that where facts are not under dispute and collection of money was without authority of law, there is no sufficient reason to deny relief to the citizens. To oppose the plea of alternative remedy, reliance is placed on *Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others*, laying down that where an instrumentality of the State acts unjustly or unreasonably, a writ would lie even if there is an Arbitration Clause.

12. The Supreme Court in *Godavari Sugar Mills Ltd. supra*, after consideration of the entire case law including *Suganmal* and *U.P. Pollution Control Board supra* as well as *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, , has made the legal position as to be maintainability of the writ petition clear as under:

(i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers;

(ii) If a right has been infringed--whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law;

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of powers conferred under Article 226 for payment of money;

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the tax collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition;

(v) It is one thing to say that the High Court has no power under Article 226 to

issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without authority of law, there is no good reason to deny a relief of refund to the citizens;

(vi) Where the lis has a public law character or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy will not be denied.

13. As per the first proposition aforesaid laid down by the Supreme Court, a writ petition is not to be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants and aggrieved party has to agitate the question in a civil suit. The liability if any of the erstwhile DVB towards the petitioner or of the respondents as successors of DVB, is a civil liability. The only exception carved out by the Supreme Court in the propositions aforesaid for entertaining a writ for payment of money is, when the liability is arising out of statutory functions of the State or its officers. The claim of the petitioner in the present case does not fall in the said exception. The third proposition aforesaid laid down by the Supreme Court, also is against entertaining a writ petition for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right, as is the present case. The present is not a case of assessment or collection of tax. The only question which remains is whether the petitioner can be said to be falling in the fifth proposition aforesaid laid down by the Supreme Court. However in my view, the fifth proposition aforesaid is to be read along with the sixth proposition i.e. the writ of mandamus for making refund of money illegally collected, is to be entertained where the lis has a public law character or involves a question arising out of public law functions on the part of the State or its authorities. Again, that is not the case here.

14. Even otherwise I am of the view that the parties are seriously at issue on the question of limitation and it thus cannot be said that the present is a case where facts are not in dispute or where there is no good reason to deny relief of refund.

15. The claim of the petitioner is predicated on collection by the erstwhile DVB from the petitioner of charges in excess of those due, relatable to the period June, 1999 to May, 2001. I have scanned the various Articles of the Schedule to the Limitation Act and do not find the suit, if were to be filed by the petitioner for recovery of the said excess amount paid, to be falling in any of the Articles. It will thus be the residuary Article 113, in which the suit will fall, and which prescribes a limitation of three years commencing from the date when the right to sue accrues. The right to sue for recovery of the amount recovered in excess would accrue when the excess amount is so recovered, particularly when the petitioner claims to be conscious at the time of payment itself that the same was not due and further claims to have paid the same to avoid disconnection of electricity supply. Reference in this regard can be made to Shri Vallabh Glass

Works Ltd supra laying down that Article 113 is applicable to a suit for recovery of excess duty paid and the suit has to be filed within three years from the date of payment. The counsel for BRPL, in this regard has also relied on J.C. Budhraja Vs. Chairman, Orissa Mining Corporation Ltd. and Another, . The limitation of three years for such a suit would thus expire on the expiry of three years from the date when the excess amount for each of the months from June, 1999 to May, 2001 was paid. Though there are no specific dates pleaded but it can safely be assumed that the said period of three years for the last of the said months would lapse in May/June, 2004.

16. The petitioner relies on acknowledgment of liability by BRPL in the letter of 25th September, 2004. However for such admission to extend the period of limitation within the meaning of Section 18 of the Limitation Act it has to be before the expiry of the prescribed period of limitation. Though the language of the Statute is clear in this regard, reliance if any needed can be placed on J.C. Budhraja supra and on the recent dicta in Suresh Kumar Joon Vs. Mool Chand Motors in CS (OS) 389/2009 decided on 22nd August, 2012 and the earlier judgment cited therein. The prescribed period of limitation for the excess payment for the month of May, 2001 would lapse in May/June, 2004 and the acknowledgment even if any, of liability in the letter dated 25th September, 2004 is thus not within the period of three years.

17. Perhaps conscious of the aforesaid, the petitioner in the written arguments has sought to create a cause of action in the purported acknowledgment of liability by BRPL before the DERC, on 10th September, 2008 and before the PGC on 1st October, 2009 and invoked Article 26 of the Schedule to the Limitation Act. I am however unable to agree. The replies before the DERC and PGC were to the claims of excess payment between June, 1999 to May, 2001 only and do not furnish a fresh cause of action. Similarly Article 26 has no application. There was no accounting relationship between the petitioner and the respondents or the predecessors of the respondents. In any case the claim of the petitioner is on the basis of excess payments which were quantified and for which no accounts were indeed to be stated between the parties. There are two kinds of accounts stated. The first refers to a claim to payment made by one party and admitted by the other; the second refers to a striking of balance after adjusting the several items of credit and debit making the account. While the first constitutes a mere admission/acknowledgment of a debt, the second kind is an account containing items both on the credit and the debit side and the figures on both sides are adjusted between the parties and a balance struck. It is the second kind which amounts to an account stated within the meaning of Article 26. Whether the striking of balance in a particular case falls under the first or second type of account stated, depends upon the intention of the parties and the circumstances of the case and adjudication of which again requires trial. In the present case, there does not appear to be any consideration for the case of account stated built by the petitioner.

18. As far as the judgments cited by the senior counsel for the petitioner are concerned, a perusal thereof shows -

(i) that in U.P. Pollution Control Board *supra*, the Supreme Court itself carved out a distinction between cases when collection of tax was illegal and not authorized and cases where Rule had been struck down and held that in ascertaining as to what is the reasonable time for claiming refund, the Courts have to take note of the period of limitation prescribed under the general law of limitation for filing suit for recovery of the amount due;

(ii) that in New Variety Tent House *supra*, the plea of time bar was found to have been not taken;

(iii) that in Indo Rama Synthetics (India) Ltd *supra*, mandamus was issued on the premise that the Union of India in all its actions must act reasonably and should not take the technical plea of limitation;

(iv) that in judgment dated 23rd July, 2010 in W.P. (C) No. 7716/2009 titled Smt. Ganga Devi Vs. Union of India also cited, the claim was to a recurring right of pension and the petitioner was found to be an illiterate, 85 years of age and in these circumstances the delay and laches were held to be not coming in her way;

(v) that Gordon Woodroffe and Company (Madras) Ltd. *supra*, was a case of sale of goods between principal and agent who had accepted a statement of account and who were, factually on the basis of evidence led in the suit, found to have settled the account;

(vi) that in M/s. Shiv Shankar Dal Mills *supra*, no plea of limitation was involved and though no direction for refund was issued but considering the peculiar situation which had arisen, equities were balanced;

(vii) that in Shri Vallabh Glass Works Ltd. *supra*, the claimants were found to have first approached the Court within the period of limitation and on account of their such conduct the claim was not found to be suffering from laches and waiver.

19. It would thus be seen that each case turned on its respective unique facts and no parallel can be drawn therewith, in the facts of the present case. The petitioner herein though claims to have made repeated representations, did not approach any Court or other fora for a period of nearly seven years. The petitioner is thus clearly guilty of laches and waiver and cannot take advantage of any of the cited judgments which turned on their respective facts and with which the facts of the present case bear no resemblance. Notice may also be taken of Trilokchand and Motichand *supra*, cited by the counsel for BRPL laying down that though no period of limitation is prescribed for a writ petition but that does not mean that in giving relief thereunder the Court must ignore and trample under foot all laws of procedure, evidence, limitation etc. and that the normal remedy for recovery of money paid to the State under coercion, is by suit. Mention may also be made of Empire Jute Company Limited *supra* and Bridge &

Roof Company (India) Ltd. supra cited by the counsel of BRPL in support of the plea of the writ petition being not maintainable for the reason of the availability of alternative remedy of arbitration.

20. I however restrain myself from discussing the matter further, the purport of the limited discussion aforesaid being only to show that it cannot be said that the facts are not in dispute. I may also observe that between the purported acknowledgments on 25th September, 2004 and 10th September, 2008 also there is a time lag in excess of three years. It thus cannot be said that the liability of May, 2001 remained alive, under acknowledgment within the meaning of Section 18 of the Limitation Act, till the filing of the writ petition on 17th March, 2010 as aforesaid.

21. The claim of Rs. 25,00,000/- towards damages in any case cannot be the subject matter of writ petition. I am therefore unable to find the petitioner entitled to the reliefs claimed in this petition and dismiss the petition. However it is further clarified that the observations made hereinabove are only for the purpose of holding the writ remedy to be not appropriate and are not to come in the way of the petitioner if chooses to institute appropriate proceedings for recovery of the amounts claimed due.

No costs.